

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XVIII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XVIII.

DESCENT AND DISTRIBUTION.

DISCOVERY, INSPECTION, AND INTERROGATORIES.

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In this Volume English Cases reported up to 1st June, 1924, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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See CONSTITUTIONAL LAW ; COURTS.

DWELLINGS.

See LOCAL GOVERNMENT ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

DYING DECLARATIONS.

See CRIMINAL LAW AND PROCEDURE.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Ayl. Pan.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Par.	Ayliffe's New Pandect of Roman Civil Law	Eng.
	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.

Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol.,	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Benl.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. N. S.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols, 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
	Bott's Laws Relating to the Poor, 2 vols.	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.

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Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—	
		Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ...	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ...	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. B. R. ...	Canadian Bankruptcy Reports Annotated, 1920—(current) ...	Can.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—1913 ...	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J. ...	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Aus.
C. L. R. ...	Calcutta Law Reporter	Ind.
C. L. R. ...	Cape Law Reports	S. Af.
C. L. T. ...	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P. ...	Upper Canada Common Pleas	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. P. D. ...	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol.,	
		Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—	
	1618	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	Canadian Gazette	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
Cart. ...	Cases on British North America Act (Cartwright)	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ...	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ..	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip. ...	New Brunswick Reports (Chipman)	Can.
Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—	
	1846	Eng.

xviii **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Ol. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	...	...	...	...	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	...	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	...	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	...	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	...	...	...	...	Can.
Co. Ent.	Coke's Entries	...	...	...	...	Eng.
Co. Inst.	Coke's Institutes	...	...	...	...	Eng.
Co. L. J.	Colonial Law Journal	...	...	...	...	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	...	...	...	...	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	...	...	...	...	...
Coch.	Nova Scotia Reports (Cochran)	...	...	...	...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	...	Eng.
	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	...	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	...	...	...	...	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	...	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	...	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	...	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	...	...	...	...	Eng.
Com. Dig.	Comyns' Digest	...	...	...	...	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	...	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols.,	...	...	...	...	Ir.
	Congdon's Digest	...	...	...	...	Can.
Cong. Dig.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol.	...	...	...	...	Ir.
Cooke & Al.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	...	Eng.
Cooke, Pr. Cas.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	...	Eng.
Cooke, Pr. Reg.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	...	Eng.
Coop. G.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	...	Eng.
Coop. Pr. Cas.	C. P. Cooper's Cases <i>temp.</i> Brougham, Chancery, 1 vol., 1833—1834	...	...	...	...	Eng.
Coop. <i>temp.</i> Brough.	C. P. Cooper's Cases <i>temp.</i> Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	...	...	...	Eng.
Coop. <i>temp.</i> Cott.	Coryton's Reports	...	...	...	...	En
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	...	Ind
Correspondances Jud.	Correspondances Judiciaires	...	...	...	...	Eng.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	...	Can.
Cout.	Coutlees' Unreported Cases	...	...	...	...	Scot.
Cout. Dig.	Coutlees' Digest	...	...	...	...	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	...	Can.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	...	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	...	...	...	...	Eng.
Cox, Eq. Cas.	S. O. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	...	Eng.
Cox, M. & H.	Cox, Macrae, and Hertalet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	...	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	...	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	...	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	...	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	...	...	...	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	...	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	...	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	...	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	...	Eng.
Cro. Car.	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	...	Eng.
Cro. Eliz.	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	...	Eng.
Cro. Jac.	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	...	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	...	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	...	Eng.
Curt.	Curteis' Ecclesiastical Reports, 8 vols., 1834—1844	...	...	...	...	Eng.
	Duxbury's Reports of the High Court of the South African	...	...	...	...	S. Af.
D. O. A.	Dorion's Queen's Bench Reports	...	...	...	...	Can.
D. L. R.	Dominion Law Reports	...	...	...	...	Can.
Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	...	...	...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1828	Eng.
Dan. & Ll.	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—	Eng.
Dav. Ir.	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	
		1611	
Dav. Pat. Cas.	...	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	...	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	Eng.
De G. & Sm.	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	Eng.
De G. F. & J.	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	
		1862	Eng.
De G. J. & Sm.	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	Eng.
De G. M. & G.	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	
		1851—1857	Eng.
Delane	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	Eng.
Den.	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	Eng.
Dick.	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dirl.	...	Dirlerton's Decisions, Court of Session (Scotland), fol., 1 vol.,	
		1665—1677	Scot.
Dods.	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas.	...	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B.	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl.	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L.	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B.	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	
		—1827	Eng.
Dow. & Ry. M. C.	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow & Ry. N. P.	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	...	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S.	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal.	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	
			Ir.
Dr. & War.	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	
			Ir.
Dra.	...	Draper's King's Bench Reports	Can.
Drew.	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm.	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	Eng.
Drinkwater	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	Eng.
Drury temp. Nap.	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—	
		1859	Ir.
Drury temp. Sug.	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841	
			Ir.
Dugd. Orig.	...	Dugdale's Origines Juridicales	Eng.
Dunl. (Ct. of Sess.)	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols.,	
			Scot.
Dunning	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	Eng.
Durie	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621	
		—1642	Scot.
Dyer	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	...	Upper Canada Error and Appeal	Can.
E. & B.	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	
			Eng.
E. & E.	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E.	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	
		1858—1860	Eng.
E. D. C.	...	Reports of the Eastern Districts Court (Cape) from 1880	S. Af.
E. D. L.	...	South African Law Reports, Eastern Districts Local Division...	S. Af.
E. L. R.	...	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.)	...	English Reports	Eng.
E. R.	...	Ontario Election Reports	Can.
Eag. & Y.	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.
East	...	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	...	East's Pleas of the Crown	Eng.
Ecc. & Ad.	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C. ...	Emden's Building Contracts, Building Leases and Building	Eng.
Eng. Pr. Cas. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
E. D.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Exch.	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch. C. R. ...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols.,	Eng.
F. (Ct. of Sess.) ...	Exchequer Court Reports	Can.
F.	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F. & F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. N. D.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
Fac. Coll.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Falc.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc. & Fitz. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol. 1744—1751	Scot.
Fenton	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Ferg.	Fenton, Important Judgments	N.Z.
Fitz. Nat. Brev. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz-G.	Fitzherbert's Natura Brevium	Eng.
. &	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fonbl.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol.,	Ir.
For.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
Forb.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Fort. De Laud. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fortes. Rep. ...	Fortesque, De Laudibus Legum Angliæ	Eng.
Fost.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fount.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fox & S. Ir. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Reg. ...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fras.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Freem. Ch.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. K. B. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
G.	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G. & R.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. I. Dig.	Nova Scotia Reports (Geldert & Russell)	Can.
Gal. & Dav.	General Index Digest	Can.
Gale	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gaz. L. R.	Gale's Reports, Exchequer, 2 vols., 1835—1836	N.Z.
Geld. Dig.	New Zealand Gazette Law Reports	Can.
Gib. Cod.	Geldert's Digest	Eng.
Giff.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Gilb.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb. C. P.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
Gilb. Ch.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilm. & F.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gl. & J.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Glanv.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. El. Cas. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	Eng.
Glascocock	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Godb.	Glascocock's Reports (Ireland), 1 vol., 1831—1832	Ir.
Gouldsb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Gr.	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. .	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. .	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding Up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C. ...	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ...	Hodgin's Election Reports	Can.
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ...	Hay's Reports	Ind.
Hay & Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—	Ir.
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Hob.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hodg.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hog.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Holt, Adm. ...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Eq. ...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, K. B. ...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, N. P. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Home, Ct. of Sess.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	Howard's Chancery Practice	Ir.
How. C. S. ...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ...	Howard's Equity Exchequer	Ir.
How. P. L. ...	Howard on the Popery Laws	Ir.
Hud. & B. ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ...	Hudson on Building Contracts, 2 vols.	Eng.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
r. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
	Hyde's Reports	Ind.
I. C. L. R.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R.	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R.	Irish Equity Reports, 13 vols., 1838—1851	Ir.
I. L.	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.

xxii **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

I. L. R. (Vol.) Mad.	..	Indian Law Reports, Madras	...	...	Ir.
I. L. T.	...	Irish Law Times, 1867—(current)	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> [1894] 1 I. R.)	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	Eng.
J. R.	...	Jurist Reports	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols.,	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols.,	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	Eng.
Keny. Ch.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	Eng.
Kerr	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	Eng.
Kilkerran	...	New Brunswick Reports (Kerr)	...	...	Can.
	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	Eng.
Knox	...	Knox's Reports	...	...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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G.	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. <i>temp.</i> Sugd.	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. O. & M. Gaz.	Local Courts and Municipal Gazette	Can.
L. O. J.	Lower Canada Jurist	Can.
L. O. L. J.	Lower Canada Law Journal	Can.
L. O. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current)	
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	Legal News	Can.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee <i>temp.</i> Hard.	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.

xxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,		Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842		Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good		S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817		Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847		Eng.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
		Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—		Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	M'Cleland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825		Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts,		Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols.,		Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865		Scot.
		Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
		Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914		Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol.,		Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
		Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
		Marshall's Reports	...	Ind.
		Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326		Eng.
		Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.
		Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Eng.
Milw.	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843		Ir.
Mod. Rep.	...	Modern Reports, 12 vols., 1669—1755	...	Eng.
Mol.	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	Ir.
Mont.	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & A.	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838		Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—	
Mont. D. & De G.	and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. O.	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. O. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R.	New South Wales Supreme Court Reports	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	North-West Territories Reports	Can.
N. Z. Jur.	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S.	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas. ...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.

New Rep.	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	Newfoundland Reports	Nfld.
Nolan	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	Old Bailey Session Papers	Eng.
O. Bridg.	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	Ontario Law Reports	Can.
O'M. & H.	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	Ontario Reports	Can.
O. R.	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	Ontario Weekly Notes	Can.
O. W. R.	Ontario Weekly Reporter	Can.
Old.	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (e.g., [1891] P.)	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P.	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	Prince Edward Island Reports	Can.
P. R.	Ontario Practice	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Park.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Pat. App.	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pater. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Peake, Add. Cas.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Pelham	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Per. & Dav.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Per. & Kn.	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Per. C. S.	Pelham (S. A.) Reports	Aus.
Per. P.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Phil. El. Cas.	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Phillim.	Perrault's Conseil Supérieur	Can.
Phillim. Eccl. Jud.	Perrault's Prévosté de Quebec, 1726—1756	Can.
Phip.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Pig. & R.	Philipps' Election Cases, 1 vol., 1780	Eng.
Pitc.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Plowd.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Poll.	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Poph.	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pow. R. & D.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Prec. Ch.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Price	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Price	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pug.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Py. R.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Q. B.	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Q. B. (preceded by date)	Price's Mining Commissioners' Cases	Can.
	New Brunswick Reports (Pugsley)	Can.
	Pykes' Lower Canada Reports	Can.
	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
	Law Reports, Queen's Bench Division, 1891—1901 (e.g., [1891] 1 Q. B.)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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D. ...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
P. ...	Queensland Justice of Peace Reports ...	Aus.
Q. L. J. ...	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R. ...	Quebec Law Reports ...	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878 ...	Aus.
Q. P. R. ...	Quebec Practice Reports ...	Can.
Q. R. (Vol.) K. B. or Q. B. ...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ...	Can.
Q. R. (Vol.) S. O. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ...	Can.
Q. S. O. R. ...	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R. ...	Queensland State Reports ...	Aus.
Q. W. N. ...	Weekly Notes, Queensland ...	Aus.
R. ...	The Reports, 15 vols., 1893—1895 ...	Eng.
R. ...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ...	S. Af.
R. (Ct. of Sess.) ...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ...	Scot.
R. A. C. ...	Ramsay, Appeal Cases ...	Can.
R. & C. ...	Nova Scotia Reports (Russell & Chesley) ...	Can.
R. & G. ...	Nova Scotia Reports (Russell and Geldert) ...	Can.
R. C. ...	La Revue Critique de Législation et de Jurisprudence de Canada ...	Can.
R. de J. ...	Revue de Jurisprudence ...	Can.
R. de L. ...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ...	Can.
R. E. D. ...	New South Wales, Reserved and Equity Decisions ...	Aus.
R. E. D. ...	Ritchie's Equity Decisions (Russell) ...	Can.
R. J. R. Q. ...	Quebec Revised Reports ...	Can.
R. L. N. S. ...	Revue Légale, New Series, 1895—(current) ...	Can.
R. L. O. S. ...	Revue Légale, Old Series, 21 vols., 1869—1892 ...	Can.
R. P. C. ...	Reports of Patent Cases, 1884—(current) ...	Eng.
R. R. ...	Revised Reports ...	Eng.
Rast. ...	Rastell's Entries ...	Eng.
Rayn. ...	Rayner's Tithe Cases, 3 vols., 1575—1782 ...	Eng.
Real Prop. Cas. ...	Real Property Cases, 2 vols., 1843—1847 ...	Eng.
Rep. Ch. ...	Reports in Chancery, fol., 3 vols., 1615—1710 ...	Eng.
Rep. in C. of A. ...	Reports in Courts of Appeal ...	N.Z.
Res. & Eq. Jud. ...	New South Wales Reserved and Equity Judgments ...	Aus.
Reserv. Cas. ...	Reserved Cases ...	Ir.
Rick. & M. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ...	Eng.
Rick. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ...	Eng.
Ridg. L. & S. ...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ...	Ir.
Ridg. Parl. Rep. ...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ...	Ir.
Ridg. temp. H. ...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ...	Eng.
Ritch. Eq. Rep. ...	Ritchie's Equity Reports ...	Can.
Rob. Eccl. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., ...	Eng.
Robert. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ...	Scot.
Robin. App. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ...	Scot.
Roll. Abr. ...	Rolle's Abridgment of the Common Law, fol., 2 vols. ...	Eng.
Roll. Rep. ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom. ...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. O. ...	Roscoe, Digest of Building Cases ...	Eng.
Ross, L. O. ...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ...	Eng.
Rowe ...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ...	Eng.
Rul. Cas. ...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Russ. ...	Campbell's Ruling Cases, 25 vols. ...	Eng.
Russ. & M. ...	Russell's Reports, Chancery, 5 vols., 1824—1829 ...	Eng.
Russ. & Ry. ...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Russ. E. R. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823 ...	Eng.
Ry. & Can. Cas. ...	Russell's Election Reports ...	Can.
Ry. & Can. Tr. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & M. ...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ryde & K. Rat. App. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde, Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
S. A. L. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
	South African Law Journal ...	S. Af.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R.	South Australian Law Reports	...	...	...	...	Aus.
S. A. L. R.	South African Law Reports	...	...	...	...	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892	...	...	...	...	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	...	...	...	...	Aus.
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880	...	...	...	...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	...	...	...	...	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	...	...	...	...	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	...	...	...	...	Scot.
S. C. R. ...	Canada, Supreme Court Reports	...	...	...	...	Can.
S. L. T. ...	Scots Law Times, 1893 (current)	...	...	...	...	Scot.
S. Q. R. ...	Queensland State Reports	...	...	...	...	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia	...	...	...	...	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports	...	...	...	...	Can.
S. R. N. S. W. ...	New South Wales, State Reports	...	...	...	...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court	...	...	...	...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports	...	...	...	...	Can.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	...	...	...	...	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	...	...	...	...	Eng.
Sask. L. R.	Saskatchewan Law Reports	...	...	...	...	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837	...	...	...	...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	...	...	...	...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	...	...	...	...	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	...	...	...	...	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	...	...	...	...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols.,	...	...	...	...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	...	...	...	...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	...	...	...	...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873	...	...	...	...	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current)	...	...	...	...	Scot.
Sc. R. R.	Scots Revised Reports	...	...	...	...	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols.,	...	...	...	...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	...	...	...	...	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	...	...	...	...	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859-	...	...	...	...	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	...	...	...	...	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	...	...	...	...	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	...	...	...	...	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	...	...	...	...	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	...	...	...	...	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols.,	...	...	...	...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	...	...	...	...	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	...	...	...	...	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	...	...	...	...	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	...	...	...	...	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	...	...	...	...	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	...	...	...	...	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	...	...	...	...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	...	...	...	...	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	...	...	...	...	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	...	...	...	...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	...	...	...	...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	...	...	...	...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	...	...	...	...	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	...	...	...	...	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	...	...	...	...	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	...	...	...	...	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	...	...	...	...	Eng.
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	...	...	...	...	Ir.
Sol. Jo. ...	Solicitors' Journal, 1856—(current)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Spence	Spence's Equitable Jurisdiction of the Court of Chancery ..	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols. 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swin.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Syme	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. O.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
	New Brunswick Reports (Trueman)	Can.
Tudor, L. O. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. O. Real. Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. O. Jur.	Upper Canada Jurist	Can.
U. O. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. O. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. O. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 166	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II Common Pleas). fol., 2 vols., 1668—1691	Eng.

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vern.	...	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	...	Eng.
Vern. & Scr.	...	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	...	Ir.
Ves.	...	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	...	Eng.
Ves. & B.	...	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	...	Eng.
Ves. Sen.	...	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	...	Eng.
Vin. Abr.	...	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	...	Eng.
Vin. Supp.	...	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	...	Eng.
W.	...	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	...	S. Af.
W. A. L. R.	...	...	West Australian Law Reports	...	...	Aus.
W. A'B. & W.	...	...	Webb, A'Beckett and Williams' Victorian Reports	...	...	Aus.
W. & W.	...	...	Wyatt and Webb	...	...	Aus.
W. C. C.	...	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols.,	...	...	Eng.
W. H. C.	...	...	South African Law Reports, Witwatersrand High Court	...	...	S. Af.
W. Jo.	...	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	...	Eng.
W. L. D.	...	...	South African Law Reports, Witwatersrand Local Division	...	...	S. Af.
W. L. R.	...	...	Western Law Reporter	...	...	Can.
W. L. T.	...	...	Western Law Times	...	...	Can.
W. N. (preceded by date)	...	...	Law Reports, Weekly notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	...	...	En
W. N.	...	...	Calcutta Weekly Notes	...	...	Ind
W. R.	...	...	Weekly Reporter, 54 vols., 1852—1906	...	...	Eng.
W. R.	...	...	Sutherland's Weekly Reporter	...	...	Ind.
W. R.	...	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	...	S. Af.
W. W. & A'B.	...	...	Wyatt, Webb and A'Beckett	...	...	Aus.
W. W. R.	...	...	Western Weekly Reports	...	...	Can.
Wallis by Lyne	...	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	...	Ir.
Web. Pat. Cas.	...	...	Webster's Patent Cases, 2 vols., 1602—1855	...	...	Eng.
Welsh, Reg. Cas.	...	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	...	Ir.
Went. Off. Ex.	...	...	Wentworth's Office and Duty of Executors	...	...	Eng.
West	...	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	...	Eng.
West temp. Hard.	...	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	...	Eng.
West. Tithe Cas.	...	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	...	Eng.
White	...	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	...	Scot.
White & Tud. L. C.	...	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	...	Eng.
Wight.	...	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	...	Eng.
Will. Woll. & Dav.	...	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	...	Eng.
Will. Woll. & H.	...	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	...	Eng.
Willes	...	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	...	Eng.
Wilm.	...	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	...	Eng.
Wils.	...	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	...	Eng.
Wils. & S.	...	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	...	Scot.
Wils. Ch.	...	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	...	Eng.
Wils. Ex.	...	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	...	Eng.
Win.	...	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	...
Wm. Bl.	...	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	...
Wm. Rob.	...	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	...	E
Wms. Saund.	...	...	Williams' Notes to Saunders' Reports, 2 vols.	...	...	E
Wolf. & B.	...	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	...
Wolf. & D.	...	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	...	Eng.
Woll.	...	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	...	Eng.
Wood	...	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	...	Eng.
Y. A. D.	...	...	Young's Vice-Admiralty Reports	...	...	Can.
Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1848	...	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols.,	...	...	Eng.
Y. & J.	...	...	Younge and Jarvis' Reports, Exchequer, 3 vols., 1826—1830	...	...	Eng.
Y. B.	...	...	Year Books	...	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xv.—xxx., *ante.*)

A.-G. .	for Attorney-General.
Act. .	„ Actiengesellschaft.
Admlty. .	„ Admiralty.
Affd. .	„ Affirmed.
Affg. .	„ Affirming.
Akt. .	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet
Anon. .	„ Anonymous.
Apld. .	„ Applied.
Appct. .	„ Applicant.
Appln. .	„ Application.
Appln. .	„ Application to Register a Trade Mark.
Applt. .	„ Appellant.
Apprvd. .	„ Approved.
Arbn. .	„ Arbitration.
Archbp. .	„ Archbishop.
Art. .	„ Article.
Assce. .	„ Assurance.
Assocn. .	„ Association.
B. C. .	„ Borough Council.
Bkpcy. .	„ Bankruptcy.
Bkpt. .	„ Bankrupt.
Bldg. Soc. .	„ Building Society.
Bp. .	„ Bishop.
C. A. .	„ Court of Appeal.
C. & S. L. Ry. Co. .	„ City & South London Railway Co.
C. C. A. .	„ Court of Criminal Appeal.
C. C. R. .	„ County Court Rules.
C. C. R. .	„ Court of Crown Cases Reserved.
C. L. P. Act. .	„ Common Law Procedure Act.
C. L. Ry. Co. .	„ Central London Railway Co.
C. O. R. .	„ Crown Office Rules.
C. S. U. C. .	„ Consolidated Statutes of Upper Canada.
Ca. sa. .	„ <i>Capias ad satisfaciendum.</i>
Cale. Ry. Co. .	„ Caledonian Railway Co.
Ch. .	„ Chancery.
Ch. Div. .	„ Chancery Division.
Co. .	„ Company.
Co-op. Assocn. .	„ Co-operative Supply Association.
Comrs. .	„ Commissioners.
Consd. .	„ Considered.
Corpn. .	„ Corporation.
Ct. .	„ Court.
Ct. of Ch. .	„ Court of Chancery.
Ct. of Eq. .	„ Court of Equity.
Ct. of R. .	„ Court of Review.
D. C. .	„ Divisional Court.
Dbtd. .	„ Doubted.
Deft. .	„ Defendant.

Distd. .		for Distinguished.
Div. Ct.		„ Divisional Court.
Eccl. Comrs.		„ Ecclesiastical Commissioners.
Eccl. Ct.		„ Ecclesiastical Court.
Ex. Ch.		„ Exchequer Chamber.
<i>Ex p.</i> .		„ <i>Ex parte</i> .
Exch. .		„ Exchequer.
Exor. .		„ Executor.
Exorship.		„ Executorship.
Expld. .		„ Explained.
Extd. .		„ Extended.
Extrix. .		„ Executrix.
<i>Fi. fa.</i> .		„ <i>Fieri facias</i> .
Folld. .		„ Followed.
G. & S. W. Ry. Co. .		„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . .		„ Great Central Railway Co.
G. E. Ry. Co. . .		„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.		„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co		„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . .		„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland		„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . .		„ Great Western Railway Co.
Govt.		„ Government.
Grdns.		„ Guardians or Guardians of the Poor.
H. C. of A.		„ High Court of Australia.
H. L.		„ House of Lords.
I. R. Comrs. . . .		„ Inland Revenue Commissioners.
Insce.		„ Insurance.
JJ.		„ Justices.
Jud. Act		„ Judicature Act.
K. B. Div.		„ King's Bench Division.
L. & B. Ry. Co. . .		„ London & Brighton Railway Co.
L. & N. E. Ry. Co. .		„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.		„ London & North Western Railway Co.
L. & S. W. Ry. Co.		„ London & South Western Railway Co.
L. & Y. Ry. Co. . .		„ Lancashire & Yorkshire Railway Co.
L. B.		„ Local Board.
L. B. & S. C. Ry. Co		„ London, Brighton & South Coast Railway Co.
L. C.		„ Lord Chancellor.
L. C. & D. Ry. Co. .		„ London, Chatham & Dover Railway Co.
L. C. C.		„ London County Council.
L. Elec. Ry. Co.		„ London Electric Railway Co.
L. G. Board . . .		„ Local Government Board.
L.J.		„ Lord Justice.
L.JJ.		„ Lords Justices.
L. M. & S. Ry. Co.		„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.		„ London, Tilbury & Southend Railway Co.
M. S. Act		„ Merchant Shipping Act.
M. S. & L. Ry. Co.		„ Manchester, Sheffield & Lincolnshire Railway Co.
Mentd.		„ Magistrates.
Met. Dist. Ry. Co. .		„ Mentioned.
Met. Ry. Co. . . .		„ Metropolitan District Railway Co.
Mid. G. W. Ry. Co.		„ Metropolitan Railway Co.
Mid. Ry. Co. . . .		„ Midland Great Western Railway Co.
Mtge.		„ Midland Railway Co.
Mtgee.		„ Mortgage.
Mtgor.		„ Mortgagee.
N. B. Ry. Co. . . .		„ Mortgagor.
N. E. Ry. Co. . . .		„ North British Railway Co.
N. F.		„ North Eastern Railway Co.
N. P.		„ Not Followed.
Ord.		„ Nisi Prius.
Overd.		„ Order.
		„ Overruled.

ABBREVIATIONS.

xxxiii

P. C. .	for Privy Council.
Petn. .	„ Petition or Election Petition.
Pltf. .	„ Plaintiff.
Q. B. Div.	„ Queen's Bench Division.
Qu. .	„ <i>Quære</i> .
R. C. .	„ Rural Council.
R. D. C.	„ Rural District Council.
R. S. A.	„ Rural Sanitary Authority.
R. S. C.	„ Revised Statutes of Canada.
R. S. C.	„ Rules of the Supreme Court, 1883.
Refd. .	„ Referred.
Regn. of Trade Mk.	„ Registration of Trade Mark.
Regr. of Trade Mks	„ Registrar of Trade Marks.
Resp. .	„ Respondent.
Restg. .	„ Restoring.
Revsd.	„ Reversed.
Revsg. .	„ Reversing.
Ry. Co.	„ Rail. Co. or Railway Co.
S. C. (name of colony following)	„ Same Case.
S. E. .	„ Supreme Court of a Colony.
S. E. & C. Ry. Co.	„ Settled Estates.
S. E. Ry. Co.	„ South Eastern & Chatham Railway Co.
S. P.	„ South Eastern Railway Co.
S.S.	„ Same Point.
Sched.	„ Steamship.
<i>Sci. fa.</i>	„ Schedule.
Sect.	„ <i>Scire facias</i> .
Set. Land Act	„ Section.
Settlmt. .	„ Settled Land Act.
Soc. .	„ Settlement.
Soc. Anon. .	„ Society.
Solr. .	„ Société Anonyme, etc.
Trade Mk. .	„ Solicitor.
Tram. Co. .	„ Trade Mark.
U. C. .	„ Tramways Company.
U. D. C. .	„ Urban Council.
U. S. A. .	„ Urban District Council.
Union Assmt. Com.	„ United States of America.
Urban S. A. .	„ Union Assessment Committee.
V.-C. .	„ Urban Sanitary Authority.
Workmen's Comp. Act	„ Vice-Chancellor.
	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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DESCENT AND DISTRIBUTION.

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		<i>Testamentary Dispositions</i>	„ WILLS.
		<i>Winding up of Companies</i>	„ COMPANIES.

Part I.—In General.

See Law of Property Act, 1922 (c. 16), ss. 154, 188–190.

1. **Definition — “Descent.”**]—The strict legal sense of the word “descent” means taking an estate by inheritance; that is, as heir of the former holder (LORD ROMILLY, M.R.).—BICKLEY v. BICKLEY (1867), L. R. 4 Eq. 216; 36 L. J. Ch. 817.

2. — **“Real estate.”**]—Real estate is a term of art, a technical term well understood (CHITTY, J.).—BUTLER v. BUTLER (1884), 28 Ch. D. 66; 54 L. J. Ch. 197; 52 L. T. 90; 33 W. R. 192.

*Annotations:—*Reid. *Re Davison, Greenwell v. Davison* (1888), 58 L. T. 304; *Re Holt, Holt v. Holt*, [1921] 2 Ch. 17. *Mentd. Re Uttormare, Leeson v. Foulis*, [1893] W. N. 158.

—.]—See, further, REAL PROPERTY & CHATTELS REAL.

3. **Personal estate—Charge on land.**]—The owner of certain freehold property paid off an outstanding charge on the property & took a reconveyance to himself of a term of years in the property by which the charge in question was secured. The reconveyance contained an express declaration that the term should still be kept alive & not merge in the fee; but that it should be kept on foot for the benefit of the owner of the fee & as a protection against *mesne* incumbrances or other mtges. charges, claims, or demands whatsoever; & that nothing therein contained should in any way prejudice his rights or claims as against any person not parties thereto. Subsequently the owner deposited the title deeds of both the fee & the term by way of equitable mtge.:—*Held*: (1) when it was for the benefit of an owner to keep alive a charge, the ct. would imply an intention on his part to do so; (2) the charge would then descend on his death intestate to his next of kin, & not to his heir-at-law; (3) the particular declaration contained in the reconveyance mentioned above was equivalent to the express provision of what the law, in its absence, would anyhow have implied, & did not accordingly by its language

limit the keeping alive of the term merely to the protection of the fee against other incumbrances; (4) the fact that the owner, when making the subsequent equitable mtge., had deposited the title deeds both of the fee & of the term, sufficiently indicated a continuing intention at that date to treat the term as still subsisting.

Where the owner of an equity of redemption takes a transfer of the outstanding mtge., with a declaration that it is kept on foot as a subsisting charge for the benefit of himself, his heirs & assigns, the mtge. passes upon his death intestate as a personalty to his next of kin. Where in a conveyance by a mtgor. & mtgee., the mtge. is conveyed separately with a declaration that the mtge. is to be deemed to be a subsisting charge as a protection to the owner of the equity of redemption against subsequent incumbrances, but for no other purpose, the same result ensues.—*Re GIBBON, MOORE v. GIBBON*, [1909] 1 Ch. 307; 78 L. J. Ch. 264; 100 L. T. 231; 53 Sol. Jo. 177.

— **Deer as.**]—See ANIMALS, Vol. II., p. 208, Nos. 41, 42.

—.]—See, further, PERSONAL PROPERTY.

4. **Application of Land Transfer Act, 1897, c. 65, s. 1 (4)—To copyhold.**]—In sub-s. 4, s. 1, of above Act, providing that the expression “real estate” in Part I. of the Act is not to be deemed to include “land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant,” the concluding words apply to land of copyhold tenure as well as customary freehold. Therefore an equitable estate or interest in copyholds devolves, on the death of the owner, on his personal representative or personal representatives as if it were a chattel real vesting in him or them.—*Re SOMERVILLE & TURNER'S CONTRACT*, [1903] 2 Ch. 583; 72 L. J. Ch. 727; 89 L. T. 405; 52 W. R. 101; 47 Sol. Jo. 727.

Descent of copyholds.]—See COPYHOLDS, Vol. XIII., pp. 102 *et seq.*

Part II.—Intestacy.

5. **Meaning of intestate.**]—It [intestate] means not a person making no will but a person dying intestate as to the subject to be distributed by the statute [Statute of Distribution, 1670 (c. 10)] (LORD ELDON, C.).—TWISDEN v. TWISDEN (1804), 9 Ves. 413; 32 E. R. 661, L. C.

*Annotations:—*Mentd. *Onslow v. Michell* (1812), 18 Ves. 490; *Goolding v. Haverfield* (1824), M'Cle. 345; *Cooper v. Cooper* (1873), 8 Ch. App. 813.

6. **What constitutes an intestacy—Surviving executor renouncing.**]—Where there are two exors., & one proves the will & dies, the executorship survives to the other; but if he then renounces, testator is dead intestate.—HOUSE & DOWNS v. PETRE (LORD) (1700), 1 Rob. Eccl. 415, n.; 1 Salk. 311; 91 E. R. 274.

*Annotations:—*Mentd. *Wankford v. Wankford* (1702), 1 Salk. 299; *Arnold v. Blencowe* (1788), 1 Cox Eq. Cas. 426; *Creswick v. Woodhead* (1842), 12 L. J. C. P. 111; *Harrison v. Harrison* (1846), 1 Rob. Eccl. 406; *Venables v. East India Co.* (1848), 2 Exch. 633.

7. — **Will inoperative—Executor predeceasing**

testator.]—Statute of Distribution, 1670 (c. 10), s. 5, directing advancements by the intestate in his lifetime by portions to his children to be brought into account, apply to an intestacy occasioned by a testamentary instrument becoming wholly inoperative by the death of the universal legatee & extrix. in the lifetime of testator, as well as to a case of actual intestacy occasioned by the non-existence of any testamentary instrument.—*Re FORD, FORD v. FORD*, [1902] 2 Ch. 605; 71 L. J. Ch. 778; 87 L. T. 113; 51 W. R. 20; 18 T. L. R. 809; 46 Sol. Jo. 715, C. A.

8. — — — —.]—Where all the legatees & the exor. named in the will predecease a testator he has died “intestate” within Intestates' Estates Act, 1890 (c. 29), & his widow will be entitled to £500 under the provisions of that Act.—*Re CUFFE, FOOKS v. CUFFE*, [1908] 2 Ch. 500; 77 L. J. Ch. 776; 99 L. T. 267; 24 T. L. R. 781; 52 Sol. Jo. 661.

PART I.

n. meaning of “heirs.”]—No legislative interpretation of the word “heirs” is abolished primogeniture in Upper Canada.—WOLFF v. SPARKS (1899), 29 S. C. R.

in 14 & 15 Vict. c. 6, which
—CAN.

Part III.—Devolution of Real and Personal Estate.

SECT. 1.—REAL ESTATE TO WHICH DECEASED BENEFICIALLY ENTITLED.

See Law of Property Act, 1922 (c. 16), ss. 155–163.

9. To heir-at-law—Until legal personal representative appointed—Or executors prove—Land Transfer Act, 1897, c. 65, s. 1.]—*JOHN v. JOHN*, [1898] 2 Ch. 573; 67 L. J. Ch. 616; 79 L. T. 362; 47 W. R. 52; 14 T. L. R. 583; 42 Sol. Jo. 731, C. A.

Annotations:—*Reid*. *Hewson v. Shelley*, [1913] 2 Ch. 384. *Mentd.* *Marshall v. Charteris*, [1920] 1 Ch. 520.

—.]—Until a legal personal representative is appointed freehold property vests in the heir.—*Re GRIGGS, Ex p. LONDON SCHOOL BOARD*, [1914] 2 Ch. 547; 83 L. J. Ch. 835; 111 L. T. 931; 80 J. P. 35; 58 Sol. Jo. 796; 13 L. G. R. 27, C. A.

11. To all named executors.]—Where a testator dies subsequently to the Land Transfer Act, 1897 (c. 65), having appointed exors., his real estate vests in all the exors., & not only in those who prove the will or act in the administration of the estate; & the exors. who have proved the will cannot convey the legal fee simple without the concurrence of their co-exor. who has not proved.—*Re PAWLEY & LONDON & PROVINCIAL BANK*, [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507; 48 W. R. 107; 44 Sol. Jo. 25.

Annotation:—*Consd.* *Hewson v. Shelley*, [1913] 2 Ch. 384.

See Law of Property Act, 1922 (c. 16), s. 162.

12. Administrator appointed under supposed intestacy—Validity of conveyance by.]—Letters of administration were granted to the widow of a man who was erroneously presumed to have died intestate. The administratrix as personal representative of the deceased, by virtue of the Land Transfer Act, 1897 (c. 65), sold & conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will the exors. thereby appointed obtained a recall of the letters of administration & a grant of probate to themselves. In an action by the exors. to recover possession of the real estate sold by the administratrix:—*Held*: (1) the grant of administration was not void *ab initio* & the purchaser had acquired a good title; (2) even if the grant of administration had been void for want of jurisdiction it was an order of the ct. by virtue of which the purchaser's title would have been protected under Conveyancing & Law of Property Act, 1881 (c. 41), s. 70.—*HEWSON v. SHELLEY*, [1914] 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 30 T. L. R. 402; 58 Sol. Jo. 397, C. A.

See Law of Property Act, 1922 (c. 16), s. 156 (6).

Equitable estate in copyholds.]—See COPYHOLDS, Vol. XIII., pp. 103, 114, 115, Nos. 1314, 1449–1454.

Transfer of estate from executors to heir or devisee.]—See EXECUTORS & ADMINISTRATORS.

Devolution of estate tail.]—See Law of Property Act, 1922 (c. 16), ss. 17 (4), 155 (2), 156 (1).

Land contracted to be purchased.]—See SALE OF LAND.

SECT. 2.—REAL ESTATE HELD BY DECEASED AS TRUSTEE.

See Law of Property Act, 1922 (c. 16), sect. 155 (1); TRUSTS & TRUSTEES.

13. Bare trustee — To heir-at-law — Land Transfer Act, 1875, c. 87, s. 48.]—A bare trustee, seised of an estate in fee simple, died intestate between the passing of the Vendor & Purchaser Act, 1874 (c. 78), & the commencement of above Act, & administration was not taken out to his estate:—*Held*: after the commencement of the last-mentioned Act, the trust estate would be in the trustee's heir-at-law.—*CHRISTIE v. OVINGTON* (1875), 1 Ch. D. 279; 24 W. R. 204.

Annotations:—*Consd.* *Morgan v. Swansea Urban S. A.* (1878), 9 Ch. D. 582; *Re Cunningham & Frayling*, [1891] 2 Ch. 567. *Mentd.* *Re Blandy Jenkins' Estate*, *Blandy Jenkins v. Walker*, [1917] 1 Ch. 46.

14. Acting trustee — To heir-at-law — Land Transfer Act, 1875, c. 87, s. 48.]—A trustee with a beneficial interest in the trust estate is not a "bare trustee," within above Act. Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money & execution of the conveyance was, by reason of his having a lien, on the property for his purchase-money, & not being bound to convey until payment, held not to be a "bare trustee" within the Act, so that upon his death the money still remaining unpaid & the conveyance unexecuted, the legal estate passed to his heir-at-law. *Qu.*: whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the Act.—*MORGAN v. SWANSEA URBAN SANITARY AUTHORITY* (1878), 9 Ch. D. 582; 27 W. R. 283.

Annotations:—*Consd.* *Re Cunningham & Frayling*, [1891] 2 Ch. 567. *Reid*. *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Blandy Jenkins' Estate*, *Blandy Jenkins v. Walker*, [1917] 1 Ch. 46. *Mentd.* *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615; *Re Calne's Mortgage Trusts*, [1918–19] B. & C. R. 297.

—.]—By indenture Nov. 23, 1836, freehold hereditaments were conveyed to D. & P. upon trust for sale, & in the event of the death of any of the trustees thereby appointed or to be appointed as thereafter mentioned a power of appointing new trustees was limited to certain named persons, & after the decease of the survivor of them, to "the acting trustees or trustee for the time being, or the exors. or administrators of the last acting trustee." D. died in 1849. P. died in 1855 intestate as to trust estates, leaving H. his heir-in-law. H. died intestate in 1857, leaving S. his heir-at-law. S. died intestate in 1876, leaving three daughters his co-heiresses-at-law. None of the persons named in the deed exercised the power of appointing new trustees, & the last survivor of them died in 1889. By deed June 7, 1890, the three co-heiresses of S. appointed new trustees, who contracted to sell the property under the trust for sale. The co-heiresses did not otherwise act as trustees of the indenture of 1836:—*Held*: (1) S. having active duties to perform was not a "bare trustee" within the meaning of sect. 48 of above Act; (2) the legal estate devolved upon the co-heiresses;

PART III. SECT. 1.

b. To personal representatives.]—*Re HEARLE* (1903), 3 S. R. N. S. W. 406. —AUS.

PART III. SECT. 2.

c. Executor of a sole executor.]—Under the Torrens System of Land Titles in Saskatchewan, there is a right

to the devolution of land to the exor of a sole or surviving exor.—*Re LAND TITLES ACT, WHITMAN'S CASE*, [1919] 1 W. W. R. 600.—CAN.

PART IV.—DESCENT OF REAL ESTATE.

(3) they were acting trustees for the time being, & consequently that their appointment of new trustees was a valid exercise of the power.—*Re CUNNINGHAM & FRAYLING*, [1891] 2 Ch. 567; 60 L. J. Ch. 591; 64 L. T. 558; 39 W. R. 469.

Annotation:—*Reid. Re Blandy Jenkins' Estate*; *Blandy Jenkins v. Walker*, [1917] 1 Ch. 46.

See, now, Conveyancing Act, 1881 (c. 41), s. 30.

Copyholds.—*See* COPYHOLDS, Vol. XIII., pp. 78, 79, Nos. 989–1002.

Mortgagee's estate in copyholds, *see* COPYHOLDS, Vol. XIII., p. 115, Nos. 1457–1459.

SECT. 4.—PERSONAL PROPERTY.

See, generally, EXECUTORS & ADMINISTRATORS; Law of Property Act, 1922 (c. 16), ss. 147–158.

Devolution as *bona vacantia*, *see* Part VI., Sect. 2, *post*.

SECT. 3.—REAL ESTATE HELD BY DECEASED AS MORTGAGEE.

See Law of Property Act, 1922 (c. 16), s. 155 (1); MORTGAGE.

SECT. 5.—PARTNERSHIP PROPERTY.

See Partnership Act, 1890 (c. 39), ss. 20 (2), 22, & *generally*, PARTNERSHIP.

Part IV.—Descent of Real Estate.

SECT. 1.—IN GENERAL.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

16. Same rules apply to legal & equitable estates.—That trusts & legal estates are to be governed by the same rules is a maxim which has obtained universally; it is so in the rules of descent, as in Gavelkind & Borough English lands, there is a *possessio fratris* of a trust, as well as of a legal estate; the like rules in limitations, & also of barring entails of trusts, as of legal estates. I believe there is no exception out of this general rule (SIR JOSEPH JEKYLL, M.R.).—*BANKS v. SUTTON* (1732), 2 P. Wms. 700; 24 E. R. 922.

Annotations:—*Consd. Buchanan v. Harrison* (1861), 1 John. & H. 662. *Reid. Burgess v. Wheate* (1759), 1 Eden, 177; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. *Mentd. Godwin v. Winsmore* (1742), 2 Atk. 525; *Curtis v. Curtis* (1789), 2 Bro. C. C. 620; *Smith v. Adams* (1854), 5 De G. M. & G. 712; *Meek v. Chamberlain* (1881), 8 Q. B. D. 31.

Resulting trusts.—*See* EQUITY; TRUSTS & TRUSTEES.

SECT. 2.—DESCENT OF AN ESTATE IN FEE SIMPLE.

SUB-SECT. 1.—THE HEIR.

See Law of Property Act, 1922 (c. 16), ss. 148, 150.

17. "Nemo est haeres viventis."—If a man seised of land in fee made a feoffment to divers to the use of his wife for her life & after to the use of the heirs of the feoffor, the wife died, & the feoffor made a lease for years & died, his issue could not avoid the lease, because a man could not have heirs in his life.—*ANON.* (1557), Ben. & D. 20; 123 E. R. 240.

18. —.—*CHALLONERS & BOWYER'S CASE* (1587), 2 Leon. 70; 74 E. R. 366.

Annotations:—*Consd. Winter v. Perratt* (1843), 9 Cl. & Fin. 606. *Reid. Burchett v. Durdant* (1690), 2 Vent. 311; *Brown v. Barkham* (1716), Gilb. Ch. 131. *Mentd. Goodright v. Cornish* (1692), 1 Ld. Raym. 3.

19. —.—W. seised in fee devised his lands to H. & his heirs for the life of D. in trust for

PART IV. SECT. 1.

d. To next of kin.—When real estate descends to a married woman, as next of kin under an intestacy, since 26 Vict. No. 20, she takes it as realty, & on her dying intestate, it descends to her children, as her next of kin, & not to her husband, *jure mariti*.—*MITCHELL v. HANNELL* (1885), 7 N. S. W. Eq. 53.—**AUS.**

e. —.—The intention of New South Wales Real Estate of Intestates Distribution Act, 1862, was to introduce a new rule of succession to real estate, that in cases of intestacy it should be administered & should devolve precisely as chattels real did before:—*Held*: such rule applies to all cases, not merely to those in which the owner has actually left an heir.—*WENTWORTH v. HUMPHREY* (1886), 11 App. Cas. 619.—**AUS.**

f. —.—The effect of 26 Vict. No. 20, ss. 1 & 2, is to give all land which previously descended to the heir, to the next of kin of the predecessor.—*PIOMLEY v. SHEPHERD*, [1891] A. C. 244.—**AUS.**

g. —.—By Real Estate of Intestates Distribution Act, 1862, the land of the intestate is now held by his personal representative on trust for

his next of kin. Such "heir trustee" cannot be regarded as "heir at law" within the meaning of sect. 5 of the Statute of Distributions.—*COLEMAN v. LAKE* (1903), 3 S. R. N. S. W. 603; 20 N. S. W. W. N. 191.—**AUS.**

h. —.—If a person dies intestate without children, between 1858, Apr. 6, & the passing of the Consolidated Statutes, leaving a mother, uncles & aunts, his mother, as his next of kin, is entitled, under cap. 78 of those statutes, to his real estate.—*DOE d. WOOD v. DE FORREST* (1883), 23 N. B. R. 209.—**CAN.**

k. No collaterals after brother's & sister's children.—W. died intestate without issue. His father died also intestate leaving six sons, including W., & three daughters. Four of W.'s brothers predeceased him without issue & intestate, & one brother & two sisters are still living. His other sister died intestate, leaving a son & three grandchildren, children of her deceased daughter, of whom plff. is one:—*Held*: plff. not entitled to a share in W.'s real estate, being a collateral "after brother's & sister's children," under Statute of distributions, s. 2.—*PHILLIPS v. GILLIS* (1898), 6 E. L. R. 575.—**CAN.**

1. Granddaughter of elder sister preferred to son of younger sister.—The granddaughter of an elder sister of deceased:—*Held*: to be principal heir in preference to the son of a younger sister.—*DE QUETTEVILLE v. HAMON*, [1893] A. C. 532.—**CHANNEL ISLANDS.**

m. Whether primogeniture & entail.—The English law gov

wise provided by statute. Under William IV., 2nd Sess., cap. 18, the laws of primogeniture & entail were in force in the Colony.—*WALBANK v. ELLIS* (1853), 3 Nfld. L. R. 400.—**NFLD.**

n. To general legatee—Not next of kin.—The real estate of a testator, if undevise, passes to the general legatees of his personality, and not to his next of kin, by virtue of Administration Act, 1879, s. 10, sub-sect. 2.—*Re MCHARDIE* (1887), 5 N. Z. L. R. 477.—**N.Z.**

PART IV. SECT. 2, SUB-SECT. 1.

ANANDIAH v. PETHE (1898), 1. IND.

984.

Sect. 2.—Descent of an estate in fee simple: Sub-sects. 1 & 2, A. (a) & (b) & B. (a) & (b).]

D. & after the death of D. to the heirs males of D. now living & such heirs males or females as he afterwards should have of his body. D. had a son G. at the time of the devise:—*Held*: G. took in fee simple although *nemo est haeres viventis*.—*JAMES v. RICHARDSON* (1685), 2 Lev. 232; *Freem. K. B.* 472; 3 Keb. 832; *Poll.* 457; *T. Jo.* 99; 1 Vent. 334; 83 E. R. 533, H. L.

Annotations:—*Darblson v. Beaumont* (1713), *Fortes.* 311; *Newcomen v. White* (1772), *L. R.* 7; *Goodright d. Brooking* *Bl.* 1010; *Allgood v. Blake* *Mentd.* *Newcomen v. Bethlom* *Bagshaw v. Spencer* (1748), *v. Masterman* (1757), *Wilm.* 386.

20. —.]—The right heir male of Robert cannot enter for the forfeiture in the life of Robert for he cannot be heir as long as Robert lives.—*ARCHER'S CASE, BALDWIN v. SMITH* (1597), 1 Co. Rep. 66 b; 2 And. 37; *Cro. Eliz.* 453; 76 E. R. 146.

Annotations:—*Consd.* *Doe d. Winter v. Perratt* (1826), 5 B. & C. 48. *Refd.* *Burchett v. Durdant* (1690), 2 Vent. 311; *Brown v. Barkham* (1716), *Glib. Ch.* 131; *Dubber v. Trollop* (1735), *Lee temp. Hard.* 160; *Goodright d. Brooking v. White* (1775), 2 Wm. Bl. 1010; *Winter v. Perratt* (1843), 9 Cl. & Fin. 606; *Greaves v. Simpson* (1864), 33 L. J. Ch. 641; *Fuller v. Chamier* (1866), *L. R.* 2 Eq. 682; *Lightfoot v. Maybery*, [1914] *A. O.* 782. *Mentd.* *Whiting v. Wilkins* (1612), 1 Bulst. 219; *Beaumont's Case* (1613), 9 Co. Rep. 138 b; *Bowles's Case* (1615), 11 Co. Rep. 79 b; *Sheffield v. Ratcliffe* (1615), *Hob.* 334; *Petts v. Browne* (1619), *J. Bridg.* 1; *Pills v. Brown* (1621), *Palm.* 131; *Beck's Case* (1630), *Litt.* 344; *Plunket v. Homes* (1661), 1 Sid. 47; *Petty v. Goddard* (1662), *O. Bridg.* 34; *Wright v. Hiccocks* (1667), 2 Keb. 192; *King v. Welling* (1672), 3 Keb. 95; *Pybus v. Mitford* (1674), 3 Keb. 338; *Harrison v. Belsey* (1680), *T. Raym.* 413; *Richards v. Bergavenny* (1694), 2 Vern. 324; *Baker v. Wall* (1695), 1 Ld. Raym. 185; *Loddington v. Kime* (1695), 3 Lev. 431; *Legate v. Sewell* (1706), 1 P. Wms. 87; *Backhouse v. Wells* (1713), *Fortes. Rep.* 133; *White v. Collins* (1718), 1 Com. 289; *Goodright d. Lisle v. Pullin* (1726), 2 Stra. 729; *Papillion v. Voice* (1728), *Kel. W.* 27; *Shaw v. Weigh* (1728), *Fortes. Rep.* 58; *Minshull v. Minshull* (1737), 1 Atk. 411; *Hopkins v. Hopkins* (1739), *West temp. Hard.* 606; *Hodgeson v. Bussey* (1740), 2 Atk. 89; *Ginger d. White v. White* (1742), *Willes.* 348; *Basset v. Basset* (1744), 3 Atk. 203; *Goodtitle d. Cross v. Wodhull* (1745), *Willes.* 592; *Bagshaw v. Spencer* (1748), 2 Atk. 570; *Garth v. Cotton* (1753), 3 Atk. 751; *Sayer v. Masterman* (1757), *Wilm.* 386; *Wright v. Pearson* (1758), *Amb.* 358; *Gulliver d. Corrie v. Ashby* (1766), 1 Wm. Bl. 607; *Thellusson v. Woodford* (1798), 4 Ves. 227; *Heneage v. Andover* (1822), 10 Price, 230; *Fetherston v. Fetherston* (1835), 3 Cl. & Fin. 67; *Chambers v. Taylor* (1837), 2 My. & Cr. 376; *Wills v. Hiscox* (1839), 4 My. & Cr. 197; *Chamberlayne v. Chamberlayne* (1856), 6 E. & B. 625; *Jordan v. Adams* (1859), 6 C. B. N. S. 748; *Johnson v. Rutherford* (1861), 3 L. T. 649; *Re Grayson's Will* (1879), 40 L. T. 98; *Evans v. Evans*, [1892] 2 Ch. 173; *Pelham-Clinton v. Newcastle* (1900), 83 L. T. 627; *Silcocks v. Silcocks*, [1916] 2 Ch. 161; *Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper*, [1921] 1 Ch. 566.

21. Effect of recital as heir in statute.]—An Act of Parliament reciting S. to be heir does not make him so (*per CUR.*).—*ANON.* (1700), 12 Mod. Rep. 384; 88 E. R. 1396.

22. Can only be excluded by express devise.]—No one shall take against the heir without an

express devise to him.—*FOWLER v. BLACKWELL* (1720), 1 Com. 353; 92 E. R. 1108.

Annotation:—*Consd.* *Doe d. Elsmore & Hale v. Coleman* (1818), 6 Price, 179.

23. Heir presumptive & heir apparent distinguished.]—Heir apparent is he, who, in the course of law, must be heir, if he survives his ancestor, as the eldest son. Heir presumptive is he who has the present presumption in his favour, that he will be heir; but which presumption may be excluded by the intervention of some body who has a nearer title. Thus, a nephew may be heir presumptive, but not heir apparent. Thus, a daughter is heir presumptive, before a son is born, but not heir apparent. The most remote relation of the whole blood may be heir presumptive; but the heir apparent can only be he who, if not disinherited, or dead before his ancestor, must take of course, because it is impossible any other should be nearer, or so near to the inheritance.—*ANON.* (1773), *Lofft*, 273; 98 E. R. 647.

24. Bastard—General rule—Cannot be heir-at-law.]—A bastard cannot succeed as heir-at-law to real property in England.—*BIRTWHISTLE v. VARDILL* (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E. R. 1308; *sub nom.* *DOE d. BURTWHISTLE v. VARDILL*, 6 Bing. N. C. 385; *West*, 500; 1 Scott, N. R. 828, H. L.; *previous proceedings, sub nom.* *DOE d. BIRTWHISTLE v. VARDILL* (1835), 2 Cl. & Fin. 571, H. L.

Annotations:—*Consd.* *Re Don's Estate* (1857), 4 Drew. 194; *Fenton v. Livingstone* (1859), 33 L. T. O. S. 335. *Expld.* *Harvey v. Farnie* (1880), 6 P. D. 35. *Consd.* *Re Goodman's Trusts* (1881), 17 Ch. D. 266. *Refd.* *Re Wright's Trust* (1856), 2 K. & J. 595; *Re Andros, Andros v. Andros* (1883), 24 Ch. D. 637; *Escallier v. Escallier* (1885), 10 App. Cas. 312; *Re Grey's Trusts, Grey v. Stamford*, [1892] 3 Ch. 88. *Mentd.* *Shaw v. Gould* (1868), *L. R.* 3 H. L. 55; *Skottowe v. Young* (1871), 40 L. J. Ch. 366.

25. —.]—*FITZ PAEN v. CHRISTIANE* (1309), *Y. B.* 2 Edw. 2, fo. 42, pl. 1.

26. — Exception to rule—Bastard elgne & muller puisne.]—*LEWKENOR v. LEWKENOR* (1289), 2 Co. Inst. 97.

Annotation:—*Refd.* *Doe d. Birtwhistle v. Vardill* (1840), 1 Scott, N. R. 828.

— Effect of legitimation.]—*See BASTARDY*, Vol. III., p. 374, Nos. 143–146.

Rule in Shelley's Case.]—*See REAL PROPERTY & CHATTELS REAL; WILLS.*

SUB-SECT. 2.—THE STOCK OF DESCENT.

A. At Common Law.

(a) In General.

See Law of Property Act, 1922 (c. 16), ss. 148–150.

27. Descent traced from person last seised.]—*KENNEDY v. ACKLAND* (1739), 9 Mod. Rep. 271; 88 E. R. 445.

28. —.]—*JENKINS d. HARRIS v. PRICHARD* (1757), 2 Wils. 45; 95 E. R. 677.

Annotations:—*Mentd.* *Doe d. Andrew v. Hutton* (1804)

22i. Can only be excluded by express devise.]—An heir-at-law is not to be disinherited except by express words. The estate devolves upon him unless it be distinctly pointed out to whom it shall go.—*SALTER v. CAVANAGH* (1838), 1 Dr. & Wal. 668.—*IF.*

o. Heir-at-law's portion.]—If A. die intestate without children, leaving a brother & two sisters, the brother as heir at law will be entitled to a double portion or two-fourths of the real estate of A., under Act of Assembly 26 Geo. 3, cap. 11, s. 12, & the sisters to one-fourth each.—*DOE d.*

THOMPSON v. ALLANSHAW (1840), 1 Kerr, 84.—*CAN.*

p. —.]—The half brothers & sisters of an intestate without children, are not entitled to the whole real estate, under Act of Assembly, 26 Geo. 3, cap. 11, but as "the next of kin" they are entitled to the remainder of the estate after the portion of the heir at law is deducted. The person entitled as heir by the common law is not excluded under the Act, though he is not one of the next of kin to the intestate; neither are the next of kin

prevented from taking the remainder because they are not in equal degree with the heir, but nearer in degree.—*DOE v. TROUGHTON* (1857), 3 All. 414.—*CAN.*

q. Right of widow.]—R. died intestate entitled to real & personal property leaving a widow & children:—*Held*: the widow having elected to take her interest under s. 4 of Devolution of Estates Act, 1886, 49 Vict. c. 22 (o), was entitled to one-third of the real estate absolutely.—*Re REDDAN* (1886), 12 O. R. 222.—*CAN.*

PART IV.—DESCENT OF REAL ESTATE.

3 Bos. & P. 643; *Doe d. Duckett v. Watts* (1807), 9 East, 17; *Doe d. Phillips v. Rollings* (1847), 4 C. B. 188.

29. ——— **Exclusion of half-blood.**—ANON. (1779), Lofft, 396; 98 E. R. 713.

30. **What amounts to selsin—Entry by guardian in socage.**—WHITCOMBE *v.* WHITCOMBE (1709), Prec. Ch. 280; 24 E. R. 135, L. C.

31. ———.]—GOODTITLE *d.* NEWMAN *v.* NEWMAN (1774), 3 Wils. 516; 2 Wm. Bl. 938; 95 E. R. 1188.

Annotations:—*Refd.* *R. v. Sutton* (1835), 3 Ad. & El. 597; *Richards v. Richards* (1860), John. 754. *Mentd.* *Wall v. Stanwick* (1887), 34 Ch. D. 763.

32. ———.]—DOE *d.* BARNETT *v.* KEEN (1797), 7 Term Rep. 386; 101 E. R. 1034.

Annotations:—*Refd.* *Clarence v. Marshall* (1834), 2 Cr. & M. 495. *Mentd.* *Wyllie v. Ellice* (1848), 6 Hare, 505.

33. ———.]—R. *v.* SHERRINGTON (INHABITANTS) (1832), 3 B. & Ad. 714; 1 L. J. M. C. 71; 110 E. R. 261.

34. ———.]—R. *v.* SUTTON (1835), 3 Ad. & El. 597; 1 Har. & W. 428; 5 Nev. & M. K. B. 353; 4 L. J. K. B. 215; 11 E. R. 540.

Annotation:—*Mentd.* *Russell v. Shenton* (1842), 3 Q. B. 449.

35. ——— **Possession by reversioner.**—ANON. (1564), Benl. 22; 73 E. R. 946.

In cases of copyhold.—See COPYHOLDS, Vol. XIII., pp. 85, 103, 107, Nos. 1059, 1315–1320, 1363.

(b) *Effect of Limitation to Heirs of Grantor or Testator.*

36. **Heir takes by descent—Though executory gift over on contingency.**—HAMSWORTH *v.* PRETTY (1599), Moore, K. B. 644; 72 E. R. 813.

Annotations:—*Refd.* *Scatterwood v. Edge* (1697), 1 Salk. 229; *Clerk v. Smith* (1699), 1 Salk. 241; *Goodridge v. Goodridge* (1742), 7 Mod. Rep. 453. *Mentd.* *Luddington v. Kime* (1698), 1 Ld. Raym. 203; *Allam v. Heber* (1748), 2 Stra. 1270.

37. ———.]—DOE PRATT *v.* TIMINS (1818), 1 B. & Ald. 530; 106 E. R. 195.

Annotations:—*Refd.* *Doe d. Player v. Nicholls* (1823), 1 B. & C. 336; *Manbridge v. Plummer* (1833), 3 L. J. Ch. 82; *Wood v. Skelton* (1833), 6 Sim. 176. *Mentd.* *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582.

38. ———.]—LANGLEY *v.* SNEYD (1822), 3 Brod. & Bing. 243; 129 E. R. 1277; *sub nom.* LANGLEY *v.* SNEYD, ALCOCK *v.* SNEYD, 7 Moore, C. P. 163; *subsequent proceedings, sub nom.* LANGLEY *v.* SNEYD (1822), 1 Sim. & St. 45.

39. ———.]—MANBRIDGE *v.* PLUMMER (1833), 2 My. & K. 93; 3 L. J. Ch. 82; 30 E. R. 879.

40. ———.]—WOOD *v.* SKELTON (1833), 6 Sim. 176; 2 L. J. Ch. 163; 58 E. R. 560.

Annotation:—*Consd.* *Buchanan v. Harrison* (1861), 1 John. & H. 662.

41. ———.]—HEDGER *v.* ROWE (1682), 3 Lev. 127; 83 E. R. 612.

Annotations:—*Refd.* *Reading v. Rawsterne* (1702), 2 Ld. Raym. 829; *Allam v. Heber* (1748), 2 Stra. 1270.

42. ——— **Though subject to charge.**—CLERK *v.* SMITH (1700), 1 Salk. 241; 91 E. R. 214; *sub nom.* CLARKE *v.* SMITH, 1 Com. 72; 1 Lut. 793.

Annotations:—*Refd.* *Plunket v. Penson* (1742), 2 Atk. 290; *Allam v. Heber* (1748), 2 Stra. 1270; *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658.

43. ———.]—CHAPLIN *v.* LEROUX (1816), 5 M. & S. 14; 105 E. R. 957.

Annotations:—*Consd.* *Wood v. Skelton* (1833), 6 Sim. 176. *Refd.* *Doe d. Pratt v. Timins* (1818), 1 B. & Ald. 530; *Biederman v. Seymour* (1841), 3 Beav. 368.

PART IV. SECT. 2, SUB-SECT. 2.— A. (b).

r. *Devise to "A. & her heirs for ever"*—*Intestacy—Cohairs take in common.*—Under a will by which landed property is devised to "A. & her heirs for ever," the eldest son of A. (who dies intestate) is not entitled to the whole property as her sole heir but must share

it in common with his brothers & sisters.—WILLIAMS *v.* WILLIAMS (1818), 1 Nfld. L. R. 103.—NFLD.

PART IV. SECT. 2, SUB-SECT. 2.— B. (b).

s. *Heir takes as purchaser.*—A testator left his estate at Port Albert to his widow during widowhood, & after

44. ——— **Appointment by will under settlement.**—HURST *v.* WINCHELSEA (EARL) (1759), 2 Burr. 879; 2 Keny. 444; 1 Wm. Bl. 187; 97 E. R. 611.

45. ——— **Right of contribution from other devisees for payment of debts.**—BIEDERMAN *v.* SEYMOUR (1840), 3 Beav. 368; 10 L. J. Ch. 177; 49 E. R. 144.

Annotation:—*Mentd.* *Owen v. Gibbons*, [1902] 1 Ch. 636.

46. **Limitation to one of several co-heirs—Co-heir takes by purchase.**—READING *v.* RAWSTERNE (1702), 2 Ld. Raym. 829; 92 E. R. 54; *sub nom.* READING *v.* ROYSTON, 1 Salk. 242; 2 Salk. 423; *sub nom.* REDDING *v.* ROYSTON, 1 Com. 123.

Annotations:—*Refd.* *Allam v. Heber* (1748), 2 Stra. 1270; *Re Willatts, Willatts v. Artley*, [1905] 1 Ch. 378. *Mentd.* *Story v. Windsor* (1743), 2 Atk. 630; *Hodgkinson v. Fletcher* (1781), 3 Doug. K. B. 31; *Doe d. Parker v. Gregory* (1834), 2 Ad. & El. 14.

B. Under Statute.

(a) In General.

See Inheritance Act, 1833 (c. 106), ss. 1, 2; Law of Property Act, 1922 (c. 16), ss. 148–150.

47. **Total failure of heirs of purchaser—Escheat to Crown.**—Where land descends to the son of an illegitimate father, who is proved to have been the purchaser thereof, & the son dies seised, intestate, & without issue, such land does not devolve upon his heirs *ex parte maternâ*, but escheats to the Crown, notwithstanding above Act, s. 2.—DOE *d.* BLACKBURN *v.* BLACKBURN (1836), 1 Mood. & R. 547, N. P.

Annotation:—*Refd.* *Muggleton v. Barnett* (1856), 2 Jur. N. S. 1026.

Escheat, see Part VI., Sect. 1, *post*.

See, now, Law of Property Amendment Act, 1859 (c. 35), ss. 19, 20.

(b) Effect of Limitation to Heirs of Grantor or Testator.

See Law of Property Act, 1922 (c. 16), ss. 19, 148–150.

48. **Heir takes as purchaser—For purpose of marshalling assets.**—Inheritance Act, 1833, s. 3, which provides that land devised to the heir of the testator, shall be considered to have been acquired by such heir as a devisee, & not by descent, applies for all purposes; & therefore, a demurrer by the heir, who was also devisee of the lands, to a bill by a legatee seeking to marshal the assets of the testator, with reference to such lands, as against the heir, was allowed.—STRICKLAND *v.* STRICKLAND (1839), 10 Sim. 374; 9 L. J. Ch. 60; 59 E. R. 659.

Annotation:—*Refd.* *Owen v. Gibbons*, [1902] 1 Ch. 636.

Marshalling of assets, see EXECUTORS & ADMINISTRATORS.

49. ——— **Heir equivalent to heirs.**—Under a devise to or in trust for a testator's right heirs, the person who at the time of the testator's death is his heir-at-law takes now, by virtue of the Inheritance Act, 1833 (c. 106), s. 3, as devisee, & not by descent as before the Act.

The word "heir" in that section includes "heirs"; & s. 3 operates also to alter the quality

her death or second marriage to his lawful heir. The testator died on July 23, 1876:—*Held*: the heir, by force of 3 & 4 Will. IV., c. 106, s. 3, would succeed to the land by virtue of the devise & not by descent.—RUSHBROOK *v.* PEARMAN (1913), 32 N. Z. L. R. 680.—N.Z.

t. *Heir takes by descent.*—When

Sect. 2.—Descent of an estate in fee simple: Subsect. 2, B. (b), C. & D.]

of the estate taken by the heir; so that, if a testator leaves co-heiresses, they, under such a devise, take as joint tenants not as co-parceners.—OWEN v. GIBBONS, [1902] 1 Ch. 636; 71 L. J. Ch. 338; 86 L. T. 571; 18 T. L. R. 347, C. A.

50. Devise to right heirs—Cohiresses take as joint tenants not coparceners.]—A testator who died in 1858 devised real estate upon trust to pay the rents & profits to his niece S. N. for life, & afterwards for her children on their attaining twenty-one years. And if there should be no such child, then to his right heirs for ever. S. N. who, together with three other ladies who were still living, were the testator's co-heiresses, died in 1898 without issue. A summons having been taken out to ascertain whether these coheiresses succeeded as joint tenants or coparceners:—*Held*: having regard to Inheritance Act, 1833 (c. 106), s. 3, they took as devisees & not by descent, Coparceny was an incident of descent, & there was nothing in the Act to show an intention to annex it to the estate of devisees, accordingly the three surviving ladies took as joint tenants.—*Re BAKER, PURSEY v. HOLLOWAY* (1898), 79 L. T. 343.

Annotation:—*Folld. Owen v. Gibbons*, [1902] 1 Ch. 636.

51. ———.]—OWEN v. GIBBONS, No. 49, *ante*.

Coparceners, *see* Sub-sect. 3, *post*.

C. Breaking the Line of Descent.

See, Inheritance Act, 1833 (c. 106), s. 4.

52. Grant of estate tail reserving rent—Rent follows descent of reversion.]—If a man seised of land *ex parte maternâ*, makes a gift of tail rendering rent, the new rent is incident to the reversion, & shall go with it to the heir *ex parte maternâ*.—SYMS'S CASE (1608), 8 Co. Rep. 51A; 77 E. R. 549.

Annotations:—*Mentd. Shipley's Case* (1610), 8 Co. Rep. 134 a; *Fowle v. Dogle* (1674), *Freem. K. B.* 157.

53. Settlement—Ultimate limitation to right heirs of settlor—Descent not broken.]—An heir *a parte maternâ* limits several estates with reversion to his right heirs, it shall go to his heir *a parte maternâ*.—GODBOLD v. FREESTONE (1694), 3 Lev. 406; 83 E. R. 753.

Annotations:—*Distd. Martin d. Tregonwell v. Strachan* (1744), *Willes.* 444. *Refd. Abbot v. Burton* (1708), 11 Mod. Rep. 181; *Roper v. Radcliffe* (1712), 9 Mod. Rep. 181; *Ratcliffe's Case* (1720), 1 Stra. 267; *Harris v. Lincoln Bp.* (1723), 2 P. Wms. 135; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden. 177; *Cave v. Holford* (1798), 3 Ves. 650; *Davis v. Kirk* (1856), 2 K. & J. 391. *Mentd. Jacob v. Jacob* (1898), 78 L. T. 451.

54. ——— Ultimate limitation to heir of ancestor—Descent not broken.]—By a marriage settlement real estate of which the lady was seised as heir to her maternal grandfather, was conveyed to trustees upon trust for the lady & her heirs until the marriage, & after the marriage upon trust for the lady for life; with remainder, in default of issue of the marriage, in trust for the lady & her heirs, if she survived her husband; but if she predeceased him, then in trust for the person or persons who would at her death have become entitled to the property if she had died intestate & without having been married. The lady died without issue in her husband's lifetime:—*Held*: the ultimate trust being for the benefit neither of the settlor, nor of the heirs of the settlor, was unaffected by Inheritance Act, 1833 (c. 106), & the persons intended to take thereunder were

those who would have been entitled if the settlement had never been made: & consequently the heir *ex parte maternâ* took the property by purchase under the settlement.—HEYWOOD v. HEYWOOD (1865), 34 Beav. 317; 5 New Rep. 441; 34 L. J. Ch. 317; 12 L. T. 168; 11 Jur. N. S. 633; 13 W. R. 514; 55 E. R. 657.

55. ———.]—By a marriage settlement executed in 1810, real estate of the wife was limited to the use of the husband for life, remainder to the use of the wife for life, & after limitations in favour of the issue of the marriage the ultimate limitation was "to the use of the right heirs of J. W. deceased, the mother of the wife, for ever." At the date of the settlement the wife was seised of part of the real estate as the heiress-at-law of her deceased mother, & of the other part as one of the co-heiresses of her deceased maternal great uncle. The wife died in 1846; the husband died in 1871. The limitations in favour of the issue all failed on the death in 1880 of the surviving son of the marriage:—*Held*: under the ultimate limitation, the wife took the estate as part of the old estate which she had before the marriage & that the descent was not broken by the settlement.—MOORE v. SIMKIN (1885), 31 Ch. D. 95; 55 L. J. Ch. 305; 53 L. T. 815; 34 W. R. 254.

56. Recovery.]—A recovery suffered of an estate in fee simple will not alter the nature of the descent & therefore if husband & wife, he being seised of lands in right of the wife by descent *ex parte maternâ*, suffer a recovery to themselves for life, with remainder in tail, remainder to the right heirs of the wife with a power to the wife to dispose of the reversion in fee & they die without issue, & without making any disposition of the reversion, the estate shall descend to the heir of the wife *ex parte maternâ*.—ABBOT v. BURTON (1708), 11 Mod. Rep. 181; 1 Com. 160; 2 Salk. 590; 88 E. R. 976.

Annotations:—*Distd. Martin d. Tregonwell v. Strachan* (1744), *Willes.* 444. *Refd. Roper v. Radcliffe* (1712), 9 Mod. Rep. 181; *Ratcliffe's Case* (1720), 1 Stra. 267; *Smith v. Triggs* (1721), 1 Stra. 487; *Harris v. Lincoln Bp.* (1723), 2 P. Wms. 135; *Garth v. Cotton* (1750), 1 Ves. Sen. 546; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden. 177; *Roe d. Nodon v. Griffiths* (1766), 4 Burr. 1952; *Cave v. Holford* (1798), 3 Ves. 650.

57. ———.]—Where a common recovery is suffered of an estate tail the recoveror acquires an absolute estate in fee simple, derived out of the estate tail; so that if a tenant in tail by purchase under a marriage settlement made by his ancestor *ex parte maternâ* with the reversion in fee by descent *ex parte maternâ* suffers a common recovery to himself in fee, this estate will descend to his heirs general *ex parte paternâ*: for the recovery does not let in the reversion in fee but a new estate is thereby acquired by purchase which is totally different from the old estate tail.—MARTIN v. STRACHAN (1744), 6 Bro. Parl. Cas. 319; 1 Wils. 66; *Willes.* 444; 2 Stra. 1179; 5 Term Rep. 107, n.; 2 E. R. 1106, H. L.

Annotations:—*Refd. Armstrong d. Neve v. Wolsey* (1755), 2 Wils. 19; *Roe d. Crow v. Baldwere* (1793), 5 Term Rep. 104; *Cave v. Holford* (1798), 3 Ves. 650. *Mentd. Garth v. Cotton* (1753), 3 Atk. 751; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden. 177; *Doe d. Lushington v. Llandaff* (Lord Bp.) (1807), 2 Bos. & P. N. R. 491; *Collyer v. Mason* (1821), 2 Brod. & Bing. 685; *Doe d. Baverstock v. Rolfe* (1838), 7 L. J. Q. B. 251; *Tarleton v. Liddell* (1851), 17 Q. B. 390.

58. Renewal of lease for lives—Descent broken.]—A feme purchases a church lease to her & her heirs, for three lives, & dies, leaving an infant daughter; two of the lives die; the infant's

a testator directs that his estates shall descend as if he died intestate the

heir-at-law takes by descent.—WALCOTT v. BLOOMFIELD (1843), 6 L. Eq. R.

227; 4 Dr. & War. 211; 2 Con. & Law. 577.—IR.

guardian renews the lease, this is a new acquisition, & shall go to the heirs of the part of the father.—**MASON v. DAY** (1711), Prec. Ch. 319; Gilb. Ch. 77; 2 Eq. Cas. Abr. 494, pl. 7; 24 E. R. 150.

Annotations:—**Folld.** *Pierson v. Shore* (1739), 1 Atk. 480. **Refd.** *Re Wells Boyer v. McLean* (1903), 72 L. J. Ch. 513. **Mentd.** *Rawe v. Chichester* (1773), Amb. 715.

59. ———.]—**PIERSON v. SHORE** (1739), 1 Atk. 480; West temp. Hard. 711; 26 E. R. 305, L. C.

Annotations:—**Consd.** *Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848. **Mentd.** *Rawe v. Chichester* (1773), Amb. 715.

60. Conveyance by tenant for life to trustees to pay debts—Descent of reversion in fee charged.]—**STRINGER v. NEW** (1741), 9 Mod. Rep. 363; 88 E. R. 509.

61. Partition by coparceners—Descent not broken.]—One of two parceners aliened. The alienee & the other parcener agreed to make partition, & an apportionment having been made, they & each of them, for the perfecting of such partition, conveyed to H., in fee, one portion of the premises, *habendum*, to the sole use of the alienee in fee, in full of his moiety, & the other portion in like manner to the sole use of the second parcener, in full of his moiety:—**Held**: the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs *ex parte maternâ*.—**DOE d. CROSTHWAITE v. DIXON** (1836), 5 Ad. & El. 834; 2 Har. & W. 364; 1 Nev. & P. K. B. 255; 6 L. J. K. B. 61; 111 E. R. 1382.

Coparceners.]—See Sub-sect. 3, *post*.

62. Devise to trustees in fee—Ultimate remainder to heir-at-law of testator—Descent broken.]—Devise to trustees, their heirs, exors., administrators, & assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, & one-third of the personalty to her absolutely, & then to lay out the other two-thirds of the personalty in the funds; & to pay the dividends & the rents of two-thirds of the freehold estates, & after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, & after her death the freehold estates & two-thirds of the personal estate to the daughter's children, to be equally divided amongst them, & to be paid them at the respective ages of twenty-one years; & if his daughter died without leaving issue, then his freehold estates to his wife for life, & after her death to his heir-at-law, as if he had died intestate:—**Held**: the trustees took an estate in fee, & upon the death of the widow, who was the surviving trustee, the legal estate descended to the daughter, & upon her death without issue, vested in the heir-at-law *ex parte maternâ*.—**DOE d. TOMKYNs v. WILLAN** (1818), 2 B. & Ald. 84; 106 E. R. 298.

Annotations:—**Mentd.** *Houston v. Hughes* (1827), 6 B. & C. 403; *Doe d. Keen v. Walbank* (1831), 2 B. & Ad. 554; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Ackland v. Pring* (1841), 2 Man. & G. 937; *Doe d. Kimber v. Cafe* (1852), 7 Exch. 675; *Collier v. Walters* (1873), L. R. 17 Eq. 252; *Baker v. White* (1875), L. R. 20 Eq. 166; *Cunliffe v. Branker* (1876), 3 Ch. D. 393.

63. ———.]—A devise of all the testator's residuary real estate to trustees in fee,

upon trust to pay the rents to A. for life, &, after his death, upon trust to convey the same residuary real estate to such person as should answer to the description of the testator's heir at law, breaks the descent of real estate which had descended to the testator *ex parte maternâ* & vests it in his heir at law as equitable devisee.—**DAVIS v. KIRK** (1856), 2 K. & J. 391; 2 Jur. N. S. 857; 69 E. R. 834.

Annotation:—**Distd.** *Buchanan v. Harrison* (1861), 1 John. & H. 662.

64. Devise to trustees of part of fee—Descent of reversion not broken.]—**BUCHANAN v. HARRISON**, No. 70, *post*.

D. Merger.

Merger generally, see EQUITY.

65. Legal & equitable estate vested in same person—Legal estate governs descent.]—If the legal interest in land descend in fee simple *ex parte maternâ*, & the equitable interest in fee simple *ex parte paternâ*, or *vice versâ*, the equitable estate shall merge in the legal, & both follow the line through which the legal estate descended.—**GOODRIGHT v. WELLS** (1781), 2 Doug. K. B. 771; 99 E. R. 491.

Annotations:—**Apld.** *Selby v. Alston* (1797), 3 Ves. 339. **Refd.** *Phillips v. Brydges* (1796), 3 Ves. 120.

66. ——— & for co-extensive estates—Legal estate governs descent.]—Where the equitable & legal estates, equal & co-extensive, unite in the same person, the former merges; therefore, where the former descends *ex parte paternâ*, the latter *ex parte maternâ*, upon their union the paternal heir has no equity.—**SELBY v. ALSTON** (1797), 3 Ves. 339; 30 E. R. 1042.

Annotations:—**Folld.** *Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327. **Mentd.** *Re Selous, Thomson v. Selous*, [1901] 1 Ch. 921; *Fung Ping Shan v. Tong Shun*, [1918] A. C. 403.

67. ———.]—A testator who died in 1853 devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to the testator's only son & to his two daughters in equal shares, & to the survivors or survivor of them, with remainder on trust for the children of the son & the daughters respectively in fee, with an ultimate remainder unto & to the use of the testator's own right heirs. The son & both the daughters survived the testator, but they all died without issue. The son survived the daughters, & died intestate. He was the heir-at-law of his father, & also of his mother. The testator had also devised real estate of his own to the son, who elected to confirm the will:—**Held**: the equitable estate, which the son took under the will & by virtue of his election, merged in the legal estate which descended to him from his mother, & the descent was regulated by the legal estate, & consequently, on his death intestate & without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, & not to his own heir.—**Re DOUGLAS, WOOD v. DOUGLAS** (1884), 28 Ch. D. 327; 33 W. R. 390; *sub nom.* **WOOD v. DOUGLAS**, 54 L. J. Ch. 421; *sub nom.* **Re DOUGLAS, DOUGLAS v. WOOD**, 52 L. T. 131.

Annotation:—**Mentd.** *Fung Ping Shan v. Tong Shun*, [1918] A. C. 403.

68. Union of seignory & fee in same person—

PART IV. SECT. 2, SUB-SECT. 2.—C.

61 i. Partition by coparceners—Descent not broken.]—A., seised in fee, died leaving E. & J. his co-heiresses. E. proved the will & died, having devised all her property to B. In a suit to administer A.'s assets, a consent was made a rule of ct. that the right of J.

should be determined in the Chancery suit as if A. had died intestate; & it was thereby admitted that the lands descended to E. & J., & that a moiety descended to J., & that B. & J. were entitled as tenants in common. A final decree was made declaring that the lands descended to E. & J. as A.'s co-heiresses. J. having died intestate:

—**Held**: though J. took a moiety of the lands under the decree as a purchaser for value, she was not a "purchaser" within the meaning of Inheritance Act, 1833, s. 3, & accordingly the title by descent as to such moiety was to be traced from A., & not from J.—**BLAKE v. HYNES** (1882), 11 L. R. Ir. 284.—**IR.**

Sect. 2.—Descent of an estate in fee simple: Sub-sect. 2, D.; sub-sects. 3, 4, 5, 6 & 7.]

By different titles but for same estate.]—If a man has a seignory in fee, & afterwards lands descend to him on the part of the mother; in that case the seignory is not extinguished, but suspended; for if the lord to whom the land descends dies without issue, the seignory shall go to the heir on the part of the father, & the tenancy to the heir on the part of the mother; & yet the father had as high an estate in the tenancy as in the seignory.—ANON. (1581), Godb. 4; 78 E. R. 3.

See, also, COPYHOLDS, Vol. XIII., pp. 51, 152, Nos. 607, 1976.

69. Union of limited fee & executory devise—By different titles.]—Upon a devise to the testator's wife B., of all his real & personal estate, etc., in trust for the education & maintenance of his only daughter M., till she arrived at the age of 21; & in case of M.'s death before she arrived at 21, then a devise of the whole of his estates & effects to B., his wife:—*Held*: M. took a present limited fee, either by descent or by implication under the will, upon the contingency of her dying under 21; & B. took an executory devise in fee, which, upon her death before the daughter attained 21, descended to the daughter; & the daughter afterwards dying before she attained 21, such executory interest, which did not unite with, nor was merged or extinguished in, the fee which she had *ex parte paternâ* during her life, descended to her heirs *ex parte maternâ*.—GOODTITLE v. WHITE (1812), 15 East, 174; 104 E. R. 810.

70. Union of estate as trustee & equitable reversion.]—Where under a devise the whole fee is not exhausted, the reversion results to the testator as part of his old estate, & the heir takes it by descent & not by purchase. Therefore, under the law of inheritance as it existed prior to Inheritance Act, 1833 (c. 106), if the heir has died intestate without being seised of such resulting interest, the descent must be traced from the ancestor.

The ct. will not allow any legal interest existing in the heir to prevent the devolution of the equitable interest in the course in which it would pass if the legal estate were separate. Therefore, where the heir was seised of the legal estate as trustee under his ancestor's will, & the ultimate trusts in the fee failed for remoteness:—*Held*: his legal estate did not so unite with his beneficial interest as to constitute a seisin of the latter.—BUCHANAN v. HARRISON (1861), 1 John. & H. 662; 31 L. J. Ch. 74; 8 Jur. N. S. 965; 10 W. R. 118; 70 E. R. 909.

SUB-SECT. 3.—COPARCENERS.

See Law of Property Act, 1922 (c. 16), s. 10, Sched. III.

71. Take as one heir.]—Both sisters must join; both take as heir by descent & make but one heir to whom the rent descends as one entire inheritance (*per CUR.*).—STEDMAN v. BATES (1695), 1 Salk. 390; 1 Ld. Raym. 64; 91 E. R. 338.

Annotations:—*Reid*. Leigh v. Shepherd (1821), 2 Brod. & Bing. 465; Decharms v. Horwood (1834), 10 Bing. 526.

See, also, COPYHOLDS, Vol. XIII., p. 85, No. 1057.

72. Descendants of coparceners take their parents share.]—Real estate was devised to A. for life, with remainder to B. in fee. B. died in 1821,

in the lifetime of A., leaving C. & D. her co-heiresses-at-law. C. died in 1824, in the lifetime of A., without having in any manner dealt with the property, leaving a son E.:—*Held*: it was not necessary to trace the descent as to C.'s moiety from B., but that E., for every purpose, ought to be taken as standing in C.'s place with reference to that moiety.—PATERSON v. MILLS (1850), 19 L. J. Ch. 310; 16 L. T. O. S. 122; 15 Jur. 1.

73. —.]—Inheritance Act, 1833 (c. 106), leaves the law of inheritance, in cases absolutely plain, as it found it, & was intended only to lay down rules where any doubt exists. Where T., being seised in fee of certain hereditaments, died intestate, leaving two daughters, E. & S., both daughters died intestate, each leaving a son:—*Held*: the statute did not apply, & the moiety of each daughter descended upon her son.—COOPER v. FRANCE (1850), 19 L. J. Ch. 313; 14 Jur. 214.

Annotations:—*Apld.* *Re* Matson, James v. Dickinson, [1897] 2 Ch. 509. *Reid*. Owen v. Gibbons, [1902] 1 Ch. 636.

74. —.]—The doctrine of *Cooper v. France*, No. 73, *ante*, that on the death intestate of a coparcener, a co-heiress of the purchaser of land, her son, notwithstanding Inheritance Act, 1833 (c. 106), s. 2, stands in her place *quoad* her share—applies equally in favour of her more remote lineal descendants. Accordingly, on the death intestate of a son of such a coparcener:—*Held*: the entire share descended on the nephew of such son (the nephew being a grandson of the coparcener) & no part thereof descended to the descendants of a sister of the coparcener.—*Re* MATSON, JAMES v. DICKINSON, [1897] 2 Ch. 509; 66 L. J. Ch. 695; 77 L. T. 69.

75. Devise to co-heiresses by name—Take as joint tenants not as coparceners.]—Devise to two daughters, there being no other sons or daughters, makes them joint tenants, & not coparceners (*per CUR.*).—ANON. (1588), Gouldsb. 88; 75 E. R. 1014.

76. —.]—ANON. (1601), Gouldsb. 141; 75 E. R. 1051.

Devise to right heirs—Where heirs co-heiresses.]—See Nos. 49, 50, *ante*.

Effect of partition by.]—See No. 61, *ante*

SUB-SECT. 4.—DESCENT TO LINEAL ANCESTOR—POSSESSIO FRATRIS.

See Law of Property Act, 1922 (c. 16), ss. 147-150.

77. Parent may inherit as cousin of child.]—A father or mother may be cousin to the son, & as such inherit to him notwithstanding the relation of father, etc.—EASTWOOD v. VINKE (1731), 2 P. Wms. 613; 24 E. R. 883.

Annotations:—*Mentd.* Richardson v. Elphinstone (1794), 2 Ves. 463; *Re* Hall, Hope v. Hall, [1918] 1 Ch. 562.

78. Brothers & sisters may inherit immediately—Though father's blood corrupted.]—HOBBIE'S CASE (1599), 4 Leon. 5; Palm. 19; 74 E. R. 688, Ex. Ch.

Annotation:—*Reid*. Kynnauld v. Leslie (1866), 14 W. R. 761.

79. —.]—A. having been attainted of treason, escaped to a foreign country, & there married & had children, & was afterwards executed on the same attainder:—*Held*: the descent of property between brothers is immediate, & not through their father; & the descendants of one of A.'s children could inherit property from the

PART IV. SECT. 2, SUB-SECT. 3.

a. Impartible property passing by survivorship—To nearest coparcener of senior line.]—When impartible property passes by survivorship from one line

to another, it devolves not on the coparcener nearest in blood, but on the nearest coparcener of the senior line.—KACHI KALIYANA v. KACHI, (1905), 21 T. L. R. 721.—IND.

PART IV. SECT. 2, SUB-SECT. 4.

b. Brothers may inherit—To exclusion of father.]—The law of descent in New Brunswick has not been altered by C. S. c. 78, except as to the double

PART IV.—DESCENT OF REAL ESTATE.

descendants of another, notwithstanding A.'s attainder.—**KYNNALD v. LESLIE** (1866), L. R. 1 C. P. 389; Har. & Ruth. 521; 35 L. J. O. P. 226; 14 L. T. 756; 12 Jur. N. S. 468; 14 W. R. 761.

Annotation:—**Mentd.** Phillips v. Eyre (1870), L. R. 6 Q. B. 1.

80. — Though father alien.—**COLLINGWOOD v. PAYS** (1864), 1 Sid. 193; O. Bridg. 410; 1 Vent. 413; 1 Lev. 59; 1 Keb. 699; 82 E. R. 1052, Ex. Ch.

Annotations:—**Consd.** Kynnauld v. Leslie (1866), L. R. 1 C. P. 389. **Refd.** Blackborough v. Davies (1701), 1 Ld. Raym. 684; Thornby v. Fleetwood (1720), 1 Stra. 318; Doe d. Duroure v. Jones (1791), 4 Term Rep. 300; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895; De Geer v. Stone (1882), 22 Ch. D. 243. **Mentd.** Cowper v. Cowper (1734), 2 P. Wms. 720; Scot v. Schwartz (1739), 2 Com. 677; Evelyn v. Evelyn (1754), 3 Atk. 762; Ferrers' Case (1760), Eden, 373; Lyons Corp'n. v. East India Co. (1836), 1 Moo. Ind. App. 175; Winter v. Perratt (1843), 9 Cl. & Fin. 606; Taylors v. Carpenter (1847), 9 L. T. O. S. 514; R. v. Manning (1849), 4 Cox, C. C. 31; Rittson v. Sturdy (1855), 3 Eq. Rep. 1039; Muggleton v. Barnett (1856), 1 H. & N. 282; *Re* Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890; R. v. Speyer, [1916] 2 K. B. 858.

81. ——**RATCLIFF'S CASE** (1592), 3 Co. Rep. 37 a; 76 E. R. 713.

Annotations:—**Refd.** Newman v. Edmunds (1611), 1 Bulst. 113; Jaques v. Collins (1628), Litt. 46; Reve v. Malster (1635), Cro. Car. 410; Collingwood v. Pace (1638), 1 Vent. 413; Smith v. Tracy (1677), 3 Keb. 806; Kellow v. Rowdon (1690), 1 Show. 244; Blackborough v. Davis (1701), 12 Mod. Rep. 615; Goodtitle d. Newman v. Newman (1774), 3 Wils. 516; Bushby v. Dixon (1824), 3 B. & C. 298. **Mentd.** Daniel v. Uply (1625), Lat. 39; Grey's Case (1641), Cro. Car. 601; Fisher v. Wigg (1700), 1 Ld. Raym. 622; Eyre v. Shaftsbury (1722), 2 P. Wms. 103; Sherwood v. Ray (1837), 1 Moo. P. C. C. 353; R. v. Clarke (1857), 7 E. & B. 186; *Ex p.* Barford (1860), 3 L. T. 467; R. v. Howes (1860), 3 E. & E. 332; R. v. Prince (1875), L. R. 2 C. C. R. 154.

See, now, Inheritance Act, 1833 (c. 106), s. 5.

SUB-SECT. 5.—PRIORITY OF PATERNAL OVER MATERNAL LINE.

See, now, Inheritance Act, 1833 (c. 106), ss. 7, 8; Law of Property Act, 1922 (c. 16), ss. 147–150.

82. Mother of more remote paternal ancestor — Preferred to mother of less remote paternal ancestor.—**CLERE v. BROOK** (1573), 2 Plowd. 442; 75 E. R. 663; *sub nom.* **CLEER v. BROOK**, 3 Dyer, 314 a.

Annotations:—**Refd.** Davies v. Lowndes (1835), 2 Scott. 71. **Mentd.** Napper v. Sanders (1631), Hut. 118; James v. Tutney (1639), Cro. Car. 497.

83. Descendants of less remote male ancestor — Preferred to descendant of more remote ancestor.—Where a person seised of an estate by descent *ex parte maternâ*, dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the *propositus*, *ex parte maternâ*.—**HAWKINS v. SHEWEN** (1823), 1 Sim. & St. 257; 1 L. J. O. S. Ch. 148; 57 E. R. 103.

84. Failure of superior line of descent—Need not be positively proved.—Pltf., in ejectment, claimed as heir through the grandmother of an intestate, who died childless in 1868. It was proved that all descendants of the intestate's grandfather were dead. The intestate's great-grandfather had a second son born in 1717, & alive in 1755. Nothing further was proved as to him, & there was no evidence as to the family of the great-grandmother, or of the great-grandfather's sister, who was a widow in 1755. After the in-

testate's death advertisements had been issued for the heir:—**Held**: there was evidence to go to the jury of failure of the male paternal & superior female paternal line.—**GREAVES v. GREENWOOD** (1877), 2 Ex. D. 289; 46 L. J. Q. B. 252; 36 L. T. 1; 25 W. R. 639, C. A.

Annotations:—**Refd.** Jones v. Hughes (1887), 4 T. L. R. 37; Lyell v. Kennedy (1887), 18 Q. B. D. 796; *Re* Jackson, Jackson v. Ward, [1907] 2 Ch. 354.

See, further, EVIDENCE.

SUB-SECT. 6.—QUALIFIED HEIR.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

85. Whether entitled to land & rents—Till birth of posthumous devisee.—**SNOW v. TUCKER** (1663), 1 Sid. 153; 82 E. R. 1027.

86. ——**Devise to trustees to the use of the first & other sons of M. in tail male, with a residuary devise. Three months after the testator's death the first son of M. was born:—Held**: the residuary devisees were entitled to the intermediate rents from the testator's death to the birth of the tenant in tail.—**Re MOWLEM** (1874), L. R. 18 Eq. 9; 43 L. J. Ch. 353; 22 W. R. 398.

Annotation:—**Refd.** Andrew v. Andrew (1875), 1 Ch. D. 410.

87. — Till birth of posthumous remainderman.—A posthumous child born after the next rent day had incurred after the death of his father, is under the 10 & 11 Will. 3 (c. 16), intitled to the intermediate profits of the lands settled as well as the lands themselves.—**BASSET v. BASSET** (1744), 3 Atk. 203; 26 E. R. 918, L. C.

Annotations:—**Refd.** Thellusson v. Woodford (1805), 1 Bos. & P. N. R. 357; Richards v. Richards (1860), John. 754; *Re* Wilmer's Trusts, Moore v. Wingfield, [1903] 1 Ch. 874. **Mentd.** York (Dean & Chapter) v. Middleburgh (1827), 2 Y. & J. 196.

Till birth of posthumous heir—Rents not got in.—A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being *enceinte* of a son, born subsequently. The rents from the ancestor's death remaining unreceived by the co-heirs:—**Held**: their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir.—**GOODALE v. GAWTHORNE** (1854), 2 Sm. & G. 375; 2 Eq. Rep. 936; 23 L. J. Ch. 878; 24 L. T. O. S. 14; 18 Jur. 927; 2 W. R. 680; 65 E. R. 443.

Annotation:—**Consd.** Richards v. Richards (1860), John. 754.

89. ——**The right of a presumptive heir to the rents which accrue due between the death of an ancestor & the birth of a posthumous heir extends to all rents which have accrued due in the interval, whether actually received or not, & whether in respect of fee simple or entailed estates.**—**RICHARDS v. RICHARDS** (1860), John. 754; 29 L. J. Ch. 836; 6 Jur. N. S. 1145; 70 E. R. 623.

Annotations:—**Refd.** *Re* Villar v. Gilbey, [190] Keogh (1874), 22 W. R. 508.

SUB-SECT. 7.—WRIT DE VENTRE INSPICIENDO.

90. Form of proceedings.—**WILLOUGHBY'S CASE** (1597), Cro. Eliz. 566; 78 E. R. 811.

portion of the heir at law, & if a person dies intestate without children, leaving a father & brothers, the brothers are entitled to his real estate, to the exclusion of the father.—**WETMORE** (1874), 2 Pug. 413.—

PART IV. SECT. 2, SUB-SECT. 5.
a. Both lines rank equally—When same degree of relationship.—L. died intestate, leaving as heirs an uncle & the representatives of deceased uncles & aunts on his father's side, & the representatives of a deceased uncle &

aunt on his mother's side:—**Held**: the heirs on the maternal side rank equally with those on the paternal side, when they stand in the same degree of relationship.—**CARTER v. I** (1907), 4 N. B. Eq. Rep. 10; 391.—**CAN.**

Sect. 2.—Descent of an estate in fee simple: Sub-sect. 7. Sects. 3 & 4: Sub-sects. 1 & 2.]

91. Where widow remarried.]—THEAKER'S CASE (1624), Cro. Jac. 686; 79 E. R. 595.

92. — Custody during pregnancy.]—ASCOUGH v. CHAPLIN (LADY) (1730), Cooke, Pr. Cas. 62; 125 E. R. 958; sub nom. *Ex p.* AYSCOUGH, Mos. 391; sub nom. *Ex p.* AISCOUGH, 2 P. Wms. 591; 2 Eq. Cas. Abr. 780, L. C.

Annotation:—*Refd. Ex p.* Bellett (1786), 1 Cox, Eq. Cas. 297.

93. — By petition.]—*Ex p.* BELLETT (1786), 1 Cox, Eq. Cas. 297; 29 E. R. 1174.

94. —.]—*Re* BROWN, *Ex p.* WALLOP (1792), 4 Bro. C. C. 90; Dick. 767; 29 E. R. 794, L. C.

Annotations:—*Refd.* Kennell v. Abbott (1799), 4 Ves. 802. *Mentd.* Knox v. Wells (1864), 2 Hem. & M. 674.

95. To whom granted—To devisee as well as heir-at-law.]—*Ex p.* BELLETT (1786), 1 Cox, Eq. Cas. 297; 29 E. R. 1174.

96. —.]—*Re* BROWN, *Ex p.* WALLOP, No. 94, ante.

97. Where child entitled to sum of money to be raised out of real estate.]—BLAKEMORE v. BLAKEMORE (1845), 1 Holt, Eq. 328; 71 E. R. 769; sub nom. *Re* BLAKEMORE, 14 L. J. Ch. 336.

SECT. 3.—DESCENT OF AN ESTATE TAIL.

See Law of Property Act, 1922 (c. 10), ss. 147-150.

98. Estate in tail general—Half blood can inherit.]—BEAUFITZ v. FAUKENER (1311), Selden Society, Year Books of Edw. 2, Vol. VI., p. 58.

99. Estate in tail female—Heir must devise through females.]—A son's daughter cannot take by limitation to the heirs female of the body of the father, for such heirs female must derive all by females.—JOHNSON v. NORTHY (1700), 2 Vern. 407; Prec. Ch. 134; 23 E. R. 863.

100. Rule of *possessio fratris*—Not applicable to estates tail.]—The rule of *possessio fratris* does not apply to estates tail, nor to inheritances in fee simple without an actual possession of the brother of the whole blood.—DOE d. GREGORY v. WHICHELO (1799), 8 Term Rep. 211; 101 E. R. 1350.

101. Qualified heir in tail—Same as in estates in fee.]—RICHARDS v. RICHARDS, No. 89, ante.

See, further, Sect. 2, sub-sect. 6, ante.

Copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 103, 104, No. 1317, 1328.

SECT. 4.—DESCENT OF AN ESTATE PUR AUTRE VIE.

SUB-SECT. 1.—IN GENERAL.

See, generally, REAL PROPERTY & CHATTELS REAL.

102. Estate of freehold — Not distributable

among next of kin.]—OLDHAM v. PICKERING (1696), Carth. 376; Comb. 388, 475; Holt, K. B. 503; 12 Mod. Rep. 103; 2 Salk. 464; 90 E. R. 819; sub nom. OLDEROON v. PICKERING, 1 Ld. Raym. 96; 91 E. R. 739; sub nom. OLDISON v. PICKERING, 3 Salk. 137.

Annotations:—*Mentd.* Ripley v. Waterworth (1802), 7 Ves. 425; *Head v.* Godlee, Reynolds v. Godlee (1859), 29 L. J. Ch. 633.

103. Not estate of inheritance.]—If a freehold lease for lives be limited to A. & the heirs of his body, with remainders over, A. may dispose of the whole, & defeat the remainders by any conveyance during his lifetime; or *semble*: by his will alone.

Such estates certainly are not estates of inheritance; they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds because the heir-at-law does not take by descent (LORD KENYON, C.J.).—DOE d. BLAKE v. LUXTON (1795), 6 Term Rep. 289; 101 E. R. 558; *previous proceedings, sub nom.* BLAKE v. BLAKE (1786), 1 Cox, Eq. Cas. 266; *subsequent proceedings, sub nom.* BLAKE v. LUXTON (1815), Coop. G. 178.

Annotations:—*Consd.* *Re* Inman, Inman v. Inman, [1903] 1 Ch. 241. *Refd.* Kenrick v. Beauchere (1802), 3 Bos. & P. 175; Slado v. Pattison (1835), 5 L. J. Ch. 51; Stead v. Platt (1853), 18 Beav. 50; Crosswell v. Hawkins (1857), 3 Jur. N. S. 407; Phillips v. Ball (1859), 6 C. B. N. S. 811.

104. —.]—*Re* MICHELL, MOORE v. MOORE, No. 106, post.

105. Words of last conveyance of property decide descent.]—An estate *pur autre vie* was created by the conveyance of applt.'s life estate in lands to applt. & resp. to hold to the use of them & their heirs upon certain trusts, with a declaration that all the estates & interests conveyed to resp. were conveyed to her as trustee for an infant:—*Held*: the infant's equitable estate was not an estate to him & his heirs, & there being no "special occupant," the infant's estate upon his death passed to his administratrix under Wills Act, 1837 (c. 26), s. 6.

It has long since been established that in determining the quality of an estate *pur autre vie*, that is whether it goes to a special occupant or to the exor. by statute, you look to the terms of the last conveyance of the estate & not to the original grant, to ascertain whether it is to go to the heir or the legal personal representative. If it is to go to the heir, my present impression is that express words are necessary, & that in a deed, at all events, the word "heir" must be used for the purpose of designating the special occupant (LORD DAVEY).—MOUNTCASHELL (EARL) v. MORE-SMYTH, [1896] A. C. 158; 65 L. J. P. C. 12; 74 L. T. 321, H. L.

Annotations:—*Consd.* *Re* Inman, Inman v. Inman, [1903] 1 Ch. 241. *Refd.* *Re* Sheppard, Sheppard v. Manning (1897), 45 W. R. 475.

In copyholds, *see* COPYHOLDS, Vol. XIII., pp. 65, 66, Nos. 805-816.

PART IV. SECT. 3.

d. Abolition of estates tail.]—When testator devised lands to his son R., "for & during his natural lifetime, then to devolve to his eldest child lawfully begotten in a line of succession forever," & [testator died before the passing of the Act abolishing estates tail, it was contended that R., who died childless, under his father's will took an estate tail which the Act converted into an estate in fee, & therefore debt., to whom R. had conveyed the land in fee, & not the heirs of testator, were entitled to the land on the death of R.:—*Held*: R. took only an estate for life.—

MCKAY v. ANNAND (1863), 1 Old. 247.—CAN.

a. —.]—*Re* SIMPSON'S ESTATE (1863), 1 Old. 317.—CAN.

f. —.]—MCKENZIE v. MCKENZIE (1864), 2 Old. 178.—CAN.

PART IV. SECT. 4, SUB-SECT. 1.

g. Application of rule *possessio fratris*—What is sufficient seisin.]—The rule of *possessio fratris* applied to estates *pur autre vie*. The receipt of rent by the step-mother of an infant was a sufficient seisin to entitle his sisters of the whole blood, in exclusion of a brother of the half blood.—LONG v. MYLES (1822), 1 Fox & S. Ir. 1.—

103 i. Not estate of inheritance.]—A tenant *quasi* in tail in possession of an estate *pur autre vie*, has full power over, & may, by any act *inter vivos*, deal with the estate precisely as if there never had been any settlement; but a *quasi* tenant in tail in remainder cannot, without the concurrence of the tenant for life, defeat the subsequent remainders. But if he alien with the consent of the tenant for life, or obtain a renewal with his concurrence, or if the tenant for life procures a renewal, & then conveys to the tenant *quasi* in tail, this will be sufficient to bar the *quasi* entail.—ALLEN v. ALLEN (1842), 2 Dr. & War. 307.—IR.

SUB-SECT. 2.—THE HEIR AS SPECIAL OCCUPANT.

See, now, Land Transfer Act, 1897 (c. 65), s. 6 ; Law of Property Act, 1922 (c. 16), s. 148.

106. General rule.]—The law as to the transmission of estates *pur autre vie* is marked by some peculiarities. If lands were given to A. for the life of B., then, anciently, on the death of A., the estate went to the first person who took possession, whoever he might be ; & such person was known as the occupant. Lord Coke (Co. Litt. 41 b) points out how this inconvenient result may be avoided. He says : “ It were good to prevent the uncertainty of the estate of the occupant to add these words, ‘ to have & to hold to him & his heirs during the life of the *cestui que vie* ’ ; & this shall prevent the occupant, & yet the lessee may assign it to whom he will ; or if he hath already an estate for another man’s life without these words, then it were good for him to assign his estate to divers men & their heirs during the life of the *cestui que vie*.” This has ever since been recognised as law. The special occupant, as the heir under these circumstances is called, may therefore be pointed out either in the instrument by which the limitation of the estate was originally created, or by an instrument executed by the tenant *pur autre vie*. It is to be observed, however, that the heir in such cases took as occupant, & not as deriving title through the original tenant. The estate is consequently not an estate of inheritance.

Wills Act, 1837 (c. 26), s. 6, provides that, where there is no special occupant of an estate *pur autre vie*, it shall go to the exor. or administrator of the party that had the estate by virtue of the grant (STIRLING, J.).—*Re MICHELL, MOORE v. MOORE*, [1892] 2 Ch. 87 ; 61 L. J. Ch. 326 ; 66 L. T. 366 ; 40 W. R. 375.

107. Express words necessary to make heir special occupant.]—*MOUNTCASHELL (EARL) v. MORE-SMYTH*, No. 105, *ante*.

108. Heir does not take by descent.]—*DOE d. BLAKE v. LUXTON*, No. 103, *ante*.

109. —.]—If an estate is given to A. simply during the life of B., & A. dies before B., any person getting possession of the land after the death of A. will be entitled to hold it as the general occupant ; but if an estate is limited to A. & his heirs during the life of B., a general occupant is not permitted, but the heir will take as special occupant, & not by descent.

Semble : if an estate is given to A. & his exors. & administrators during the life of B., & A. dies first, the exor. would be capable of taking the estate as special occupant.

If A., having an estate to himself, his heirs & assigns, during the life of B. conveys the legal interest to trustees, their exors., administrators & assigns, & the trustees die in the lifetime of the *cestui que vie*, the exors. of the trustees will be special occupants, & A. will have no interest in the legal estate.—*NORTHERN v. CARNEGIE* (1859), 4 Drew. 587 ; 28 L. J. Ch. 930 ; 33 L. T. O. S. 355 ; 7 W. R. 481 ; 62 E. R. 225.

Annotation :—*Refd. Re MICHELL, MOORE v. MOORE*, [1892] 2 Ch. 87.

110. —.]—*Re MICHELL, MOORE v. MOORE*, No. 106, *ante*.

111. May be named by instrument executed by tenant.]—*Re MICHELL, MOORE v. MOORE*, No. 106, *ante*.

112. Gift to A. & B. for life—Remainder to C.

on death of B.—C. special occupant.]—A. being tenant for life, levies a fine to the use of himself & B. for life, & if B. die, living A. to the use of C. The estate on the death of B. in the lifetime of A. shall go to C. as an occupant.—*CASTLE v. DOD* (1607), Cro. Jac. 200 ; 79 E. R. 175.

Annotations :—*Consd. Pinker v. Litcott* (1665), O. Bridg. 373 ; *Geary v. Bearcroft* (1666), Cart. 57 ; *Penny v. Allen* (1857), 7 De G. M. & G. 409. *Refd. Holden v. Smallbrooke* (1668), Vaugh. 187.

113. Lease at will by tenant *pur autre vie*—Lessee occupant on death of tenant.]—*SKELLITON v. HAY* (1619), Cro. Jac. 554 ; 79 E. R. 475.

Annotations :—*Consd. Holden v. Smallbrooke* (1668), Vaugh. 187. *Refd. Geary v. Bearcroft* (1666), Cart. 57.

114. Gift to A. & his heirs—Heir special occupant—Rentcharge.]—A rentcharge granted to a man & his heirs during his life & the lives of three others, is good, & it shall descend to the heir as occupant.—*BOWLES v. POORE* (1611), Cro. Jac. 282 ; 1 Bulst. 135 ; 79 E. R. 242.

Annotation :—*Mentd. Gravenor v. Woodhouse* (1824), 2 Bing. 71.

115. —.]—*NORTHERN v. CARNEGIE*, No. 109, *ante*.

116. —.]—*Re MICHELL, MOORE v. MOORE*, No. 106, *ante*.

117. — Devise to B. by A.—Heir of devisor special occupant.]—Where the tenant of lands, granted to him & his heirs *pur autre vie*, devised them “ to A. B.,” without saying more, & A. B. died, living *cestui que vie* :—*Held* : the heir of the devisor was entitled to the lands as special occupant.—*DOE d. JEFF v. ROBINSON* (1828), 8 B. & C. 296 ; 2 Man. & Ry. K. B. 249 ; 6 L. J. O. S. K. B. 273 ; 108 E. R. 1053.

Annotations :—*Consd. Northern v. Carnegie* (1859), 28 L. J. Ch. 930. *Refd. Slade v. Pattison* (1835), 5 L. J. Ch. 51.

118. Conveyance by tenant in tail—To A. & his heirs—Heir special occupant.]—Tenant in tail by bargain & sale conveys to another & his heirs. The bargainee has only an estate descendible for the life of tenant in tail, & not devisable under 34 & 35 H. 8, c. 5, but on the death of bargainee his heir shall take as special occupant.—*TOOK v. GLASCOCK* (1669), 1 Wms. Saund. 250 ; 85 E. R. 298.

Annotations :—*Refd. Machell v. Clerk* (1702), 1 Com. 119. *Mentd. Doe d. Jones v. Harrison* (1832), 3 B. & Ad. 764 ; *Lock v. Furze* (1865), 19 C. B. N. S. 96 ; *Heymann v. R.* (1873), 28 L. T. 162.

119. Gift to A. his heirs, executors, administrators & assigns—No devise—Heir special occupant.]—If an estate *pour autre vie* be limited to a man, his heirs, exors., administrators, & assigns, & be not devised, it descends to the heir as a special occupant.—*ATKINSON v. BAKER* (1791), 4 Term Rep. 229 ; 100 E. R. 989.

Annotation :—*Refd. Carpenter v. Dunsmure* (1854), 3 E. & B. 918.

120. Gift to A., his heirs & assigns, to hold to A. & his assigns—Heir special occupant.]—Demise to H. her heirs & assigns, to have & to hold to the said H. & her assigns for the life of G. :—*Held* : under these words an estate passed to H., her heirs & assigns, for the life of G., so that on her death in the life of G., her heir would take as special occupant.—*DOE d. TIMMIS v. STEELE* (1843), 4 Q. B. 663 ; 3 Gal. & Dav. 622 ; 12 L. J. Q. B. 272 ; 1 L. T. O. S. 168, 169 ; 7 Jur. 555 ; 114 E. R. 1048.

Annotation :—*Refd. Phillips v. Ball* (1859), 6 C. B. N. S. 811.

121. Sale of estate *pur autre vie*—Death of life tenant before conveyance—Whether heir

PART IV. SECT. 4, SUB-SECT. 2.

h. Lease *pur autre vie*—To A. & his heirs—Heir special occupant.]—In case of a lease *pur autre vie*, to a man

& his heirs ; on the death of the grantee, in the lifetime of *cestui que vie*, his heir takes not as heir, but as special occupant.—*DOWELL v. DIGNAN* (1826), Batt. 698.—*IR.*

k. —.]—*WALL v. BYRNE* (1845), 7 I. Eq. R. 578 ; 2 Jo. & Lat. 118.—*IR.*

l. —.]—*Re KING, KING v. KING*, [1890] 1 I. R. 30.—*IR.*

Sect. 4.—Descent of an estate pur autre vie: Sub-1, 2 & 3.]

special occupant as trustee for purchaser.]—Lessee for another man's life contracted to sell his estate, & received the purchase-money, but died before conveyance. His heir entered as special occupant:—*Held*: the vendor was trustee for the purchaser, & the trust was binding on the heir, although as special occupant, he was not privy to the contract.—*STEPHENS v. BAILY* (1666), Nels. 106; 21 E. R. 502.

Annotation:—*Reid. Gell v. Vermedun* (1694), Freem. Ch. 199.

122. ———.]—*ANON.* (1672), Freem. Ch. 155; 22 E. R. 1126.

SUB-SECT. 3.—DESCENT TO PERSONAL REPRESENTATIVES.

See Wills Act, 1837 (c. 26), ss. 2, 6; Land Transfer Act, 1897 (c. 65), s. 1; Law of Property Act, 1922 (c. 16), ss. 155-163.

123. **Gift to A. & his assigns.]**—Where a lessee of lands demised to him, his heirs & assigns, for lives, devised the premises for the residue of the term to W. J. L. & his assigns, who died intestate:—*Held*: the premises did not go to the heir of W. J. L., but to his personal representative, under Stat. Frauds.—*DOE d. LEWIS v. LEWIS* (1842), 9 M. & W. 662; 11 L. J. Ex. 305; 6 Jur. 375; 152 E. R. 280.

Annotations:—*Consd. Reynolds v. Wright* (1860), 2 De G. F. & J. 590; *Re Inman, Inman v. Inman*, [1903] 1 Ch. 241.

124. **Gift to A., his exors. & administrators.]**—*NORTHERN v. CARNEGIE*, No. 109, *ante*.

125. **Conveyance of legal estate to trustees—No special occupant of equitable estate.]**—A. by will devises lands to trustees & their heirs, in trust, that the profits should be equally divided between his wife & daughter, the heir of the testator, during the wife's life, & after her death he devises the same to the use of his daughter in tail, with remainder over; the daughter dies without issue, & intestate, during the mother's life:—*Held*: the mother & daughter were tenants in common, & the mother should have a moiety of the profits during her life, & the other moiety, by Stat. Frauds, should go to the exors. or administrators of the daughter, as before that statute it would have been liable to occupancy, & not to the heir of the testator, as profits undisposed of & resulting to him.—*PHILIPS v. PHILIPS* (1701), 1 P. Wms. 34; 1 Eq. Cas. Abr. 292, pl. 6; Freem. Ch. 11, 247; 1 Ld. Raym. 721; Prec. Ch. 167; 2 Vern. 430; 24 E. R. 283, L. C.

Annotations:—*Mentd. Crawley v. Crowther* (1702), Freem. Ch. 257; *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Ingle v. Vaughan-Jenkins* (1900), 69 L. J. Ch. 618.

126. ———.]—*PENNY v. ALLEN* (1857),

7 De G. M. & G. 409; 29 L. T. O. S. 41; 3 Jur. N. S. 273; 5 W. R. 303; 44 E. R. 160, L. C.

Annotation:—*Mentd. Morgan v. Morgan* (1870), L. R. 10 Eq. 99.

127. ———.]—*MOUNTCASHELL (EARL) v. MORE-SMYTH*, No. 105, *ante*.

128. ———.]—A testator who died in 1873 devised his real estate to trustees upon trust to pay the rents & profits unto & for the benefit of his three daughters A., B., & C. & their issue in equal shares for & during the term of their natural lives respectively, & the life of the longer liver of them. On the death of A., leaving three children, the ct. had decided that these children became absolutely entitled in thirds to A.'s share; two of A.'s children having since then died intestate:—*Held*: no special occupant having been designated the interest of A.'s deceased children passed to their respective legal personal representatives under Wills Act, 1837 (c. 26), s. 6.—*Re SHEPPARD, SHEPPARD v. MANNING*, [1897] 2 Ch. 67; 66 L. J. Ch. 445; 76 L. T. 756; 45 W. R. 475; 41 Sol. Jo. 451.

129. ———.]—A testator devised an equitable estate *pur autre vie*, limited to himself, his heirs & assigns, to certain trustees, their heirs & assigns, for the use of his grandson, describing the property as freehold hereditaments. The grandson died intestate:—*Held*: though the entire estate had passed to the grandson, there was nothing on the face of the will to entitle his heir to claim as special occupant, & the estate therefore passed to his administrator under Wills Act, 1837 (c. 26), s. 6.—*Re INMAN, INMAN v. INMAN*, [1903] 1 Ch. 241; 72 L. J. Ch. 120; 88 L. T. 173; 51 W. R. 188; 47 Sol. Jo. 92.

130. ———. **Heir named as special occupant—No heir.]**—There may be a special occupant of an equitable estate *pur autre vie*. Leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, exors., administrators & assigns. A. survived the deviser, & being illegitimate, died without heirs & intestate, living the *cestuis que vie*:—*Held*: the devised estates passed under the Wills Act, 1837 (c. 26), to A.'s administrator.—*REYNOLDS v. WRIGHT* (1860), 2 De G. F. & J. 590; 30 L. J. Ch. 381; 3 L. T. 531; 7 Jur. N. S. 246; 9 W. R. 211; 45 E. R. 749, L. C.

131. ———. **Death of trustees in lifetime of tenant.]**—*NORTHERN v. CARNEGIE*, No. 109, *ante*.

132. **Rentcharge pur autre vie—Effect of death of grantee.]**—*SALTER v. BOTELER* (1602), Moore, K. B. 664; 72 E. R. 825.

Annotations:—*Consd. Hassell d. Hodgson v. Gowthwaite* (1744), Willes, 500. *Refd. Holden v. Smallbrooke* (1668), Vaugh. 187; *Bearpark v. Hutchinson* (1830), 7 Bing. 178. *Mentd. Scattergood v. Edge* (1699), 12 Mod. Rep. 278.

133. ———.]—A rentcharge *pur autre vie*, where the grantee dies, *cestui que vie* surviving, passes, by operation of Stat. Frauds, to the exor. of the grantee.—*BEARPARK v. HUTCHINSON* (1830), 7 Bing. 178; 4 Moo. & P. 848; 9 L. J. O. S. C. P. 1; 131 E. R. 69.

PART IV. SECT. 4, SUB-SECT. 3.

125 i. **Conveyance of legal estate to trustees—No special occupant of equitable estate.]**—A lease for lives—*habendum* to the lessee, his heirs, etc.—was conveyed by marriage settlement to trustees, their exors., etc., upon trust, after certain life interests, for the children of the marriage, subject to appointment; & in default of appointment, for the children absolutely, but without words of limitation. The children died before the determination of the life interests, under age & unmarried. It was assumed that they

took a vested estate in the entire interest in the lease *pur autre vie*:—*Held*: upon the determination of the life interests, the personal representative, & not the heir-at-law of the children, became entitled to the beneficial interest in the lease.—*CROKER v. BRADY* (1881), 4 L. R. Ir. 653.—*IR.*

m. **Lease pur autre vie—No words of limitation—No special occupant.]**—A lessee of lands which had been demised to him, his heirs & assigns, for three lives or thirty-one years, conveyed the lands by deed to M. to hold the same unto & to the use of M. for the existing lives, without using

words of limitation. M. afterwards died intestate as regards the lands:—*Held*: M.'s interest in the lease passed on his death to his personal representative, & not to his heir-at-law.—*Re MURRAY, MURRAY v. CONDRON*, [1916] 1 L. R. 302.—*IR.*

132 i. **Rentcharge pur autre vie—Effect of death of grantee.]**—A rent charge was granted to A. & his heirs, charged on land held for lives with a covenant for perpetual renewal. A. died intestate & without an heir:—*Held*: his administratrix was entitled to the rent charge.—*PLUNKET v. REILLY* (1852), 2 L. Ch. R. 585.—*IR.*

PART IV.—DESCENT OF REAL ESTATE.

SECT. 5.—DESCENT OF CUSTOMARY LANDS.

SUB-SECT. 1.—IN GENERAL.

See, generally, REAL PROPERTY & CHATTELS REAL; Law of Property Act, 1922 (c. 16), s. 128, sched. 12.

134. Customary rules only altered by Parliament—Not by words in grant.]—ANON. (1560), Jenk. 220; 2 Dyer. 179 b; 145 E. R. 151.

SUB-SECT. 2.—COPYHOLDS.

See COPYHOLDS, Vol. XIII., pp. 102–110, Nos. 1306–1401.

See Law of Property Act, 1922 (c. 16), ss. 128–

SUB-SECT. 3.—GAVELKIND LAND.

As to custom of gavelkind.]—See REAL PROPERTY & CHATTELS REAL; Law of Property Act, 1922 (c. 16), s. 128, sched. 12.

135. Custom of descent.]—It being established that by the custom of gavelkind the brothers of an intestate dying without issue are his heirs in gavelkind, the rule of descent, that the issue of a parent take *jure representationis*, applies, & hence the issue *ad infinitum* of a deceased brother stand in his place, taking likewise, according to the custom. Therefore, where a man died, intestate, seised of gavelkind lands, leaving a nephew, & two sons of a deceased nephew:—*Held*: the latter were entitled, *jure representationis*, to the share which their father, if living, would have taken.—*HOOK v. HOOK* (1862), 1 Hem. & M. 43; 1 New Rep. 85; 32 L. J. Ch. 14; 7 L. T. 501; 9 Jur. N. S. 42; 11 W. R. 105; 71 E. R. 19.

136. — Applicable to estates tail.]—A. seised in fee of Borough English land demises it to B. his son in tail, & dies. B. dies seised, having issue two sons:—*Held*: the youngest son shall inherit as well to the tail as to the fee simple. So all the issues shall inherit an estate tail in gavelkind.—*WEEKS v. CARVEL* (1602), Noy. 106; 74 E. R. 1071.

137. Partibility—Cousins & second cousins.]—In a partition suit in Chancery, second cousins & second cousins once removed were accepted as co-heirs in gavelkind.—*COLE v. WADE* (circa 1790), cited in [1902] 2 Ch. at p. 496.

Annotation:—Fold. Re Chenoweth, Ward v. Dwelley, [1902] 2 Ch. 488.

138. — Extends to all degrees of remoteness.]—The partibility of lands held in gavelkind among the heirs in equal shares extends to collaterals of every degree, & is not confined to brothers, & their issue or nearer relations.—*Re CHENOWETH, WARD v. DWELLEY*, [1902] 2 Ch. 488; 71 L. J. Ch. 739; 86 L. T. 890; 50 W. R. 663; 18 T. L. R. 702; 46 Sol. Jo. 634.

139. Jus representationis applies.]—*HOOK v. HOOK*, No. 135, ante.

140. Devise to persons in fact customary heirs—Heirs take by purchase.]—*BEAR'S CASE* (1588), 1 Leon. 112; 74 E. R. 105.

141. Devise to right heir of A.—Common law rule prevails.]—If I give land in gavelkind, or borough English, to one for life, the remainder to the right heirs of A. the true heirs shall take it, for this is out of the case of custom, & so must run to the heir at the common law.—*COUNDEN v. CLERKE* (1612), as reported in Hob. 29; 80 E. R. 180.

Annotations:—Mentd. Collingwood v. Pace (1661), O'Bridg. 410; Bate v. Amherst (1662), T. Raym. 82; Petty v. Goddard (1662), O. Bridg. 35; Wright v. Hiccocks (1667),

2 Keb. 192; Pybus v. Mitford (1674), Freem. K. B. 369; Fisher v. Wigg (1700), 1 Ld. Raym. 622; Idle v. Cooke (1705), 2 Ld. Raym. 1144; Abbot v. Burton (1708), 11 Mod. Rep. 181; Roper v. Radcliffe (1712), 9 Mod. Rep. 181; Darbison v. Beaumont (1713), Fortes. Rep. 18; Brown v. Barkham (1717), 1 Stra. 35; Harris v. Lincoln Bp. (1723), 2 P. Wms. 135; Papillon v. Voice (1728), Kel. W. 27; Godolphin v. Abingdon (1740), 2 Atk. 57; Newcoman v. Bothlem Hospital (1741), Amb. 785; Martin d. Tregonwell v. Strachan (1744), Willes, 444; Gulliver v. Vaux (1746), 8 De G. M. & G. 167; Allam v. Heber (1747), 2 Stra. 1270; Stanley v. Lennard (1758), 1 Eden. 87; Stephenson v. Heathcote (1758), 1 Eden. 38; Crosley v. Clare (1761), 3 Swan. 320, n.; Jones v. Morgan (1783), 1 Bro. C. C. 206; Buck d. Whalley v. Nurton (1797), 1 Bos. & P. 53; Right d. Compton v. Compton (1808), 9 East. 267; Wright v. Atkyns (1810), 17 Ves. 255; Doe d. Chattaway v. Smith (1816), 5 M. & S. 126; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Miller v. Travers (1832), 8 Bing. 244; Doe d. Gord v. Needs (1836), 2 M. & W. 129; Chambers v. Taylor (1837), 6 L. J. Ch. 193; Doe d. Hiccocks v. Hiccocks (1839), 5 M. & W. 363; Winter v. Perratt (1843), 9 Cl. & Fin. 606; White v. Briggs (1848), 2 Ph. 583; Holmes v. Godson (1856), 25 L. J. Ch. 317; Evans v. Angell (1858), 32 L. T. O. S. 382; Parker v. Nickson (1863), 1 De G. J. & Sm. 177; Holt v. Sindrey (1868), L. R. 7 Eq. 170; Lightfoot v. Maybery, [1914] A. C. 782.

142. — — —.]—A testator by his will devised his real estate to his wife for life, with remainder "to his then heir male & his heirs in strict tail male." The testator died seised of land held in fee or common socage & in gavelkind, & left several sons, who were living at the death of the testator's wife:—*Held*: on the death of the wife the testator's then eldest son & heir male, according to the common law was entitled to the lands held in gavelkind as well as to those held in fee or common socage.—*THORP v. OWEN* (1854), 2 Sm. & G. 90; 2 Eq. Rep. 392; 23 L. J. Ch. 286; 18 Jur. 641; 2 W. R. 208; 65 E. R. 315.

Annotations:—Reid. Polley v. Polley (No. 2) (1862), 31 Beav. 363; Garland v. Beverley (1878), 9 Ch. D. 213.

143. — — —.]—Two houses, one of leasehold & the other of gavelkind tenure, were given by will, after the exhaustion of prior limitations, to the right heirs of the testator:—*Held*: the heir-at-law was entitled to both.—*SLADEN v. SLADEN* (1862), 2 John. & H. 369; 31 L. J. Ch. 775; 7 L. T. 63; 8 Jur. N. S. 1075; 10 W. R. 597; 70 E. R. 1100.

Annotation:—Consd. Garland v. Beverley (1878), 9 Ch. D. 213.

144. — — —.]—A testator made devises of gavelkind lands for lives & in tail, with remainder to his right heirs:—*Held*: on failure of the particular estate the lands passed to the heir at common law, & not to the gavelkind heirs.—*GARLAND v. BEVERLEY* (1878), 9 Ch. D. 213; 38 L. T. 911; 26 W. R. 718; *sub nom. Re GARLAND, GARLAND v. BEVERLEY*, 47 L. J. Ch. 711.

Annotations:—Mentd. Re Lyon's Trusts (1879), 48 L. J. Ch. 245; Patching v. Barnett (1880), 43 L. T. 50; Anderson v. Berkley, [1902] 1 Ch. 936; Owen v. Gibbons, [1902] 1 Ch. 636.

145. Whether equitable interest descends according to custom.]—ANON. (1531), Cary, 11; 21 E. R. 6.

146. Executory interest descends according to common law.]—Where a trust is executory & to be carried into execution by this ct. they will direct a conveyance of lands, notwithstanding they are gavelkind, to be made according to the rules of Common Law.—*ROBERTS v. DIXWELL* (1738), 1 Atk. 607; 2 Eq. Cas. Abr. 668, pl. 19; cited in 8 Bac. Abr. at p. 302; 26 E. R. 381; *sub nom. ROBERTS v. DIXWELL, SANDYS v. DIXWELL, PYOTT v. DIXWELL*, West temp. Hard. 536; *sub nom. SANDS v. DIXWELL*, cited in 2 Ves. Sen. at pp. 234, 652, L. C.

Annotations:—Consd. Morgan v. Morgan (1820), 5 M. & S. 408; Trash v. Wood (1839), 4 My. & Cr. 324; Re Hudson, Cassels v. Hudson, [1908] 1 Ch. 655. Reid. Hopkins v. Hopkins (1739), West temp. Hard. 606; Read v. Snell (1743), 2 Atk. 642; Kenworthy v. Bate (1802), 6 Ves.

Sect. 5.—Descent of customary lands: Sub-sects. 3

793; *Re Redgate, Marsh v. Redgate* (1902), 72 L. J. Ch. 204; *Re Adams' Trustees' & Frost's Contract*, [1907] 1 Ch. 695. **Mentd.** *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Douglas v. Willes* (1849), 7 Hare, 318; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Cooper v. Macdonald* (1877), 7 Ch. D. 288.

147. Rentcharge—Follows customary descent.]—Rent in fee or in tail granted out of gavelkind land follows the nature of the land & descends as the land does.—*ANON.* (1534), *Jenk.* 193; 145 E. R. 130.

148. ———.]—A rent granted out of gavelkind lands in Kent, descends in accordance with the custom as to these lands, not in accordance with the common law.—*RANDAL v. RIDDAL (OR WRITTALL)* (1672), 3 Keb. 165, 214; 2 Lev. 87; 1 Freem. K. B. 105, 345; 84 E. R. 655, 683; *sub nom.* *RANDALL v. JENKINS*, 1 Mod. Rep. 96. *Annotation:—Refd.* *Stokes v. Verryer* (1674), 1 Mod. Rep. 112.

149. ———.]—Gavelkind rent is of the nature of the land.—*STOKES v. VERRIER* (1674), 3 Keb. 292; 1 Mod. Rep. 112; 84 E. R. 727; *sub nom.* *STOAKES v. VERRIER*, *Cas. temp. Finch.* 292. *Annotation:—Mentd.* *Tabor v. Tabor* (1679), 3 Swan. 635.

150. ———.]—Rentcharge in fee granted out of gavelkind land shall descend in gavelkind.—*EDWIN v. THOMAS* (1687), 1 Vern. 489; 1 Eq. Cas. Abr. 378, pl. 5; 23 E. R. 611, L. C.; *subsequent proceedings* (1688), 2 Vern. 75, L. C. *Annotations:—Refd.* *Trash v. Wood* (1839), 4 My. & Cr. 324; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

SUB-SECT. 4.—BOROUGH ENGLISH LAND.

See, generally. REAL PROPERTY & CHATTELS REAL; Law of Property Act, 1922 (c. 16), s. 128, Sched. 12.

151. Custom of descent—To youngest son.]—If a person have five sons, & the youngest son die in the life-time of his father, leaving issue a daughter, & the father afterwards purchase & become seised of copyhold lands in the nature of borough English, the daughter of the fifth son shall, on the death of her grandfather, inherit these lands *jure representationis*, & not the fourth surviving son; for the youngest son by borough English, & his representatives, are as much heirs to the borough English lands as an eldest son or his representatives are heirs to lands descendible at common law.—*CLEMENT v. SCUDAMORE* (1703), *Holt, K. B.* 124; 2 *Ld. Raym.* 1024; 6 *Mod. Rep.* 120; 1 *P. Wms.* 63; 1 *Salk.* 243; 90 E. R. 967.

Annotations:—Consd. *Hook v. Hook* (1862), 1 *Hem. & M.* 43. *Refd.* *Locke v. Colman* (1836), 1 *My. & Cr.* 423; *Trash v. Wood* (1839), 4 *My. & Cr.* 324; *Doe d. Hamilton v. Clift* (1840), 12 *Ad. & El.* 566; *Rider v. Wood* (1855), 1 *K. & J.* 644; *Re Smart, Smart v. Smart* (1881), 18 *Ch. D.* 165; *Re Hudson, Cassels v. Hudson*, [1908] 1 *Ch.* 655. **Mentd.** *Hartop v. Hoare* (1743), 2 *Stra.* 1187; *Doe d. Norfolk v. Saunders* (1783), 3 *Doug. K. B.* 303.

152. Jus representationis.]—*CLEMENT v. SCUDAMORE*, No. 151, *ante*.

153. Extent of custom—Whether extended to

youngest brother.]—A custom that lands shall descend to the youngest son, shall not extend to the youngest brother.—*BAYLY v. STEVENS* (1607), *Cro. Jac.* 198; 79 E. R. 173.

Annotation:—Refd. *Muggleton v. Barnett* (1857), 2 *H. & N.* 653.

154. ———.]—If the youngest son in borough-English dies, the middle brother shall have the land by the custom.—*DAVIS v. HALES* (1610), 1 *Bulst.* 93; 80 E. R. 792.

155. ———.]—*RAPLEY & CHAPLEIN'S CASE* (1610), *Godb.* 166; 78 E. R. 101; *sub nom.* *RATCLIFFE & CHAPLIN'S CASE*, 4 *Leon.* 242.

Annotations:—Consd. *Muggleton v. Barnett* (1857), 2 *H. & N.* 653. *Refd.* *Denn v. Spray* (1786), 1 *Term Rep.* 466.

See, also, COPYHOLDS, Vol. XIII., p. 105, Nos. 1337–1341.

156. ——— Extends to estates tall.]—*WEEKS v. CARVEL*, No. 136, *ante*.

157. ——— Extends to estates pur autre vie.]—Borough-English granted to a man & his heirs for three lives, it shall go to his customary heir, & not to the heir at common law.—*BAXTER v. DOWDSWELL* (1675), 3 *Keb.* 475, 486, 498; 2 *Lev.* 138; 84 E. R. 832, 836, 843. *Annotation:—Refd.* *Baker v. Bayley* (1691), 2 *Vern.* 225.

158. Executory trust—Common law mistakes.]—*STARKEY v. STARKEY* (1746), 8 *Bac. Abr.* 302; *Co. Litt.* 24 b, n. 3.

Annotations:—Consd. *Re Hudson, Cassels v. Hudson*, [1908] 1 *Ch.* 655. *Refd.* *Thellusson v. Rendlesham* (1859), 28 *L. J. Ch.* 948.

159. Devise to heirs—Common law heir takes.]—Devise, after a tenancy for life, of Borough-English lands for sale, & to divide the moneys among all the testator's sons & daughters which might then be living, & to the heir & heirs of them which might be deceased, share & share alike:—*Held:* under the gift to the heirs, the common law & not the heirs in Borough-English took.—*POLLEY v. POLLEY* (No. 2) (1862), 31 *Beav.* 363; 54 E. R. 1179.

Annotation:—Refd. *Garland v. Beverley* (1878), 9 *Ch. D.* 213.

160. Fair or market—Tolls descend to common law heir—Stallage & pickage to customary heir.]—*HEDDEY v. WELHOUSE* (1597), *Moore, K. B.* 474; *Cro. Eliz.* 558, 591; 72 E. R. 705.

Annotations:—Refd. *Northampton Corpn. v. Ward* (1745), 2 *Stra.* 1238; *R. v. Bell* (1816), 5 *M. & S.* 221; *Wright v. Bruister* (1832), 4 *B. & Ad.* 116; *Egremont v. Saul* (1837), 6 *Ad. & El.* 924; *Lockwood v. Wood* (1841), 6 *Q. B.* 31; *Colchester Corpn. v. Brooke* (1846), 7 *Q. B.* 339; *Draper v. Sperring* (1861), 10 *C. B. N. S.* 113. **Mentd.** *Lowden v. Hierons* (1818), 2 *Moore C. P.* 102; *Stamford Corpn. v. Pawlett* (1830), 1 *Cr. & J.* 57; *Young v. Thank* (1845), 6 *L. T. O. S.* 146; *Great Yarmouth Corpn. v. Groom, Great Yarmouth Corpn. v. Daniel* (1862), 32 *L. J. Ex.* 74; *Lawrence v. Hitch* (1868), *L. R.* 3 *Q. B.* 521; *Northumberland v. Houghton* (1870), *L. R.* 5 *Exch.* 127; *Penryn Corpn. v. Best* (1878), 3 *Ex. D.* 292; *Saltash Corpn. v. Goodman* (1880), 5 *C. P. D.* 431; *Newcastle v. Worksop U. C.*, [1902] 2 *Ch.* 145.

Whether lands brought into hotchpot in distribution of personalty.]—*See* EQUITY.

SECT. 6.—DESCENT OF FOREIGN IMMOVABLES.

See CONFLICT OF LAWS, Vol. XI., p. 362, Nos. 436–439.

Part V.—Distribution of Personal Estate.

SECT. 1.—APPLICATION OF THE STATUTES OF DISTRIBUTION.

See, generally, EXECUTORS & ADMINISTRATORS; Law of Property Act, 1922 (c. 16), ss. 147–150.

161. Interests vest at death of intestate—Not liable to be divested on death before administration.]

—If a man die intestate, leaving two sons, a moiety of his personal estate immediately vests in each of them by Statute of Distribution, 1671 (c. 10) & therefore if one die intestate before distribution made, his share shall go to his administrator, & not to the administrator of his father, for the statute vests the shares in those who are intitled to distribution at the time the intestate died.

Statute of Distribution, 1671 (c. 10), shall be expounded according to the common law.—PALMER v. ALLICOCK (1684), 3 Mod. Rep. 58; 2 Show. 486; Skin. 212; Comb. 14; 87 E. R. 37. *Annotations*:—*Mentd.* Wallis v. Hodson (1740), 2 Atk. 114; Stow v. Drinkwater (1772), Lofft, 83.

162. ———.]—Under the Statutes of Distribution:—(1) the distributive shares vest in the persons respectively entitled thereto immediately on the death of the intestate, & do not lapse by reason of their death within the year allowed for distribution; (2) the maternal grandmother is not entitled to share with brothers & sisters; (3) brothers & sisters of the half blood share equally with those of the whole blood.—WINCHELSEA (EARL) v. NORCLIFF (1686), Freem. Ch. 95; 1 Vern. 403; 2 Rep. Ch. 367; 22 E. R. 1080, L. C.

Annotations:—*Generally, Mentd.* Wallis v. Hodson (1740), Barn. Ch. 272; Inwood v. Twyne (1762), Amb. 417.

163. ———.]—The Statute of Distribution, 1671 (c. 10), vests the several shares of the intestate's effects, in those who are intitled to distribution at the time the intestate died; & therefore if a relation under the statute die between the death of the intestate, & the administration made, his share shall go to his personal representatives.—BROWNE v. SHORE (1688), 1 Show. 2, 25; 89 E. R. 408, 425; *sub nom.* BROWN v. BROWN, BROWN v. FARNDAL, Comb. 112; Holt, K. B. 258; *sub nom.* BROWN v. FARNDALL & SHORE, Carth. 51.

164. ———.]—Where a husband dies before he administers to his wife's personal estate, it shall not go to her next of kin, but to his representative.—ELLIOT v. COLLIER (1747), 3 Atk. 526; 1 Ves. Sen. 15; 1 Wils. 168; 26 E. R. 1104, L. C.

Annotations:—*Refd.* A.-G. v. Partington (1864), 3 H. & C. 193; *Re* Lambert's Estate, Stanton v. Lambert (1888), 39 Ch. D. 626; Elliot v. North, [1901] 1 Ch. 424.

165. ———.]—The rule of Statute of Distribution, 1671 (c. 10), which requires the conversion of an intestate's estate into money is introduced simply for the benefit of creditors, & the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin, subject only to the claims of creditors, is complete. A residuary legatee under a will has a clear & tangible interest in the residue, & Statute of Distribution being nothing but a will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will.—COOPER v. COOPER (1874), L. R. 7 H. L. 53; 44 L. J. Ch. 6; 30 L. T. 409; 22 W. R. 713, H. L.

Annotations:—*Consd.* *Re* Barber, Dardier v. Chapman J.—VOL. XVIII.

(1879), 11 Ch. D. 442; Blake v. Bayne, [1908] A. C. 371; Vanneck v. Benham, [1917] 1 Ch. 60. *Refd.* *Re* Jones, Christmas v. Jones, [1897] 2 Ch. 190. *Mentd.* Codrington v. Codrington (1875), L. R. 7 H. L. 854; Bate v. Willatts (1877), 37 L. T. 221; *Re* Vardon's Trusts (1885), 31 Ch. D. 275; *Re* Chesham, Cavendish v. Dacre (1886), 31 Ch. D. 466; *Re* Bradshaw, Bradshaw v. Bradshaw, [1902] 1 Ch. 436; Pitman v. Crum Ewing, [1911] A. C. 217; *Re* Hargrove, Hargrove v. Pain, [1915] 1 Ch. 398; *Re* Williams, Cunliffe v. Williams, [1915] 1 Ch. 450; Brown v. Gregson, [1920] A. C. 860.

166. Next of kin not excluded by negative words in will—From share of undisposed of estate.

—SYMPSON v. HUTTON (1716), 2 Eq. Cas. Abr. 439; Prec. Ch. 452; 22 E. R. 374; *sub nom.* SIMPSON v. HORNBY, Gilb. Ch. 120; *sub nom.* HUTTON v. SIMPSON, 2 Vern. 722, L. C.

Annotations:—*Consd.* Pickering v. Stamford (1797), 3 Ves. 332. *Refd.* Dyer v. Dyer (1816), 1 Mer. 414; R. v. Ringstead (1829), 9 B. & C. 218; Lett v. Randall (1855), 3 Sm. & G. 83; Thompson v. Watts (1862), 8 Jur. N. S. 760; Ralph v. Carrick (1879), 11 Ch. D. 873; *Re* Willatts, Willatts v. Artley, [1905] 1 Ch. 378. *Mentd.* Hopkins v. Hopkins (1734), Cas. temp. Talb. 44; Gulliver v. Wickett (1745), 1 Wils. 105; Potter v. Potter (1750), 1 Ves. Sen. 437; A.-G. v. Downing (1769), Amb. 571; Hodgson v. Ambrose (1780), 1 Doug. K. B. 337; White d. White v. Warner (1781), 3 Doug. K. B. 4; Curtis v. Curtis (1789), 2 Bro. C. C. 620; Pigott v. Waller (1802), 7 Ves. 98.

167. ———.]—Where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it.—JOHNSON v. JOHNSON (1841), 4 Beav. 318; 49 E. R. 361.

168. ———.]—A testator, who died in 1889, by his will, dated in 1887, gave various pecuniary bequests to individuals & charitable institutions, & ended his will thus: "And now revoking & hereby making utterly & for ever void & powerless any & all wills by me at any time heretofore by me made, & hereby utterly & for ever excluding any & all relatives except my two dear nieces aforesaid from any & all advantages or benefit in this my last will & testament, I hereby lastly nominate, constitute, & appoint my said two dear nieces," & certain other persons executrixes & exors. of his will.

The two nieces of the testator named in his will were not his only next of kin, & the question therefore arose, who were entitled to the residue of the testator's estate, of which no disposition was contained in the will:—*Held*: the residue of testator's estate was undisposed of & devolved upon his statutory next of kin without any person of that class being excluded.—*Re* HOLMES, HOLMES v. HOLMES (1890), 62 L. T. 383.

169. ——— Unless words of exclusion can be read as words of gift to remaining next of kin.]—

A testator, who died intestate as to his residuary personal estate, after stating in his will that his niece L. had derived advantages from the provisions which he had made for her in his lifetime, declared that neither she nor her children should ever take any benefit from his property other than what was by his will given to her or them respectively, & after stating also that certain others of his relatives had also been provided for by him in his lifetime, further declared that neither they, nor any of them, should participate in any property of which he should die intestate, but should be wholly excluded therefrom as if they had all died in his lifetime:—*Held*: the declaration amounted to a gift in favour of the testator's next of kin under the statute, exclusive of the persons specified & their children or other representatives, & the residue was divisible accordingly.

1.—*Application of the statutes of distribution.*
Sect. 2.]

—**BUND v. GREEN** (1879), 12 Ch. D. 819; 28 W. R. 275.

*Annotation:—*Re **Holmes, Holmes v. Holmes** (1890), 62 T. L. 383.

170. Whether next of kin excluded by public policy—Intestate killed by next of kin.]—Where a son kills his father, & is found insane, he can take his proper share in his father's estate under his father's intestacy. *Qu.*: where the father dies intestate, whether the Statute of Distribution, 1671 (c. 10), can be disregarded even if the son should not be found insane.—*Re HOUGHTON, HOUGHTON v. HOUGHTON*, [1915] 2 Ch. 173; 84 L. J. Ch. 726; 113 L. T. 422; 31 T. L. R. 427; 59 Sol. Jo. 562.

171. Partial intestacy—Next of kin entitled to undisposed of residue.]—One devises the surplus of his personal estate to four equally, & leaves S. exor. in trust. One of the four dies in the life of testator; his share, as so much of testator's estate undisposed of by the will, shall go according to Statute of Distribution, 1671 (c. 10).—**BAGWELL v. DRY** (1721), 1 P. Wms. 700; 2 Eq. Cas. Abr. 344; 24 E. R. 577, L. C.

*Annotations:—*Folld. **Androvin v. Poilblanc** (1745), 3 Atk. 299. *Re*ld. **Blindon v. Suffolk** (1707), 1 P. Wms. 96; **Farrington v. Knightley** (1721), Prec. Ch. 566; **Owen v. Owen** (1738), West temp. Hard. 593.

172. ———.]—P. being dead in testator's life-time what is given to her is a lapsed legacy & the exor. being a trustee only it must be divided according to the Stat. Distribution; two thirds to testator's two sisters & the remaining third to P. the only child of testator's brother.—**ANDROVIN v. POILBLANC** (1745), 3 Atk. 299; 26 E. R. 974, L. C.

*Annotations:—*Mentd. *In the goods of Oliphant* (1860), 30 L. J. P. M. & A. 82; *In the goods of Pryse*, [1904] P. 301.

173. ———.]—A testator, who died in 1789, by his will gave all his property to deft. upon a series of trusts, which did not exhaust the whole beneficial interest in the estate, & he then appointed deft. his exor.:—*Held*: the next of kin, & not the exor., were entitled to the undisposed of residue.—**MAPP v. ELCOCK** (1849), 2 Ph. 793; 18 L. J. Ch. 217; 13 L. T. O. S. 397; 13 Jur. 290; 41 E. R. 1150, L. C.; *affd. sub nom. ELLCOCK v. MAPP* (1851), 3 H. L. Cas. 492, H. L.

*Annotations:—*Folld. **Powell v. Merrott** (1853), 1 Sm. & G. 381. *Consd.* **Williams v. Roberts** (1857), 30 L. T. O. S. 364. Folld. **Read v. Stedman** (1859), 26 Beav. 495. *Re*ld. **Rittson v. Stordy** (1855), 3 Sm. & G. 230; **Clarke v. Hilton** (1866), L. R. 2 Eq. 810; **Williams v. Arkle** (1875), L. R. 7 H. L. 606; **A.-G. v. Jefferys**, [1908] A. C. 411.

174. ———.]—Gift by will as follows:—"The residue of my personal estate & effects not hereinbefore disposed of, I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go to my next of kin, according to the statutes for the distribution of estates of intestates." Testator died without having made

a codicil, leaving a widow & several brothers, a sister, & two children of a deceased sister him surviving:—*Held*: the clause amounted to the expression of the testator's intention to die intestate as to the residue, if he made no codicil, & the property went as undisposed of personalty, according to the law of succession *ab intestato*, the widow taking her share.—**ASH v. ASH** (1863), 33 Beav. 187; 9 L. T. 673; 10 Jur. N. S. 142; 12 W. R. 189; 55 E. R. 338.

175. ——— Rules of statute applied by analogy.]—The Statute of Distribution applied only to intestacy; it is only, therefore, by analogy that it has been brought in at all. The statute is to be read to ascertain the persons to take the shares & the proportion in which they take (**FARWELL, L.J.**).—*Re ROBY, HOWLETT v. NEWINGTON*, [1908] 1 Ch. 71; 77 L. J. Ch. 169; 97 L. T. 773, C. A.

— By failure of persons or objects named in will.]—*See* TRUSTS & TRUSTEES.

See, generally, EXECUTORS & ADMINISTRATORS.

176. Devise to class by reference to statutes of distribution—Interests of & persons comprising class determined by statute.]—If a testator makes a gift to a class by reference to Statute of Distribution, 1671 (c. 10), the interests which the class take as well as the persons constituting the class are determined by the statute.—*Re NIGHTINGALE, BOWDEN v. GRIFFITHS*, [1909] 1 Ch. 385; 78 L. J. Ch. 196; 100 L. T. 292.

177. Custom of City of London—Whether Statutes of Distribution excluded.]—If a freeman of the City of London dies leaving a will, but without having appointed an exor., so much of his personal estate as he has not disposed of by his will must be distributed according to the custom of London, & not according to Statutes of Distribution.—**CHAPPELL v. HAYNES** (1858), 4 K. & J. 163; 27 L. J. Ch. 336; 31 L. T. O. S. 246; 6 W. R. 319; 70 E. R. 68.

See, now, 19 & 20 Vict. c. 94.

178. Procedure—Where next of kin declared by decree — Fresh claimant must apply on new proceedings.]—After a decree had been enrolled, declaring B. entitled to a particular fund as next of kin to a testator, a stranger to the suit presented a petition to be allowed to come in & prove his claim to be entitled to the fund instead of B.:—*Held*: even if petitioner could show such a case as would insure his succeeding, the ct. had no power to disturb the decree, & petitioner could only establish his rights by filing a bill for that purpose.—**BAUER v. MITFORD** (1859), 29 L. J. Ch. 268; 7 W. R. 570.

179. ——— Onus of proof on claimant—To show that ancestor survived intestate.]—Persons claiming property as next of kin to a deceased intestate, & showing their kindred, are entitled, in the absence of evidence that a person now dead & nearer of kin to the intestate survived him. The onus rests on those claiming through a deceased

PART V. SECT. 1.

170 i. Whether next of kin excluded by public policy—Intestate killed by next of kin.]—A woman was murdered by her husband, who afterwards became insane, & the Master in Lunacy claimed on his behalf, to be entitled to one-third share in deceased's estate:—*Held*: having been guilty of his wife's murder, he could not take any interest in her estate on her intestacy.—*Re TUCKER* (1920), 21 S. R. N. S. W. 175.—AUS.

170 ii. ———.]—A. died intestate, his death being caused by his wife's felonious act:—*Held*: A's widow by reason of her felonious act, in causing A's death, was not entitled

to share in his estate under the Statute of Distributions.—*Re SANGAL*, [1921] V. L. R. 355.—AUS.

170 iii. ———.]—A person who in a fit of insanity has killed another may take the benefit accruing to him through the death intestate of that person.—*Re MASON'S ESTATE*, 1 W. W. R. 329; 23 B. C. R. —CAN.

171 i. Partial intestacy—Next of kin entitled to undisposed of residue.]—A testator having by his will made a disposition of portion of his real estate amongst his wife & children, subsequently during his life time transferred portions of such estate to certain

of his children. There was other real estate not disposed of by the will, & there was, therefore, on his death a partial intestacy:—*Held*: the portion of the estate as to which the testator died intestate should be distributed amongst the next of kin in accordance with sect. 5 of the Statute of Distributions.—*Re CORNWALL* (1910), 13 W. A. L. R. 40.—AUS.

n. *Devolution of Estates Act, R. S. O. 1914 (c. 119)—Effect of.*—By sect. 3 of the above Act the real property of a deceased person, whether he desires it or not, vests in his exors. or administrators, & unless a caution is registered, automatically passes at the expiration of three years from the executors to

of kin to the intestate, to show that such deceased survived the intestate.—*Re GREEN'S*

139. —*Reid. Re Phené's Trusts* (1870), 5 Ch. App.

SECT. 2.—RIGHTS OF HUSBAND.

Law of Property Act, 1922 (c. 16), ss. 147–150.

180. Husband takes whole personalty.—Though dead without taking out administration.—*Feme covert* possessed of choses in action, dies, her husband administers & makes a voluntary assignment, this is an alteration of the property. So if the husband had survived, & then had died without altering it, or so much as administering to his wife.—*SQUIB v. WYN* (1717), 1 P. Wms. 378; 24 E. R. 432, L. C.

Annotations:—*Reid. Forbes v. Phipps* (1760), 1 Eden, 502; *Betts v. Kimpton* (1831), 2 B. & Ad. 273; *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626; *Smart v. Tranter* (1890), 43 Ch. D. 587; *Elliot v. North*, [1901] 1 Ch. 424.

181. ———.—*CART v. REES* (1718), cited in 1 P. Wms. app. 381; 24 E. R. 433; *sub nom. REES v. CART*, 2 Hag. Ecc. App. 161.

Annotations:—*Consd. Smart v. Tranter* (1890), 43 Ch. D. 587. *Reid. Squib v. Wyn* (1717), 1 P. Wms. 378; *Betts v. Kimpton* (1831), 2 B. & Ad. 273. *Mentd. Humphreys v. Bullen* (undated), 2 Eq. Cas. Abr. 446, pl. 59; *In the Goods of Bryant*, [1896] P. 159.

182. ———.—*BACON v. BRYANT* (1729), 2 Eq. Cas. Abr. 425; 22 E. R. 361.

183. ———.—*ELLIOT v. COLLIER*, No. 164, *ante*.

184. ———. Separation between husband & wife.—After a separation between husband & wife, the wife invested money derived from the savings of her separate estate in the name of trustees, & appointed it by will. Upon her death she left an additional sum undisposed of:—*Held*: her husband could not be compelled to take out letters of administration, but was entitled to the undisposed of personalty *jure mariti*.—*MOLONY v. KENNEDY* (1839), 10 Sim. 254; 3 Jur. 793; 59 E. R. 611.

Annotations:—*Reid. Tugman v. Hopkins* (1842), 4 Man. & G. 389; *Johnstone v. Lumb* (1846), 10 Jur. 699; *Bird v. Peagram* (1853), 13 C. B. 639; *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626.

See, now, Matrimonial Causes Act, 1857 (c. 85), s. 25.

the person beneficially entitled.—*Re SHIER* (1922), 52 O. L. R. 464.—CAN.

o. *Devolution of Estates Act, R. S. O. 1920* (c. 73)—*Effect of*.—By sect. 3 of the above Act all real & personal property shall be administered as personal estate.—*WAHL v. NUGENT*, [1924] 1 D. L. R. 155; [1923] 3 W. W. R. 168.—CAN.

PART V. SECT. 2.

p. *Husband takes whole personalty*.—The husband of a married woman dying intestate without next of kin, or ascertainable next of kin, is entitled to the whole of her personal estate.—*Re BROWN, EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. MACKINNON* (1914), V. L. R. 535.—AUS.

q. ———.—In the administration of the estate of a *feme covert*, her next of kin claimed the personalty:—*Held*: the personal property passed to the husband & not to the next of kin of the wife.—*LAMB v. CLEVELAND* (1890), 19 S. C. R. 78.—CAN.

r. ———.—On the death of a

feme covert, her husband, in the absence of any disposition, by her, becomes entitled, *jure mariti*, to her equitable interest in chattels real settled to her separate use.—*ARCHER v. LAVENDER* (1875), 1 R. 9 Eq. 220.—IR.

s. ———.—A testator bequeathed a share of property to S., who died intestate, leaving a husband & seven children:—*Held*: S.'s husband, being the person who on her death was entitled to her personal property *ab intestato* took her share.—*Re CUSIN, WALKER v. CUSIN*, [1917] 1 I. R. 63.—IR.

t. *Husband & next of kin—Husband takes half*.—The estate of a married woman who died intestate leaving her surviving her husband & next of kin, the value of the estate not exceeding £1,000 is distributable one half to the husband & one-half to the next of kin.—*JAMIESON v. CHRISTENSON* (1907), 4 C. L. R. 1489.—AUS.

u. ———.—A married woman died intestate, having an estate of less than £500, leaving a husband, & next

Husband convicted felon.]—C. died intestate, the wife of a felon under sentence of transportation, & leaving property acquired after the conviction of her husband:—*Held*: such property belonged to the Crown as accrued to the felon & not to the next of kin of the wife.—*COOMBS v. QUEEN'S PROCTOR* (1852), 2 Rob. Eccl. 547; 20 L. T. O. S. 48; 16 Jur. 820; 163 E. R. 1409.

186. ———.—An infant had a life interest & a general power of appointment under her mother's will. She made a settlement in exercise of the power, with the sanction of the ct., under the Infants' Settlement Act, 1855 (c. 43). She died while still an infant, & the ultimate limitation in the settlement, which was in favour of the infant's next of kin according to the Statute of Distribution, failed by reason of the infant's illegitimacy:—*Held*: there was a resulting trust in favour of the infant herself, & the property appointed passed to her surviving husband.—*Re SCOTT, SCOTT v. HANBURY*, [1891] 1 Ch. 298; 60 L. J. Ch. 461; 63 L. T. 800; 39 W. R. 264.

187. *Effect of Married Women's Property Act, 1882* (c. 75)—*Undisposed of separate estate*.—

The Married Women's Property Act, 1882 (c. 75), has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty the quality of separate property ceases, & the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.—*Re LAMBERT'S ESTATE, STANTON v. LAMBERT* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

Annotation:—*Reid. Surman v. Wharton*, [1891] 1 Q. B. 491.

188. ———.—The wife of W. to whom she was married in 1881, held certain leaseholds which had been settled on her by a former husband under a deed of May 2, 1862, for her own proper use & benefit, & with full power & authority to sue & give receipts. In the year 1885 & afterwards she, on her own account, borrowed various sums of money from S., which with interest remained owing & unpaid at the date of her death, when the husband took possession of the leaseholds, without taking out letters of administration. In an action brought by S. in the county ct. against W. to recover £36 money lent to his deceased wife, judgment was given for debt. Pltf. appealed:—*Held*: the leaseholds were the separate estate of the wife; the husband had no need to take out letters of administration & was liable, under

of kin:—*Held*: the husband took one half of the surplusage of the estate & no more.—*Re MAHONEY* (1919), 12 Q. S. R. 44.—AUS.

b. *Husband takes share—Unless he renounces*.—A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship & right, unless he has agreed not to share.—*DORSEY v. DORSEY* (1898), 29 O. R. 475; 30 O. R. 133.—CAN.

187 i. *Effect of Married Women's Property Act, 1882—Undisposed of separate estate*.—The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personal estate of a married woman; & accordingly, on the death of a married woman, even if married after the passing of the Act, the husband is entitled, *jure mariti*, to the undisposed of chattels real to which the deceased was entitled for her separate use, & administration is unnecessary to perfect his title.—*Re EVANS' ESTATE*, [1910] 1 I. R. 95; 44 I. L. T. 88.—IR.

Sect. 2.—Rights of husband. Sect. 3: Sub-sects. 1, 2 & 3, A.]

Married Women's Property Act, 1882 (c. 75), s. 23, as legal personal representative of his deceased wife for the purpose of paying her debts, to the extent of her separate estate coming to him.—*SURMAN v. WHARTON*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233; 64 L. T. 866; 39 W. R. 416; 7 T. L. R. 196.

Annotations:—Refd. Pelton v. Harrison, [1891] 2 Q. B. 422; *Re Wheeler's Settlement Trusts*, *Briggs v. Ryan*, [1899] 2 Ch. 717.

SECT. 3.—RIGHTS OF WIDOW.

SUB-SECT. 1.—UNDER STATUTES OF DISTRIBUTION.

See Law of Property Amendment Act, 1922 (c. 16), ss. 147–150.

189. Not next of kin to husband.]—A widow, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distribution, 1671 (c. 10).—*CHOLMONDELEY v. ASHBURTON* (LORD) (1843), 6 Beav. 86; 12 L. J. Ch. 337; 49 E. R. 757.

190. Where no issue—Widow takes half—Residue to next of kin.]—By 1 Jac. 2, c. 17, if after the death of the father any of his children shall die intestate without wife or children, every brother & sister & their representatives shall have an equal share with the mother. The case was, after the death of the father the son died intestate leaving a wife, & without children, but leaving a mother, brothers & a sister, & two nieces the children of a deceased brother:—*Held*: this was within the statute, & the intestate's wife should have but one moiety; & as to the other moiety, the intestate's brothers & sister, etc., should come in for an equal share thereof with the mother.—*KEYLWAY v. KEYLWAY* (1720), 2 P. Wms. 344; 24 E. R. 758; *sub nom. KEILWAY v. KEILWAY* 2 Eq. Cas. Abr. 442; pl. 47, 48; Gilb. Ch. 189; 2 Stra. 170, L. C.

Annotation:—Refd. Stanley v. Stanley (1739), 1 Atk. 455.

191. ———.]—W. S. & A. his wife, had two sons, G. & H., who severally married in their father's lifetime; W. the father dies, A. his wife survives him. G. afterwards dies, & leaves several children, who are still living, then H. dies intestate, leaving P. his wife possessed of a very large personal estate.

The children of G. bring a bill against P., who has administered to her husband, & also against A. their grandmother, insisting, that as the representatives of their father, they were intitled with their grandmother to one half of the moiety of the intestate's estate, the wife being intitled to the other moiety, by Statute of Distribution, 1671 (c. 10):—*Held*: the residue of the intestate's

estate, after satisfaction of debts, should be divided into four equal parts, two fourths thereof to be retained by P. the intestate's widow, one other fourth part to be paid to A. S. the intestate's mother, & the remaining fourth part to be laid out in South-sea annuities, in the name of the accomptant general, subject to the order of the ct., for the benefit of the children of G., equally to be divided.—*STANLEY v. STANLEY* (1739), 1 Atk. 455; *West temp. Hard.* 643; cited in 2 Ves. Sen. at p. 213; 26 E. R. 289, L. C.

192. Where issue—Widow takes one third—Residue to issue.]—*FOX v. MARSTON & HORDERN* (1837), 1 Curt. 494.

Annotations:—Mentd. Israell v. Rodon (1839), 2 Moo. P. C. C. 51; *Matson v. Magrath* (1849), 1 Rob. Eccl. 680; *In the Goods of Cadywold* (1858), 1 Sw. & Tr. 34.

193. Where no next of kin—Widow take half—Residue to Crown.]—Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of his personal estate, but one moiety belongs to her & the other to the Crown.—*CAVE v. ROBERTS* (1836), 8 Sim. 214; *Donnelly*, 139; 6 L. J. Ch. 4; 59 E. R. 86.

194. Effect of separation—Voluntary separation—Widow not deprived of share.]—Husband & wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, & by a separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity & it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts & contracts of his wife, & all dower & thirds at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal; & an agreement that the wife should make & execute all such acts, deeds, & matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate:—*Held*: the deed did not deprive the wife of her share of her husband's personal estate, under Stat. Distribution, 1671 (c. 10).—*SLATTER v. SLATTER* (1834), 1 Y. & C. Ex. 28; 4 Y. & C. Ex. App. 561; 160 E. R. 12, 1131.

195. ——— Divorce a mensâ et thoro—Widow not deprived of share.]—A codicil to a will does not affect the construction of the will itself as an independent instrument.

A widow, who has been divorced *a mensâ et thoro*, on the ground of adultery, is nevertheless entitled to a share in the effects of her deceased husband, under Stat. Distribution.—*ROLFE v. PERRY* (1863), 1 New Rep. 428; 32 L. J. Ch. 149;

PART V. SECT. 3, SUB-SECT. 1.

c. Where no issue—Widow takes \$1,000.]—Under R. S. O. 1897, c. 127, the widow of an intestate who has left no issue is entitled to \$1,000 out of his estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.—*SINCLAIR v. BROWN* (1898), 29 O. R. 370.—CAN.

d. Where no provision made for widow—Right to apply for relief.]—Where a testator domiciled in Alta, at the time of his death disposes of all his property, making no provision for his widow, the cts. of Sask, may entertain an application by the widow for relief under Devolution of Estates Act with

regard to immovables situated within that province.—*Re OSTANDER ESTATE* (1915), 30 W. L. R. 890.—CAN.

e. ——— Time to apply for relief.]—An application by a widow for relief under the Devolution of Estates Act, R. S. S. 1920, c. 73, cannot be entertained unless the death of appct.'s husband occurred after the date (April 5th, 1919) when the Act now in force was originally enacted by c. 20, 1918–19.—*Re HANNA ESTATE*, [1921] 1 W. W. R. 1090; 61 D. L. R. 430.—CAN.

f. ——— Whether limited to amount receivable under intestacy.]—Under Married Women's Relief Act, the ct.'s jurisdiction in allowances to the widow is not limited by implication to the

amount she would have received under an intestacy.—*MCBRATNEY v. MCBRATNEY*, [1919] 2 W. W. R. 685; 48 D. L. R. 29; 50 D. L. R. 132; 59 S. C. R. 550.—CAN.

g. Money deposited in joint names of husband & wife—Survival of wife.]—A husband placed a sum of money in a bank on deposit receipt in the joint names of himself & his wife. He died intestate, leaving his wife but no issue:—*Held*: the widow was entitled to her charge of £500 under the Intestates' Estates Act, 1890, & to her half of the residuary personal estate under the Statute of Distributions as well as to the sum placed on deposit receipt, which she took by survivorship.—*Re HOOD*, [1923] 1 I. R. 109.—IR.

9 Jur. N. S. 491; 11 W. R. 357; *subsequent proceedings*, 3 De G. J. & Sm. 481, L. C.

Annotation:—*Mentd. Re Elcom, Layborn v. Grover Wright*, [1894] 1 Ch. 303.

See, now, Intestate Estates Act, 1890 (c. 29), sect. 2.

See, also, HUSBAND & WIFE.

SUB-SECT. 2.—UNDER INTESTATES' ESTATES ACT, 1890.

See Intestates' Estates Act, 1890 (c. 29); Law of Property Act, 1922 (c. 16), ss. 147–150.

196. Act not a "statute of distribution."—Above Act is not an Act proper to be included in the expression "Statute of Distribution" still less in phrase used by a testator "statutes for the distribution of the personal estates of intestates":—*Held*: (1) a claim by the widow of a testator under above Act for a further sum of £500 in addition to her share of testator's residuary estate under Stat. of Distribution failed; (2) above Act did not apply to a case where there was no intestacy, & the persons participating in the residuary estate of a testator took solely under a will, & not by virtue of the statutes.—*Re MORGAN, MORGAN v. MORGAN*, [1920] 1 Ch. 196; 89 L. J. Ch. 97; 121 L. T. 573; 63 Sol. Jo. 759.

197. Whether act applies—Partial intestacy.—Above Act does not, like Stat. Distribution, apply to cases of partial intestacy.—*Re TWIGG'S ESTATE, TWIGG v. BLACK*, [1892] 1 Ch. 579; 61 L. J. Ch. 444; 66 L. T. 604; 40 W. R. 297; 36 Sol. Jo. 231.

Annotation:—*Consd. Re Cuffe, Fooks v. Cuffe*, [1908] 2 Ch. 500.

198. Total intestacy—Caused by complete failure of will.—Where there was a complete failure by lapse of all the beneficial interests under a will, & the person named as exor. had predeceased testator, who died leaving a widow, but no issue:—*Held*: testator had died intestate within the meaning of above Act.—*Re CUFFE, FOOKS v. CUFFE*, [1908] 2 Ch. 500; 77 L. J. Ch. 776; 99 L. T. 267; 24 T. L. R. 781; 58 Sol. Jo. 661.

199. — Distribution under will—Referring to statutes of distribution.—*Re MORGAN, MORGAN v. MORGAN*, No. 196, *ante*.

200. Ascertainment of net value of estate—Reversionary interest valued as at death.—An intestate, who left a widow but no issue, was at the date of his death in 1894 entitled to a contingent reversionary interest in certain real & personal property. With the exception of assets to the value of £10, this interest comprised his whole property. It was of no market value at the time, but in 1904 it fell into possession & proved to be worth about £3,500. The widow of the intestate now claimed to be absolutely entitled to the whole under s. 1 of above Act, on the ground that at the date of the death of the intestate the net value of such real & personal estates did not exceed £500:—*Held*: the value of the intestate's real

& personal estates must be taken as at his death, & the whole passed absolutely to his widow for such estate & interest as the intestate had therein:

The fact that the above Act only contains provisions for ascertaining the net value of real & personal property in possession does not exclude interests in reversion from the operation of the general words of s. 1 of the Act.—*Re HEATH, HEATH v. WIDGEON*, [1907] 2 Ch. 270; 76 L. J. Ch. 540; 97 L. T. 41.

201. ——*Re MANSER, KILLICK v. MANSER*, [1910] W. N. 61.

202. Widow's charge paramount to dower.—Dower out of real estate of an intestate is subject to abatement in respect of the widow's charge of £500 imposed on the intestate's estate by the above Act.—*Re CHARRIERE, DURET v. CHARRIERE*, [1896] 1 Ch. 912; 65 L. J. Ch. 460; 74 L. T. 650; 44 W. R. 539.

SUB-SECT. 3.—BAR OF WIDOW'S CLAIM.

A. By Marriage Settlement or Will of Husband.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

203. Proviso in settlement in lieu of thirds.—*BENSON v. BELLASIS* (1683), 2 Rep. Ch. 252; 1 Vern. 15; 1 Eq. Cas. Abr. 17, pl. 3; 21 E. R. 671, L. C.; *subsequent proceedings, sub nom. BELLASIS v. BENSON* (1685), 1 Vern. 369, L. C.

204. ——A. by marriage articles is bound to pay his wife if she survives him, £1,500 in full of dower, thirds, custom of London or otherwise, out of his real & personal estate. A. dies intestate; this bars the wife of her share by Stat. Distribution.—*DAVILA v. DAVILA* (1716), 2 Vern. 724; 23 E. R. 1075, L. C.

Annotations:—*Folld. Badcock v. Stanhope* (1727), 2 Eq. Cas. Abr. 277. *Consd. Buckinghamshire v. Drury* (1761), 2 Eden, 60. *Folld. Thompson v. Watts* (1862), 2 John. & H. 291. *Refd. Garthshore v. Chalie* (1804), 10 Ves. 1.

205. ——*BADCOCK v. STANHOPE* (1727), 2 Eq. Cas. Abr. 277, pl. 11; 22 E. R. 234, L. C.

206. — Wife party in deed—Infancy of wife—Right of election.—A provision for a wife, in articles before marriage, declared to be in full satisfaction of dower, or any claim or right by common law, custom of the city, or any other usage, law or custom notwithstanding. The wife survived the husband, & accepted of the terms mentioned in the articles. This demand of the wife may be extinguished by agreement, but as she was an infant when the articles were signed, had her election at her husband's death, which she has made by accepting what was designed as a satisfaction for dower.

The words in the articles, any law, usage, or custom notwithstanding, extend to the husband's personal estate, & bar the wife of her share under Stat. Distribution.—*GLOVER v. BATES* (1739), 1 Atk. 439; *West temp. Hard. 667*; 26 E. R. 280, L. C.

be taken in full lieu of dower or thirds to which she might be entitled at common law, or otherwise howsoever:—*Held*: she was barred of her share of her husband's personal estate, under the Statute of Distributions.—*Re BURGESS' TRUSTS* (1860), 11 L. Ch. R. 164.—*IR*.

m. ——*By marriage settlement, lands of the husband held for lease for lives renewable for ever, & lands of the wife held for a term of years, were settled upon trust, after the death of the husband, that the*
in case she should survive him

PART V. SECT. 3, SUB-SECT. 2.

h. Entry by widow with acquiescence of next-of-kin—Corroboration of claim.—Where a widow enters into possession of assets of her intestate husband, claiming that same are her property under Intestates' Estates Act, 1890, the acquiescence of the next-of-kin for eleven years is, where such widow's position is altered by reason of such acquiescence, the strongest possible corroboration of such claim by the widow.—*O'CONNOR v. O'CONNOR* (1916), 50 I. L. T. 103.—

PART V. SECT. 3, SUB-SECT. 3.—A.

k. Proviso in settlement in lieu of dower & thirds—Whether bars widow's claim.—B., by his settlement, granted to A., his intended wife, a jointure in satisfaction & bar of all dower or thirds:—*Held*: A. was not barred of her right by the provision in the settlement.—*BERRY v. BERRY* (1857), 6 I. Ch. R. 497; 3 Ir. Jur. 98.—*IR*.

l. ——*A marriage settlement contained a clause that the provision thereby made for the intended*

Sect. 3.—Rights of widow: Sub-sect. 3, A.]

207. ———.]—An infant may by a contract previous to her marriage bar herself of a distributive share of her husband's personalty in case of his dying intestate.—BUCKINGHAMSHIRE (EARL) v. DRURY (1762), 2 Eden, 60; 3 Bro. Parl. Cas. 492; Wilm. 177; 28 E. R. 818, H. L.; *reversg. S. C. sub nom. DRURY v. DRURY* (1761), 2 Eden, 39, L. C.

Annotations:—Consd. Durnford v. Lane (1781), 1 Bro. C. C. 106; *Caruthers v. Caruthers* (1794), 4 Bro. C. C. 500; *Holmes v. Blogg* (1818), 8 Taunt. 508; *Smith v. Jersey* (1821), 3 Bll. 290; *Field v. Moore* (1855), 7 De G. M. & G. 691; *Field v. Moore*, *Field v. Brown* (1855), 26 L. T. O. S. 207; *Seaton v. Seaton* (1888), 13 App. Cas. 61; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Cowern v. Nield*, [1912] 2 K. B. 419. *Reid. R. v. Shilfield* (1811), 14 East, 541; *Corbet v. Corbet* (1824), 1 Sim. & St. 612; *Corpe v. Overton* (1833), 3 Moo. & S. 738; *Hobson v. Ferraby* (1846), 2 Coll. 412; *Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 6 Ry. & Can. Cas. 622; *Dyke v. Rendall* (1852), 2 De G. M. & G. 209; *Cooper v. Simmons* (1862), 7 H. & N. 707; *Leslie v. Sheill*, [1914] 3 K. B. 607. *Mentd. Daniel v. Adams* (1765), Amb. 495; *Maddon v. White* (1787), 2 Term Rep. 159; *Beckford v. Wade* (1805), 17 Ves. 87; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* (1894), 43 W. R. 126.

208. ———.]—It has been argued, but somewhat faintly, that even prior to 1855 it was competent for an infant to execute a valid settlement, which should dispose effectually of his or her property. For the purpose of establishing that proposition the case of *Earl of Buckinghamshire v. Drury*, No. 207, *ante*, was relied upon. That case has given rise to a good deal of criticism since the time when the decision in it was pronounced, & much disapproval has been expressed of it. That case decides this & this alone, that it was competent for an infant by means of a marriage settlement to bar her right to obtain by virtue of the marriage an interest in her husband's property, & in the opinion expressed by Lord Mansfield he distinctly says, "I approve the distinction taken by Wilmot, J., between infants contracting for conveying away something of their own & barring themselves of a right which is a third person's." It is quite unnecessary to inquire whether that distinction is one which can be supported by reasoning or not (LORD HERSCHELL).—SEATON v. SEATON (1888), 13 App. Cas. 61; 57 L. J. Ch. 661; 58 L. T. 565; 36 W. R. 865, H. L.; *affg. S. C. sub nom. BUCKMASTER v. BUCKMASTER* (1887), 35 Ch. D. 21, C. A.

Annotations:—Consd. Greenhill v. North British & Mercantile Insce. [1893] 3 Ch. 474. *Reid. Viditz v. O'Hagan*, [1899] 2 Ch. 569. *Mentd. Mills v. Fox* (1887), 37 Ch. D. 153; *Re Leigh*, *Leigh v. Leigh* (1888), 40 Ch. D. 290; *Re Jones*, *Farrington v. Forrester*, [1893] 2 Ch. 461; *Harle v. Jarman*, [1895] 2 Ch. 419.

209. ———.]—A provision by marriage settlement in lieu, bar, & satisfaction, of all dower or thirds, which the wife might otherwise be entitled to out of all the real & personal estate, would bar her interest in what was not disposed of by the will of her husband.—DRUCE v. DENISON (1801),

should take during her life for jointure in lieu, bar, & satisfaction of, all dower & thirds, to which she might at common law, or otherwise, be entitled, the annual sum of £50 charged upon all the said lands. The settlor died intestate as to portion of his personal estate:—*Held*: the widow was barred from any share of the undisposed of personal estate.—*Re DUGAN, COYNE v. DUGAN*, [1894] 1 I. R. 138.—IR.

n. ———.]—A provision for a wife in a marriage settlement in discharge of all claims by her on the

event of his dying intestate & without issue, as well as to the share of his assets to which she is entitled under Statute of Distributions.—*Re HOGAN, HOGAN v. HOGAN*, [1901] 1 I. R. 168.—IR.

o. *Proviso in settlement in lieu of dower.*—Where by marriage settlement a widow has accepted an equivalent in lieu of dower, she has no right to any share in the lands.—TORONTO GENERAL TRUSTS Co. v. QUIN (1894), 25 O. R. 250.—CAN.

p. *Gift by will—Claim barred.*—A testator directed his trustees to

6 Ves. 385; 31 E. R. 1106, L. C.; *subsequent proceedings* (1847), 15 Sim. 356.

Annotations:—Consd. Thompson v. Watts (1862), 2 John. & H. 291. *Reid. Gurly v. Gurly* (1842), 8 Cl. & Fin. 743. *Mentd. Doe d. Oxenden v. Chichester* (1816), 4 Dow. 65; *Colpoys v. Colpoys* (1822), Jac. 451; *Dummer v. Pitcher* (1833), Coop. temp. Brough. 257; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756.

210. ———.]—On the marriage of A. a certain sum was settled in trust for her for life "as & for her jointure, in full lieu, bar, & satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal or freehold," of her intended husband:—*Held*: this settlement barred her claim on the personal estate of her intestate husband, under Stat. Distribution.—GURLY v. GURLY (1842), 8 Cl. & Fin. 743; 8 E. R. 291, H. L.

Annotations:—Reid. Thompson v. Watts (1862), 2 John. & H. 291. *Mentd. Naismith v. Boyes*, [1899] A. C. 495.

211. ———.]—By a marriage settlement a provision was made for the wife out of real & personal estate, & it was declared that such provision was in lieu of dower or thirds. The husband having died intestate:—*Held*: the provision was in satisfaction of dower out of real estate & thirds of personalty, & the wife could claim nothing under Stat. Distribution.—THOMPSON v. WATTS (1862), 2 John. & H. 291; 31 L. J. Ch. 445; 6 L. T. 817; 8 Jur. N. S. 760; 10 W. R. 485; 70 E. R. 1067.

212. *Proviso in settlement in lieu of dower—Does not bar thirds.*—Leasehold estate settled "in lieu of dower," is not a bar of thirds.—CRESWELL v. BYRON (1791), 3 Bro. C. C. 362; 29 E. R. 584, L. C.

213. *Covenant to leave sum of money by will—Satisfaction pro tanto.*—A citizen of London entered into a bond to a trustee to leave his wife at his death £500. He died & left her nothing. She brought her bill for the £500, & to have a moiety of the residue of her husband's personal estate:—*Held*: she could not have both, but she might have her election. The £500 was to be left her at all events, although at his death she was entitled to a moiety of his personal estate, yet the husband might have converted that moiety into a real estate.—EAST v. COGGS (1709), 2 Eq. Cas. Abr. 275, pl. 3; 22 E. R. 232.

214. ———.]—A. covenanted to leave his wife £620. A. died intestate, & wife's share came to above £620. This was a satisfaction.—BLANDY v. WIDMORE (1716), 1 P. Wms. 324; 2 Vern. 709; 24 E. R. 408, L. C.

Annotations:—Consd. Lee v. Cox (1746), 3 Atk. 419; *Haynes v. Mico* (1781), 1 Bro. C. C. 129; *Garthshore v. Challe* (1804), 10 Ves. 1; *Twisden v. Twisden* (1804), 9 Ves. 413; *Goldsmid v. Goldsmid* (1818), 1 Swan. 211; *Lang v. Lang* (1837), 8 Sim. 451; *Salisbury v. Salisbury* (1848), 6 Hare, 526. *Apld. Thacker v. Key* (1869), L. R. 8 Eq. 408. *Consd. Re Hall, Hope v. Hall*, [1918] 1 Ch. 562. *Reid. Hanbury v. Bateman* (1740), 2 Atk. 63; *Parsons v. Parsons* (1744), 9 Mod. Rep. 464; *Barret v. Beckford* (1750), 1 Ves. Sen. 519; *Devese v. Pontet* (1785), 1 Cox, Eq. Cas.

dispose of all his real estate, some of which passed under the residuary trust:—*Held*: the widow was a devisee of "an interest in real estate" within sect. 9 of the Dower Act, & her right to dower was barred.—MERRIMAN v. PERPETUAL TRUSTEE CO. (1896), 17 N. S. W. Eq. 325.—AUS.

q. ———.]—*Annuity in lieu of dower & thirds—Does not bar widow's claim.*—A testator, by his will gave the residue of his personal estate to his wife for life & after her death to his step-daughter for life, with remainder over to such of the stepdaughter's children as he & declared that

188; *Kirkman v. Kirkman* (1786), 2 Bro. C. C. 95; *Adams v. Lavender* (1824), M'Cle. & Yo. 41; *Glengal v. Barnard* (1836), 1 Keen, 769; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131; *James v. Castle* (1875), 33 L. T. 665.

215. ———.]—L. previous to his marriage with D. covenanted that he would by will, or by some good assurance in the law, grant to D. or E. D. the mother, or her exors., etc. in trust for D. & for her separate use, £1,000 to be paid to D. after his decease; & in case he should not by will or otherwise assure to D. the £1,000 then his exors., etc., should within six months after his decease pay D. the £1,000. L. died without making any will or deed in regard to the £1,000:—*Held*: D. was not entitled to the £1,000, & the distributive share likewise of L.'s personal estate, being meant only to secure a provision for the wife, without any intention of the husband to leave it as a debt.—*LEE v. COX* (1747), 3 Atk. 419; 26 E. R. 1042; *sub nom. LEE v. D'ARANDA*, 1 Ves. Sen. 1, L. C.

Annotations:—*Consd.* *Garthshore v. Chalie* (1804), 10 Ves. 1; *Twisden v. Twisden* (1804), 9 Ves. 413; *Ex p. Tindal* (1832), 8 Bing. 402; *Glengal v. Barnard* (1836), 1 Keen, 769; *Lang v. Lang* (1837), 8 Sim. 451; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562. *Refd.* *Barret v. Beckford* (1750), 1 Ves. Sen. 519; *Haynes v. Mico* (1781), 1 Bro. C. C. 129; *Warren v. Warren* (1783), 1 Bro. C. C. 305; *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188; *Kirkman v. Kirkman* (1786), 2 Bro. C. C. 95; *Rickman v. Morgan* (1788), 2 Bro. C. C. 394; *Richardson v. Elphinstone* (1794), 2 Ves. 463; *Sparkes v. Cator* (1797), 3 Ves. 530; *Goldsmid v. Goldsmid* (1818), 1 Swan. 211; *Adams v. Lavender* (1824), M'Cle. & Yo. 41; *Salisbury v. Salisbury* (1848), 6 Hare, 526; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131.

216. ———.]—Covenant in a marriage settlement by the husband in the event of his death leaving his wife surviving & children within six months after his decease to convey, pay, assign, etc., one full & clear moiety of all such real & personal estate as he shall be seised & possessed of or entitled to at his decease. Upon the principle of part-performance the widow not entitled in addition to the moiety under the covenant to a third of the residue of the personal estate by the intestacy of her husband.—*GARTHSHORE v. CHALIE* (1804), 10 Ves. 1; 32 E. R. 743, L. C.

Annotations:—*Consd.* *Adams v. Lavender* (1824), M'Cle. & Yo. 41; *Glengal v. Barnard* (1836), 1 Keen, 769; *Patch v. Shore* (1862), 2 Drew. & Sm. 589. *Refd.* *Goldsmid v. Goldsmid* (1818), 1 Swan. 211; *Lang v. Lang* (1837), 1 Jur. 472; *Salisbury v. Salisbury* (1848), 6 Hare, 526; *Lett v. Randall*, *Lett v. Dormer* (1855), 3 Sm. & G. 83; *Willis v. Willis* (1865), 34 Beav. 340; *James v. Castle* (1875), 33 L. T. 665; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562. *Mentd.* *Wathen v. Smith* (1819), 4 Madd. 325.

217. Gift by will—Annuity in lieu of dower & thirds—Election by widow to take dower.]—B., being seised & possessed of real & personal estate, by will, gave his wife half his ready money cash & bills in England, & the produce of his sugar & rum, & the other moiety thereof he gave to his son, if he should be living at the time of his death, but if his son were not then living, he then gave the whole of the ready money, cash, bills, etc., to his wife absolutely for her own & her children's use & support, & he likewise gave to his wife an

annuity of £300 for her life, & he declared that the annuity should be accepted by his wife in lieu of all dower & thirds which she might be entitled to out of his real & personal estate, & that the annuity should be applied by his wife for & towards the maintenance of herself & her children. At the death of the testator, his son was dead, but he left daughters. The wife elected to take her dower, & gave up the annuity:—*Held*: with respect to the annuity, the wife might renounce that benefit given her by the will, & yet take the rest of the testator's bounty. The manner in which the testator had given it in lieu of dower, showed that he intended she should hold that annuity as she would have done her dower, which might be for the benefit of those who were dear to her as well as of herself; but with respect to the money, the bills, & other personal property, the daughters were entitled in equal shares with the wife.—*BROWN v. PARRY* (1787), Rom. 84; Dick. 685; 21 E. R. 438, L. C.

218. Covenant creating present debt—Does not bar widow's claim.]—Provision for a wife & a distributory share of her husband's personal estate were decreed to her. The covenant was to lay out a sum of money as a provision for the wife in two years in the lifetime of the husband of the two years lapsed without anything done of that kind, & therefore was a plain breach of the covenant.—*OLIVER v. BRICKLAND* (1732), cited in 3 Atk. at pp. 420, 422; 26 E. R. 1043.

Annotations:—*Refd.* *Lee v. D'Aranda* (1747), 1 Ves. Sen. 1; *Garthshore v. Chalie* (1804), 10 Ves. 1.

219. ———.]—In a marriage settlement it was stipulated that A., the husband, should invest, in certain securities, £4,000, the property of the lady which he acknowledged he had received from her, & that she should receive the income on her sole receipts, for her maintenance & personal wants, & that on her dying in A.'s lifetime without leaving issue by him the capital should belong to him. If A. did not invest the £4,000 in his lifetime, she was to be at liberty to take it out of his assets on his death. A. died intestate in his wife's lifetime. He never received the £4,000, nor invested a sum to that amount:—*Held*: his widow was entitled to be paid the £4,000 out of his assets, & also to receive her distributive share of the residue.—*LANG v. LANG* (1837), 8 Sim. 451; 6 L. J. Ch. 324; 1 Jur. 472; 59 E. R. 179.

220. Covenant of different nature—Gift of annuity—Does not bar widow's claim.]—Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, etc., & for making some provision for the wife & her issue, to pay within three months after his death £8,000 to the trustees, in trust, if the wife should survive him, & there should be no issue, to pay £1,500 to the wife, her exors., etc., & to pay the interest of the remaining

over in remainder having failed owing to the death of the children of the stepdaughter during the life time of the tenant for life, their interest fell into intestacy:—*Held*: as it appeared from the terms of the will, that the events which had happened, & the consequent intestacy had never been contemplated by the testator, the declaration could not be construed as imposing that the widow should only take the gift to her on the terms of renouncing any share on a possible partial intestacy, not as a gift by implication of her share in the personalty to the next of kin, & consequently she was entitled to both the provision & her share in the intestacy under the Statute of Distributions.—*PENNY v. MILLIGAN*

(1907), 5 C. L. R. 349.—AUS.

r. ——— *Annuity—Election by widow.*—A testator, by his will, gave his widow an annuity, & provided that when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate & the residue when he should attain thirty, subject however to the annuity. He also provided that if his son should die before attaining the age of thirty, the trustees or trustee should hold "the estate in trust to distribute same according to the statute of distributions." The son attained the age of twenty-one, received half of the estate, & died before attaining the age of thirty, unmarried & without issue:—

Held: the widow was entitled to her annuity as well as her share under the statute, but testator, having treated the real & personal estate as a blended fund to be distributed, she was not also entitled to dower, & that she must elect between the distributive share & the dower.—*Re QUIMBY, QUIMBY v. QUIMBY* (1884), 5 O. R. 738.—CAN.

2181. Covenant creating present debt—Does not bar widow's claim.—A covenant by the husband, in marriage articles, to provide a jointure of £200 sterling per annum, though the jointure be paid, will not bar the wife's right to her distributive share of the personal estate.—*CREAGH v. CREAGH* (1845), 8 L. Eq. R. 68.—IR.

Sect. 3.—Rights of widow: Sub-sect. 3, A. & B. Sub-sects. 1 & 2. Sects. 5 & 6.]

£4,500 to her for life:— she was entitled to dower; & her share under Stat. Distribution is not a satisfaction or performance of the covenant.—**COUCH v. STRATTON** (1799), 4 Ves. 391; 31 E. R. 199, L. C.

Annotations:—**Consd.** Garthshore v. Chalie (1804), 10 Ves. 1. **Foll.** Salisbury v. Salisbury (1848), 6 Hare, 526. **Consd.** James v. Castle (1875), 33 L. T. 665. **Refd.** *Re* Hall, Hope v. Hall, [1918] 1 Ch. 562.

221. ————.]—A wife's distributive share of her husband's effects under his intestacy is not a performance of the husband's covenant to leave her an annuity for life.—**SALISBURY v. SALISBURY** (1848), 6 Hare, 526; 17 L. J. Ch. 480; 12 Jur. 671; 67 E. R. 1272.

See, also, No. 194, ante.

B. In Cases of Partial Intestacy.

See Law of Property Act, 1922 (c. 16), ss. 147-150.

222. Whether wife's claim barred—By devise in lieu of thirds & dower.]—Testator gave his wife real & personal estate in bar, full satisfaction & recompense, of all dower or thirds, which she can have or claim in, out of or to, all or any part of his real & personal estate or either of them; he gave the residue to four persons, & afterwards by a codicil directed them to dispose thereof in charities; part of the residue, being invested in real securities, goes according to the Statute as undisposed of; & the widow is not barred.—**PICKERING v. STAMFORD (LORD)** (1797), 3 Ves. 492; 30 E. R. 1121, L. C.

Annotations:—**Consd.** Lett v. Randall (1855), 3 Sm. & G. 83; Naismith v. Boyes, [1899] A. C. 495. **Refd.** Waring v. Ward (1800), 5 Ves. 670; Garthshore v. Chalie (1804), 10 Ves. 1; Leake v. Robinson (1817), 2 Mer. 363; Thompson v. Watts (1862), 2 John. & H. 291. **Mentd.** Chalmer v. Bradley (1819), 1 Jac. & W. 51; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Campbell v. Graham (1831), 1 Russ. & M. 453; Clark v. Wyburn (1848), 13 L. T. O. S. 441; Kohler v. Reynolds (1857), 26 L. J. Ch. 415; Harcourt v. White (1860), 28 Beav. 303; *Re* Richardson, Pole v. Pattenden, [1920] 1 Ch. 423.

223. ———— Contrary intention collected from will.]—A rent-charge expressed to be for a jointure & in lieu of dower & thirds at common law, does not bar the jointress of her distributive share in her husband's undisposed-of personal estate.—**COLLETON v. GARTH** (1833), 6 Sim. 19; 2 L. J. Ch. 75; 58 E. R. 502.

Annotations:—**Distd.** Thompson v. Watts (1862), 2 John. & H. 291. **Refd.** Gurly v. Gurly (1842), 8 Cl. & Fin. 743. **Mentd.** Houlding v. Cross (1855), 1 Jur. N. S. 250.

224. ————.]—Devise, upon trust, to pay & make up to testator's wife £1,200 a year for her life; & to divide the residue of his property amongst all his children who might be living at his decease, share & share alike, for their lives. & he expressly declared that the said provision given unto his wife was intended to be, & should by her be, accepted in full, entire lieu, bar, recompense, discharge & satisfaction of, & for all & all

manner of claims & demands whatsoever which she at any time might or could have, or which without provision she could or might have, at the time of his decease, out of any part of his real or personal estate by virtue of any settlement or other writing at any time made upon her, or on account of any dower she might in any manner have or claim out of or upon, or from or in respect of, any part of his estate or effects in any manner however:—**Held:** the widow was excluded from anything beyond the annuity of £1,200.—**LETT v. RANDALL** (1855), 3 Sm. & G. 83; 3 Eq. Rep. 1034; 24 L. J. Ch. 708; 25 L. T. O. S. 244; 1 Jur. N. S. 747; 3 W. R. 564; 65 E. R. 572; *affd.* on other grounds (1860), 2 De G. F. & J. 388, L. C.

Annotations:—**Mentd.** Hill v. Rattey (1862), 2 John. & H. 634; Ramsay v. Shelmerdine (1865), L. R. 1 Eq. 129; Blight v. Hartnoll (1881), 19 Ch. D. 294; *Re* Morgan, Morgan v. Morgan (1893), 69 L. T. 407.

225. ————.]—Testator gave his wife in the event which happened an annuity of £30 & declared such annuity to be in lieu of all dower & claims that his said wife might have upon all or any of his estate & effects. Testator's personal estate was, except so far as the annual income thereof was directed to be applied to the maintenance of his children, undisposed of:—**Held:** his widow was not barred from participating in the undisposed of personalty as one of the next of kin.—**TAVERNOR v. GRINDLEY** (1875), 32 L. T. 424.

Annotation:—**Mentd.** Locke v. Dunlop (1888), 39 Ch. D. 387.

SECT. 4.—RIGHTS OF CHILDREN AND THEIR ISSUE.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1922 (c. 16), ss. 147-150.

226. Only child—Takes all personal estate.]—A person dies intestate, leaving one child. The whole personal estate belongs to him, within Stat. of Distribution.—**PALMER v. GARRARD** (1690), Prec. Ch. 21; 24 E. R. 11.

227. Posthumous child—Entitled with other children.]—**BALI v. SMITH** (1698), Freem. Ch. 230; 22 E. R. 1178.

228. ————.]—J. W. died intestate 1724, & left issue T. W. who died within a week after his father, & his wife *enccint*, & on May 20, following, pltf. was born:—**Held:** she was entitled to her share under Stat. Distribution as much as if she had existed in his lifetime.—**WALLIS v. HODSON** (1740), 2 Atk. 114; Barn. Ch. 272; 26 E. R. 472, L. C.

Annotations:—**Appl.** Burnet v. Mann (1748), 1 Ves. Sen. 156. **Refd.** Thellusson v. Woodford (1805), 1 Bos. & P. N. R. 357. **Mentd.** Villar v. Gilbey, [1907] A. C. 139.

229. Representative descendants—Per stirpes not per capita.]—**LOCKYER v. VADE** (1741), Barn. Ch. 444; 27 E. R. 713, L. C.

Annotation:—**Foll.** *Re* Natt, Walker v. Gammage (1888), 37 Ch. D. 517.

PART V. SECT. 3, SUB-SECT. 3.—B.

s. Whether wife's claim barred.]—Where under a will there was an intestacy in part:—**Held:** the widow was not entitled to \$1,000 under Devolution of Estates Act, s. 12.—*Re* **HARRISON** (1901), 21 C. L. T. 478; 2 O. L. R. 217.—**CAN.**

t. ————.]—A widow is not entitled, under Intestate Husband Estates Act, s. 2, to payment of £500 out of the residue of the estate of her husband who has died leaving a will purporting to dispose of his whole estate, but which, in the event which happened, left the fee of the residue undisposed of.—**TAYLOR'S EXECUTORS v. TAYLOR**, [1918] S. C. 207.—**SCOT.**

PART V. SECT. 4, SUB-SECT. 1.

229 i. Representative descendants—Per stirpes not per capita.]—A son, in consideration of his father conveying to him land, accepted it in lieu of all claims against his father's estate as one of his next of kin, & agreed that neither he nor his heirs would make any claim against the estate. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as next of kin of the grandfather to share in the estate of the latter:—**Held:** the children took, if at all, *per stirpes*.—*Re* **LEWIS** (1898), 29 O. R. 609.—**CAN.**

229 ii. ————.]—W. died intestate leaving one brother & two sisters surviving

him. One sister predeceased him, leaving a son & three children of her deceased daughter:—**Held:** the grandchildren are entitled under P. E. I. Statute of Distributions, s. 10, as representatives of their mother, to her distributive share in W.'s estate.—*Re* **DODD'S ESTATE** (1900), 6 E. L. R. 578.—**CAN.**

229 iii. ————.]—The word "children" in C. S., N. B., 1903, c. 161, s. 2, must be construed to include a grandchild of the intestate.—*Re* **KENNEDY** (1911), 40 N. B. R. 437.—**CAN.**

229 iv. ————.]—It is the intention of Administration Act Amendment Act, 1885, s. 3, that, in the event of the death of a child in the lifetime of a man or

230. —.]—A fund was divisible under Stat. Distribution among grandchildren & great-grandchildren, claiming by two lines of descent from their common ancestor:—*Held*: the fund must be divided into moieties, & each moiety subdivided between the respective descendants *per stirpes*, & not *per capita*.

Where there are no ancestors or descendants, & the nearest of kin are brothers & sisters, but there are also children of dead brothers & sisters, the latter, though not the next of kin, may claim as representatives of the brother or sister from whom they spring, & may stand in the place of that brother or sister for the purpose of distribution, so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, & does not extend to any more remote descendants of brothers & sisters than their children, & does not apply at all to any case where the next of kin are all more remote than brothers & sisters (WICKENS, V.-C.).—*Re Ross's TRUSTS* (1871), L. R. 13 Eq. 286; 41 L. J. Ch. 130; 25 L. T. 817; 20 W. R. 231.

Annotation:—*Folld. Re Natt, Walker v. Gammage* (1888), 37 Ch. D. 517.

231. —.]—A share of the residuary estate of a testatrix, a widow, which she had given by her will, lapsed. She had only two children, a son & a daughter, both of whom died before her. Three children of the son, & one child of the daughter, survived the testatrix:—*Held*: under Stat. Distribution, the four grandchildren took the lapsed share, so far as it arose from personal estate, *per stirpes*, not *per capita*.—*Re NATT, WALKER v. GAMMAGE* (1888), 37 Ch. D. 517; 57 L. J. Ch. 797; 58 L. T. 722; 36 W. R. 548.

232. — Descendants not next of kin of deceased child.]—In Stat. Distribution the words "legal representatives," are not used for next of kin, nor for exors. or administrators, but for the testator's children, or their children only, or the descendants of the next of kin. The statute means persons substituted in the place of others deceased (ARDEN, M.R.).—*BRIDGE v. ABBOT* (1791), 3 Bro. C. C. 224; 29 E. R. 502.

Annotations:—*Consd. Evans v. Charles* (1794), 1 Anst. 128; *Palin v. Hills* (1834), 1 My. & K. 470; *Cotton v. Cotton* (1839), 2 Beav. 67; *Re Crawford's Trusts* (1854) 2 Drew. 230. *Appld. Re Thompson, Machell v. Newman* (1886), 55 L. T. 85. *Refd. Holloway v. Holloway* (1800), 5 Ves. 399; *Horseman v. Abbey* (1819), 1 Jac. & W. 381; *Price v. Strange* (1820), 6 Madd. 159; *Waite v. Templer* (1829), 2 Sim. 524; *King v. Cleaveland* (1859), 4 De G. & J. 477; *Briggs v. Upton* (1872), 7 Ch. App. 376; *Re Greenwood, Greenwood v. Sutcliffe*, [1912] 1 Ch. 392. *Mentd. Bone v. Cook* (1824), M'Cle. 168; *Bulmer v. Jay* (1834), 3 My. & K. 197; *Holloway v. Clarkson* (1843), 2 Hare, 521; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

233. —.]—*EVANS v. CHARLES* (1794), 1 Anst. 128; 145 E. R. 821.

Annotations:—*Consd. Price v. Strange* (1820), 6 Madd. 159; *Marshall v. Collett* (1835), 1 Y. & C. Ex. 232; *Long v. Watkinson* (1852), 17 Beav. 471. *Refd. Holloway v. Holloway* (1800), 5 Ves. 399; *Horseman v. Abbey* (1819), 1 Jac. & W. 381; *Palin v. Hills* (1834), 1 My. & K. 470.

woman who subsequently dies intestate, the children of the deceased's child shall take what would have been their parent's share had he or she survived.—*Re STACE* (1887), 5 N. Z. L. R. 303.—N.Z.

a. Adopted child—*Entitled by law of foreign State where adopted.*]—Deceased adopted a child while living in Iowa, where she would have been entitled to the same rights as his legitimate child. He removed to Alberta where he died intestate:—*Held*: this child is entitled to share in his estate.—*Re THROSSEL* (1910), 12 W. L. R. 683.—CAN.

PART V. SECT. 5.

b. In absence of issue takes whole personalty.]—Where a child dies in-

Mentd. Wellman v. Bowring (1830), 3 Sim. 328; *Bulmer v. Jay* (1834), 3 My. & K. 197; *Holloway v. Clarkson* (1843), 2 Hare, 521.

234. —.]—In Stat. Distribution the term "legal representatives" means descendants, & not next of kin; as for example, a son of an intestate is dead, having a widow & child. The widow takes nothing, & the child the whole of its father's share (SIR JOHN LEACH, V.-C.).—*PRICE v. STRANGE* (1820), 6 Madd. 159; 56 E. R. 1052.

Annotations:—*Refd. Palin v. Hills* (1834), 1 My. & K. 470; *Holloway v. Clarkson* (1843), 2 Hare, 521; *Re Crawford's Trusts* (1854), 2 Drew. 230; *Wing v. Wing* (1876), 34 L. T. 941. *Mentd. Alker v. Barton* (1842), 12 L. J. Ch. 16; *Pyrke v. Waddingham* (1852), 10 Hare, 1; *Mullings v. Trinder* (1870), 39 L. J. Ch. 833.

Legitimated child.]—*See BASTARDY*, Vol. III., p. 148, No. 374.

SUB-SECT. 2.—ADVANCEMENT.

See EQUITY; Law of Property Act, 1922 (c. ss. 147–150.

SECT. 5.—RIGHTS OF FATHER.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

235. In absence of issue takes whole personalty—*Though administration not taken out.*]—A legacy given a child by a stranger, at the child's death, vests in the father by Stat. Distribution, although he took not out administration to such child.—*GRICE v. GOODWIN* (1706), Prec. Ch. 260; 24 E. R. 126.

236. —.]—*BACON v. BRYANT* (1729), 2 Eq. Cas. Abr. 425; 22 E. R. 361.

SECT. 6.—RIGHTS OF MOTHER, BROTHERS AND SISTERS, AND GRANDPARENTS.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

237. Stepmother cannot take as next of kin.]—"Being but a mother-in-law to the testatrix, if the surplus had been distributable, she as not being of the blood of the testatrix, could have claimed no part upon Stat. Distribution (LORD MACCLESFIELD, C.).—*RUTLAND (DUKE) v. RUTLAND (DUCHESS)* (1723), 2 P. Wms. 210; 24 E. R. 703, L. C.

Annotations:—*Mentd. Nourse v. Finch* (1793), 4 Bro. C. C. 239; *Clennell v. Lewthwaite* (1794), 2 Ves. 465.

238. Mother & no brothers or sisters—*Mother takes whole estate*—*Though administration not taken out.*]—*JACKSON v. PROUDEHOME* (1716), 2 Eq. Cas. Abr. 439; 22 E. R. 374, L. C.

239. Mother, brothers & sisters—*Mother takes half & brothers & sisters half*—*Subject to right of widow.*]—*KEYLWAY v. KEYLWAY*, No. 190, *ante*.

testate & unmarried entitled to personal estate, leaving a father, mother, brother, & sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others.—*LEWIN v. LEWIN* (1903), 36 N. B. R. 365.—CAN.

PART V. SECT. 6.

c. Mother, brothers & sisters—*Mother takes half & brothers & sisters half.*]—Where one who dies intestate is survived by a mother, brothers & sisters, the mother takes one-half of the personalty & the brothers & sisters the other half.—*Re POWELL* (1921), 30 B. C. R. 134.—CAN.

d. — Brother & sisters take the whole estate.]—If a person dies intestate without children, leaving a mother,

brother & sisters, the brother & sisters are entitled to his estate under Act of Assembly, 26 Geo. 3, c. 11, s. 12, to the exclusion of the mother.—*DON d. MAHONEY v. CRANE* (1846), 3 Kerr, 228.—CAN.

e. — — — — —]—An intestate left a widow & two children, both under age, one of whom died under age & without having been married:—*Held*: the mother took no interest in the share which came to the child, since deceased, on the father's death, but all of such child's interest descended to the other child, not from the deceased child but from the father's intestacy.—*Re LYNE'S ESTATE*, [1922] 1 W. W. R. 1094; 67 D. L. R. 592; 32 Man. L. R. 85.—CAN.

f. Rights of brothers & sisters of illegitimate.]—Under the law of Sas-

Sect. 6.—Rights of mother, brothers and sisters, and grandparents. Sects. 7, 8 & 9.]

240. ————.]—STANLEY v. STANLEY, No. 191, *ante*.

241. Brothers & sisters only—Grandparent excluded.]—WINCHELSEA (EARL) v. NORCLIFF, No. 162, *ante*.

242. ————.]—If an intestate leaves only a grandfather & a brother, the whole of his personal estate goes to the brother.—NORBURY v. RICHARDS (1749), cited in *Amb.* at p. 191; 27 E. R. 131.

Annotations:—Refd. Buissieres v. Albert (1754), 2 Lee, 51; Evelyn v. Evelyn (1754), 3 Atk. 762. *Mentd.* Withy v. Mangles (1843), 10 Cl. & Fin. 215.

243. ————.]—The question was, whether the personal estate of a brother who died intestate should go wholly to his brother, or be divided equally between him & the grandfather:—*Held*: it belonged entirely to the brother, & the grandfather had no right to share in the distribution with him.—EVELYN v. EVELYN (1754), 3 Atk. 762; *Amb.* 191; Dick. 146; 26 E. R. 1237, L. C.

Annotations:—Refd. Mourgue v. Buissieres (1756), 1 Keny. 296. *Mentd.* Withy v. Mangles (1843), 10 Cl. & Fin. 215.

SECT. 7.—RIGHTS OF NEPHEWS AND NIECES.

See Law of Property Act, 1922 (c. 16), ss. 147–150.

244. Representation among collaterals—Confined to children of brothers & sisters of intestate.]—CARTER v. CRAWLEY (1680), 1 Freem. K. B. 298; T. Raym. 496; 89 E. R. 216.

Annotations:—Refd. Blackborough v. Davis (1701), 1 P. Wms. 41. *Mentd.* R. v. Raines (1700), 1 Ld. Raym. 571; Montney v. Petty (1722), Prec. Ch. 593; Wallis v. Hodson (1740), Barn. Ch. 272; Gould v. Gapper (1804), 5 East, 345.

245. ————.]—Distribution under Stat. Distribution shall only extend to brothers & sisters children of the intestate.—CALDICOT v. SMITH (1683), 2 Show. 286; 89 E. R. 943.

246. ————.]—WELCH v. WELCH (1692), Freem. Ch. 189; 22 E. R. 1153.

247. ————.]—R. v. RAINES, PETT v. PETT, No. 270, *post*.

248. ————.]—DURANT v. PRESTWOOD (1738), 1 Atk. 454; West temp. Hard. 448; 26 E. R. 289, L. C.

Annotations:—Mentd. Lloyd v. Tench (1751), 2 Ves. Sen. 213; Mourgue v. Buissieres (1756), 1 Keny. 296.

249. If brother or sister living—Children of deceased brother or sister—Take per stirpes.]—WELCH v. WELCH (1692), Freem. Ch. 189; 22 E. R. 1153.

250. ————.]—*Re* ROSS'S TRUSTS, No. 230, *ante*.

251. No brother or sister living—Nephews & nieces—Take per capita.]—WELCH v. WELCH (1692), Freem. Ch. 189; 22 E. R. 1153.

252. ————.]—A. had three brothers.

katchewan if an illegitimate child dies intestate & unmarried & predeceased by his mother but survived by another or other illegitimate child or children of the mother, his real & personal property will go to such other illegitimate child or children.—*Re* STONE'S ESTATE (1920), 1 W. W. R. 563; 53 D. L. R. 677; 13 Sask. L. R. 159.—CAN.

PART V. SECT. 7.

244 i. Representation among collaterals—Confined to children of brothers & sisters of intestate.]—Statute of Distributions excludes the children of a deceased nephew of the intestate.—CROWTHER v. CAWTHRA (1882), 1 O. R. 128.—CAN.

244 ii. ————.]—The limitation in the Statute of Distributions does not apply to the case where the intestate

leaves no widow.—*Re* PRICE (1887), 27 N. B. R. 205.—CAN.

244 iii. ————.]—On the death of a person, intestate leaving no issue, the children of a predeceased sister or brother are not entitled under Devolution of Estates Act, 1887, s. 6, to share in competition with a surviving brother, or sister of the intestate.—*Re* COLQUHOUN (1895), 26 O. R. 104.—CAN.

249 i. If brother or sister living—Children of deceased brother or sister—Take per stirpes.]—Where brothers or sisters are entitled to share on an intestacy, the children of a deceased brother or sister of the intestate are entitled to share per stirpes.—WALKER v. ALLEN (1897), 24 A. R. 336.—CAN.

251 i. No brother or sister living—Nephews & nieces—Take per capita.]—

One died, leaving two children, another three, & the third five. Then A. died intestate:—*Held*: the distribution should be per capita, & not per stirpes, being all next of kin in equal degree.—WALSH v. WALSH (1695), Prec. Ch. 54; 1 Eq. Cas. Abr. 249, pl. 7; 24 E. R. 27.

Annotations:—Foll. Davers v. Dewes (1730), 3 P. Wms. 40. *Refd.* Stanley v. Stanley (1739), 1 Atk. 455; Lloyd v. Tench (1751), 2 Ves. Sen. 213; Buissieres v. Albert (1754), 2 Lee, 51.

253. ————.]—JANSON v. BURY (1723), Bunb. 157; 145 E. R. 631.

254. ————.]—LLOYD v. TENCH, No. 268, *post*.

255. ————.]—In cases of intestacy, nephews & nieces never take by representation. When they concur with a brother or sister, they take per stirpes. In other cases they take per capita.—BUISSIÈRES v. ALBERT (1754), 2 Lee, 51; 161 E. R. 260.

256. Advancements not brought into hotchpot.]

—A bachelor lunatic died intestate, leaving a brother, a sister, & the children of a deceased sister his sole next of kin. The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Ct., which order, with her consent, directed that the advance should be taken & considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him:—*Held*: the deceased sister's children were not bound to bring the advance into hotchpot.—*Re* GIST, GIST v. TIMBRILL, [1906] 2 Ch. 280; 75 L. J. Ch. 657; 95 L. T. 41; 22 T. L. R. 637, C. A.

Annotations:—Foll. *Re* White, White v. White (1914), 111 L. T. 274. *Refd.* *Re* Crozier, Cooper v. Thorneycroft (1906), 50 Sol. Jo. 206.

257. ————.]—A father had covenanted with his brother to pay off a mtge. debt & had died without carrying out such covenant, leaving four children, & the brother had subsequently died intestate:—*Held*: the four children were entitled to receive their share of the personal estate of the intestate without first making good to the estate of the intestate the money secured by the mtge., for although they did in fact take a distributive share between them as the persons who legally represented their father, yet they, nevertheless, took by original title & not under or through their father.—*Re* WHITE, WHITE v. WHITE (1914), 111 L. T. 274; 58 Sol. Jo. 611.

Advancements.]—*See* EQUITY.

SECT. 8.—RIGHTS OF REMOTER RELATIONS.

See Law of Property Act, 1922 (c. 16), ss. 147, 150.

258. General rule—Degrees of proximity calcu-

The property of an intestate who has left no child or other lineal descendants or wife or husband, parent, brother or sister, but nephews & nieces, children of deceased brothers & sisters, should be divided among such nephews & nieces per capita.—*Re* SMITH'S ESTATE, [1919] 3 W. W. R. 745; 48 D. L. R. 424.—CAN.

251 ii. ————.]—On the death of an intestate leaving only the children of his brothers & sisters, the estate should be distributed amongst them per capita.—*Re* MCCABE'S ESTATE, [1921] 3 W. W. R. 169.—CAN.

PART V. SECT. 8.

g. Application of rule—Three grandparents.]—Where an infant died leaving a paternal grandfather & paternal & maternal grandmothers:—

PART V.—DISTRIBUTION OF PERSONAL ESTATE.

lated according to civil law.]—PALMER v. ALLICOCK, No. 161, ante.

259. ———.]—MENTNEY v. PETTY (1722), Prec. Ch. 593; 24 E. R. 266.

Annotations:—*Foll.* Thomas v. Ketteriche (1749), 1 Ves. Sen. 333. *Mentd.* Lloyd v. Tench (1750), 2 Ves. Sen. 213.

260. ———.]—In cases of distribution & succession to personal estate, the degrees of relationship are to be computed according to the civil, not according to the canon, law.—LOCK v. LAKE (1757), 2 Lee, 420; 161 E. R. 390.

261. Application of rule—Grandparent & uncle & aunt.]—One dies intestate leaving an aunt & a grandmother his next of kin; the grandmother is nearer of kin than the aunt, & is entitled to administration in preference to her; neither is the latter to come in for a distributory share.—BLACKBOROUGH v. DAVIS (1701), 1 P. Wms. 41; 1 Com. 108; Holt, K. B. 43; 1 Ld. Raym. 684; 1 Salk. 251; 12 Mod. Rep. 615; 24 E. R. 285.

Annotations:—*Appl.* Thomas v. Ketteriche (1749), 1 Ves. Sen. 333. *Consd.* Lloyd v. Tench (1751), 2 Ves. Sen. 213. *Refd.* *Re* Goodman's Trusts (1881), 17 Ch. D. 266. *Mentd.* Clements v. Scudamore (1703), 1 P. Wms. 63; Paul v. Knight (1732), Kel. W. 223; Ryall v. Rolle (1749), 1 Atk. 165; Evelyn v. Evelyn (1754), Amb. 191; *In the Goods of* Belham, Richardes v. Yates (1901), 84 L. T. 300; Hewson v. Shelley, [1914] 2 Ch. 13.

262. ———.]—The grandmother is entitled to a distribution of the grandchild's personal estate, in exclusion of the uncles & aunts.—WOODROFF v. WICKWORTH (1719), Prec. Ch. 527; 1 Eq. Cas. Abr. 249, pl. 5; 24 E. R. 236.

Annotation:—*Consd.* Lloyd v. Tench (1751), 2 Ves. Sen. 213.

263. ——— Two grandparents.]—If an intestate leaves only a grandfather on the father's side & a grandmother on the mother's side, his personal estate will be divided equally between them.—MOOR v. BARHAM (1723), cited in 1 P. Wms. at p. 53; 242 E. R. 289.

264. ——— Uncles & aunts & cousins.]—CARTER v. CRAWLEY (1680), 1 Freem. K. B. 298; T. Raym. 496; cited in 1 Ld. Raym. at p. 572; 89 E. R. 216.

Annotations:—*Foll.* R. v. Raines, Pett v. Pett (1700), 1 Ld. Raym. 571. *Refd.* Blackborough v. Davis (1701), 1 P. Wms. 41; Mentney v. Petty (1722), Prec. Ch. 593; Gould v. Gapper (1804), 5 East, 345. *Mentd.* Wallis v. Hodson (1740), Barn. Ch. 272.

265. ———.]—The son of a dead uncle is not entitled to a distribution with a living uncle.—MAW v. HARDING (1691), Prec. Ch. 28; 2 Vern. 233; 24 E. R. 15.

266. ———.]—One dies intestate, leaving an uncle & a deceased aunt's son; the latter shall have no share under Stat. Distribution.—BOWERS v. LITTLEWOOD (1719), 1 P. Wms. 594; 2 Eq. Cas. Abr. 439, pl. 37; 24 E. R. 531, L. C.

267. ——— Uncles & aunts & nephews & nieces.]—Aunts & nephews in equal degrees of kindred & equally entitled under Stat. Distribution.—

Held: that being the next of kindred to the infant in equal degree, they took equal shares in the estate of the infant.—SKEELES v. HUGHES (1877), 3 V. L. R. 161.—AUS.

h. ——— Cousins & first cousins once removed.]—Deceased died intestate & unmarried. There were first cousins & first cousins once removed. The intestate's father & mother were dead. No brothers or sisters, or children of such, survived her. The question was whether the first cousins once removed were entitled to participate, by representation of their deceased parents, with the cousins in the distribution of the estate:—*Held*: there was no representation of collaterals of this class, & the first cousins took to the exclusion of the others.—*Re* Mc- (1905), 6 O. W. R. 393; 10

O. L. R. 499.—CAN.

k. Representation among collaterals.—*Confined to grandchildren of brothers & sisters or children of uncles & aunts.*—Representation is not allowed amongst collaterals further than the grandchildren of brothers & sisters & the children of uncles & aunts inclusively.—*RAUBENHEIMER v. BREDA'S EXECUTORS* (1880), F. 111.—S. AF.

PART V. SECT. 9.

273 i. Half blood equally entitled with whole blood.]—A sister of the half blood is one of the next of kin, of a deceased person, equally with a brother of the whole blood.—*Re* HOOD (1890), 16 V. L. R. 628.—AUS.

273 ii. ———.]—The half-sister of a person who dies intestate without issue

DURANT v. PRESTWOOD (1738), 1 Atk. 454; West temp. Hard. 448; 26 E. R. 289, L. C.

Annotations:—*Refd.* Lloyd v. Tench (1751), 2 Ves. Sen. 213; Mourgue v. Buissieres (1756), 1 Keny. 296.

268. ———.]—Where no issue, nor brother or sister of an intestate, an aunt takes under the statute equally with nephews & nieces. In such case they take *per capita*, & not *per stirpes*.—LLOYD v. TENCH (1751), 2 Ves. Sen. 213; 28 E. R. 138.

Annotations:—*Consd.* *Re* Gist, Gist v. Timbrill, [1906] 1 Ch. 58. *Refd.* *Re* Natt, Walker v. Gammage (1888), 37 Ch. D. 517.

269. ———.]—MOURGUE v. BUISSIÈRES (1756), 1 Keny. 296; 96 E. R. 999, L. C.

270. ——— Nephew & grand-nephew.]—Intestate dies leaving a deceased brother's child & a deceased brother's grandchild, the grandchild not admitted to any distributory share; the clause in Stat. Distribution which says, that there shall be no representatives among collaterals beyond brothers' & sisters' children, being to be intended that none shall take by representation but the children of brothers & sisters to the intestate.—R. v. RAINES, PETT v. PETT (1700), 1 Ld. Raym. 571; 1 Com. 87; Holt, K. B. 259; 1 Salk. 250; 3 Salk. 138; 91 E. R. 1281; *sub nom.* PETT'S CASE, 1 P. Wms. 25; 2 Eq. Cas. Abr. 435, pl. 16; *sub nom.* PET v. PET, 12 Mod. Rep. 409.

Annotation:—*Foll.* Bowers v. Littlewood (1719), 1 P. Wms. 594.

271. ——— Cousin & child of cousin.]—The children of a deceased cousin-german shall not have a distributive share with another cousin-german.—ANON. (1680), 1 Freem. K. B. 298; 89 E. R. 216.

272. ——— Cousin & grand-niece.]—Granddaughter of the sister, & the daughter of the aunt of the intestate are in equal degree.—THOMAS v. KETTERICHE (1749), 1 Ves. Sen. 333; 27 E. R. 1065, L. C.

Annotations:—*Mentd.* Meddowcroft v. Huguenin (1844), 4 Moo. P. C. 386; Harris v. Jackson (1845), 1 Ph. 582; Spencer v. Williams (1871), L. R. 2 P. & D. 230.

SECT. 9.—RIGHTS OF THE HALF BLOOD.

See Law of Property Act, 1922 (c. 16), s. 150.

273. Half blood equally entitled with whole blood.]—The half blood is equally entitled to distribution & administration with the whole blood.—SMITH v. TRACY (1677), Freem. K. B. 294; 3 Keb. 831; 2 Mod. Rep. 204; T. Jo. 93; 1 Vent. 323; 1 Eq. Cas. Abr. 249; 89 E. R. 212; *sub nom.* TRACY v. SMITH, 2 Lev. 173.

Annotations:—*Refd.* Winchelsea v. Norcliffe (1686), 1 Vern. 435; Brown v. Brown, Brown v. Farndale (1689), Holt, K. B. 258; R. v. Raines, or Pett v. Pett (1700), 1 Ld. Raym. 571; Wallis v. Hodson (1740), Barn. Ch. 272. *Mentd.* Blackborough v. Davis (1701), 1 P. Wms. 41.

is entitled to an equal share of the estate of the intestate with the sisters of the whole blood.—DOE d. SHANNON v. FORTUNE (1876), 3 Pug. 259.—CAN.

273 iii. ———.]—In the distribution under Devolution of Estates Act of the personal estate of an intestate, brothers & sisters of the half blood share equally with those of the whole blood.—*Re* WAGNER (1903), 6 O. L. R. 680.—CAN.

273 iv. ———.]—Collateral relatives of the half blood take equally with those of the whole blood.—*Re* ADAMS (1903), 6 O. L. R. 697.—CAN.

273 v. ———.]—Upon failure of descendants or paternal relatives entitled to claim, applot., a maternal half-brother of deceased:—*Held*: entitled as sole heir to the whole estate of intestate.—*Ex parte* THOMAS (1908), 18 C. T. R. 830.—S. AF.

Sect. 9.—Rights of the half blood. Sects. 10 & 11. Parts VI. & VII. Sect. 1: Sub-sects. 1 & 2,

274. —.]—*STAPLETON v. SHERWOOD (LADY)* (1882), 2 Rep. Ch. 255; 21 E. R. 672.

275. —.]—*PULLEN v. SERJEANT* (1884), 2 Rep. Ch. 300; 21 E. R. 684.

276. —.]—*WINCHELSEA (EARL) v. NORCLIFFE*, No. 162, *ante*.

277. —.]—*BROWNE v. BROWNE* (1888), 1 Show. 1; 89 E. R. 408; *sub nom.* *BROWN v. FARNDALL & SHORE*, Carth. 51.

278. —.]—*WATTS v. CROOKE* (1690), Show. Parl. Cas. 108; 1 E. R. 74; *sub nom.* *ANON.*, 2 Vent. 317; *sub nom.* *CROOKE v. WATT*, 1 Eq. Cas. Abr. 249. H. L.; *affg.* S. C. *sub nom.* *CROKE v. WATTS* (1689), Freem. Ch. 112.

Annotation:—Refd. *Wallis v. Hodson* (1740), Barn. Ch. 272.

279. — **Posthumous child.**—Posthumous brother of the half blood shall take under statute of distribution.—*BURNET v. MANN* (1748), 1 Ves. Sen. 156; 27 E. R. 953, L. C.

Annotation:—Refd. *Jessopp v. Watson* (1833), 1 My. & K. 665.

280. —.]—Under 1 Jac. 2, c. 17, brothers & sisters of the half blood of an intestate are equally entitled with brothers & sisters of the whole blood, to share with their mother, after the death of the intestate's father, in the personal property of the intestate dying without wife or children.—*JESSOPP v. WATSON* (1833), 1 My. & K. 665; 2 L. J. Ch. 197; 39 E. R. 832.

Annotations:—Mentd. *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Williams v. Williams*, *Williams v. Kershaw* (1835), 5 L. J. Ch. 84; *Fitch v. Weber* (1848), 6 Hare, 145; *Re Richerson*, *Scales v. Heyhoe*, [1892] 1 Ch. 379.

281. —.]—The description of nephews & nieces includes the child of a brother or sister of the half blood.—*GRIEVES v. RAWLEY* (1852), 10 Hare, 63; 22 L. J. Ch. 625; 78 E. R. 840.

Annotations:—Fold. *Re Hammersley, Kitchen v. Myers* (1886), 2 T. L. R. 459. *Apld.* *Re Reed* (1888), 57 L. J. Ch. 790. *Refd.* *Halton v. Foster* (1868), 3 Ch. App. 505; *Re Cozens*, *Miles v. Wilson*, [1903] 1 Ch. 138.

282. —.]—Testator gave his property first to his wife & after his death to all his nephews & nieces living at her death:—*Held*: nephews & nieces of the half blood were included in the gift.—*Re HAMMERSLEY, KITCHEN v. MYERS* (1886), 2 T. L. R. 459.

283. — **Children of deceased wife's sister—Death of parent before Deceased Wife's Sister Act, 1907 (c. 47).**—T. G. died intestate on Mar. 19, 1911. He was the son of J. G. by his first marriage, his mother having died in 1860.

J. G. went through the form of marriage with the sister of his first wife in 1863.

J. G. died in 1900, & the second wife in 1907.

At the date of the death of T. G. there were living besides children of the first marriage two children of J. G. by his second marriage.

The question now arose whether these two children were entitled to share with the children of the first marriage under the statutes for the distribution of the estates of intestates in the personal estate of T. G., having regard to the above Act:—*Held*: all the children of J. G. were entitled to share in the estate of T. G.—*Re GREEN, GREEN v. MEINALL*, [1911] 2 Ch. 275; 80 L. J. Ch. 623; 105 L. T. 360; 27 T. L. R. 490; 55 Sol. Jo 552.

Annotation:—Mentd. *Re Mudge*, [1913] 2 Ch. 92.

SECT. 10.—DISTRIBUTION OF FOREIGN MOVABLES.

See *CONFLICT OF LAWS*, Vol. XI., pp. 365–369, Nos. 453–491.

SECT. 11.—RIGHTS OF EXECUTOR AGAINST NEXT OF KIN TO UNDISPOSED OF RESIDUE.

See *EXECUTORS & ADMINISTRATORS*; Law of Property Act, 1922 (c. 16), s. 150 (3).

Part VI.—Descent of Peerages and Dignities.

See *PEERAGES & DIGNITIES*.

Part VII.—Escheat and bona vacantia.

SECT. 1.—ESCHEAT.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1922 (c. 16), s. 148.

284. **General rule.**—If a freehold estate comes to an end by death without an heir, or by attainder, it goes back to the Crown on the principle that all freehold estate originally came from the Crown, & that where there is no one entitled to the freehold estate by law it reverts to the Crown (*JESSEL, M.R.*).—*Re MERCER & MOORE* (1880), 14 Ch. D. 287; 49 L. J. Ch. 201; 42 L. T. 311; *sub nom.* *Re BEARDSWORTH & MOORE'S CONTRACT*, 28 W. R. 485.

Annotation:—Mentd. *Hill v. East & West India Dock Co.* (1884), 48 J. P. 788.

285. **Nature of escheat.**—“Escheat” is a word of art, & signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say that the fee is escheated” (*Co. Litt.* 13 a). When there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. The tenant's estate, subject to any charges upon it which he may have created, has come to an end, & the lord is in by his own right (*LORD SELBORNE, C.*).—*A.-G. OF ONTARIO v. MERCER* (1883), 8 App. Cas. 767; 52 L. J. P. C. 84; 49 L. T. 312, P. C.

Annotations:—Refd. *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46. *Mentd.* *A.-G. of British*

PART VII. SECT. 1, SUB-SECT. 1.

1. **Escheats—Whether source of revenue reserved to Dominion of Canada.**—Escheats arising in Alberta at all events in respect of lands which belonged to the Crown at the date of

the creation of that province, are amongst the rights & sources of revenue excepted & reserved to the Dominion of Canada by the Alberta Act.—*R. v. TRUSTS & GUARANTEE CO.*, [1917] 1 W. W. R. 358 54 S. C. R. 107.—**CAN.**

m. —.]—The devolution of estates by escheat is a matter coming within the subject of property & civil rights in the province and which under (13) B. N. A. Act, s. 92, is a subject of exclusive provincial legislation.—*Re STONE'S ESTATE* (1920), 1 W. W. R.

PART VII.—ESCHEAT AND BONA VACANTIA.

Columbia v. A.-G. of Canada (1889), 14 App. Cas. 295; *Maritime Bank of Canada (Liquidators) v. New Brunswick (Receiver-General)*, [1892] A. C. 437; *A.-G. v. British Museum Trustees*, [1903] 2 Ch. 598; *S. S. Magnhild v. McIntyre*, [1920] 3 K. B. 321; *R. v. A.-G. for British Columbia* (1923), 40 T. L. R. 13.

286. — Founded on want of tenant to perform services.]—I think escheat not founded on want of heir but of tenant to perform the services (CLARKE, M.R.).

There is but one case in which a possibility of reverter could remain after a fee granted, & that is where lands are granted to a corp., if the corp. is dissolved, the lands return to donor or his heirs (LORD MANSFIELD, C.J.).—BURGESS *v.* WHEATE, *A.-G. v. WHEATE* (1759), 1 Eden. 177, 1 Wm. Bl. 123; 28 E. R. 652.

*Annotations:—*Consd. *Middleton v. Spicer* (1783), 1 Bro. C. C. 201; *Williams v. Lonsdale* (1798), 3 Ves. 752; *A.-G. v. Leeds* (1833), 2 My. & K. 343; *Downe v. Morris* (1844), 3 Hare, 394; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Davall v. New River Co.* (1849), 3 De G. & Sm. 394; *Beale v. Symonds* (1853), 16 Beav. 406; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Gallard v. Hawkins* (1884), 27 Ch. D. 298. *Refd.* *Barclay v. Russell* (1797), 3 Ves. 424; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Dolder v. Bank of England* (1805), 10 Ves. 352; *Gordon v. Gordon* (1821), 3 Swan. 400; *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582; *Onslow v. Wallis* (1849), 1 Mac. & G. 506; *Cox v. Parker* (1856), 25 L. J. Ch. 873; *Masulipatam v. Cavalry Vencata Narrainapah* (1861), 8 Moo. Ind. App. 529; *Sweeting v. Sweeting* (1863), 3 New Rep. 240; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Re Gosman* (1880), 15 Ch. D. 67; *Re Van Hagan*, *Sperling v. Rochfort* (1880), 16 Ch. D. 18; *Re Bond*, *Panes v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jevers*, [1917] 2 Ch. 363. *Mentd.* *Mackreth v. Symmons* (1808), 15 Ves. 329; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Langley v. Sneyd* (1822), 1 L. J. O. S. Ch. 14; *Re Reay* (1847), 8 L. T. O. S. 476; *Wythes v. Lee* (1855), 3 Drew. 396; *Haywood v. Cope* (1858), 25 Beav. 140; *Brookman v. Smith* (1871), L. R. 6, Exch. 291; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354.

287. Reference under Escheat Act, 1834 (c. 23) —Form of.]—The proper reference under Escheat Act is “whether the party is within the meaning of the Escheat Act, & also within the meaning of 1 Will. 4, c. 60.”—ANON. (1834), 4 L. J. Ch. 73.

SUB-SECT. 2.—WHAT IS LIABLE TO BE ESCHEATED.

A. In General.

See Law of Property Act, 1922 (c. 16), s. 148.

288. Not rentcharge.]—*A.-G. v. SANDS* (1670), Nels. 130; 3 Rep. Ch. 33; *Freem. Ch.* 129; *Hard.* 488; 21 E. R. 808.

*Annotations:—*Mentd. *Doyly v. Persall* (1673), *Freem. Ch.* 138; *A.-G. v. Duplessis* (1752), *Park.* 144; *Burgess v. Wheate*, *A.-G. v. Wheate* (1759), 1 Eden. 177; *Downes v. Morris* (1844), 13 L. J. Ch. 337; *Rittson v. Stordy* (1855), 3 Sm. & G. 230; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343.

289. Chattel real—Term in trustees attendant on inheritance.]—One seised in fee of lands by settlements limited a term to trustees for 100 years upon such trust as he by deed or will should appoint & for want of such appointment to attend the inheritance. Being a bastard, he died without heir, leaving a nuncupative will in these words: “I give all, all to S.” S. had administration with the will annexed. The question was whether this term should escheat with the inheritance:—*Held*: the trust of the term did not pass but went to the Crown together with the reversion in fee.—*THRUXTON v. A.-G.* (1685), 1 Vern. 340; 23 E. R. 507, L. C.

*Annotations:—*Consd. *Downe v. Morris* (1844), 3 Hare, 394. *Refd.* *Burgess v. Wheate*, *A.-G. v. Wheate*, (1759), 1 Eden. 177; *Barrow v. Wadkin* (1857), 24 Beav. 1. *Mentd.* *M’Hardy v. Hitchcock* (1848), 11 L. T. O. S. 170.

563; 53 D. L. R. 677; 13 Sask. L. R. 159.—CAN.

n. — *Whether doctrine applies to lands in Ontario.]*—The doctrine of escheats applies to lands held in Ontario.—*A.-G. v. O’REILLY* (1878), 26 Gr. 126; 6 A. R. 576.—CAN.

o. — *To Province not Dominion.]*—Lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situated, & not to the Dominion.—*A.-G. OF ONTARIO v. MERCER* (1883), 8 App. Cas. 767.—CAN.

290. Interim rents & profits—Devise to unborn person.]—A testator, having contracted for the sale of part of his real estate, devises his real & personal estate to trustees for payment of his debts by mtge. & sale, & by a codicil directs his trustees, after payment of debts & legacies to settle the whole estate on the children of his brother F. & their issue. F. had been attainted for treason, & was unmarried. By a second codicil he gives his personal estate to T. & directs his debts, legacies, & funeral expenses to be paid out of the moneys raised by mtge. & sale of his real estate:—*Held*: the Crown, standing in the place of the heir-at-law was entitled to the rents & profits, subject to payment of interest or debts, till a son of F. came into esse.—*WRIGHTSON v. A.-G.* (1737), *West temp. Hard.* 187; 25 E. R. 887, L. C.

291. Not estate of felo de se.]—Freeholds of inheritance which belong to a *felo de se* when he so died, do not escheat to the Crown, but descend to the heir-at-law.—*NORRIS v. CHAMBRES*, *CHAMBRES v. NORRIS* (1861), 3 De G. F. & J. 583; 30 L. J. Ch. 285; 4 L. T. 345; 7 Jur. N. S. 689; 9 W. R. 794; 45 E. R. 1004, L. C.

*Annotations:—*Mentd. *Cookney v. Anderson* (1862), 31 Beav. 452; *Cood v. Cood* (1863), 3 New Rep. 275; *Matthaci v. Galitzin* (1874), L. R. 18 Eq. 340; *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583; *Re Hawthorne*, *Graham v. Massey* (1883), 23 Ch. D. 743; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Deschamps v. Miller*, [1908] 1 Ch. 856; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

292. Accumulations—Of escheated real estate.]—A testator gave freehold & leasehold estates to trustees upon trust for his wife for her life, or until her second marriage, & in case she should marry again, upon the trusts thereafter mentioned, & after the death of his wife, in trust for M. absolutely. But in case his wife should marry again, the said bequest in her favour was to cease, & instead thereof she was to receive £500 a year, & the residue of the income was to be accumulated from such second marriage until the wife’s death, & then to be disposed of as the will directed. Testator died in 1852. His widow married again in 1854. The period of twenty-one years from the testator’s death prescribed by the *Thellusson Act* expired Apr. 16, 1873:—*Held*: there was no effectual disposition of the surplus from Apr. 16, 1873, & there was an intestacy. The trusts for accumulation then ceased. Accumulations since accrued & the future income of the estate belonged, so far as the same were attributable to personal estate, in equal moieties to the Crown & testator’s widow respectively, & so far as attributable to real estate to the Crown alone.—*WEATHERALL v. THORNBURGH* (1878), 8 Ch. D. 261; 47 L. J. Ch. 658; 39 L. T. 9; 26 W. R. 593, C. A.

*Annotations:—*Refd. *Harbin v. Masterman*, [1894] 2 Ch. 184; *Re Travis*, *Frost v. Greatorex*, [1900] 2 Ch. 541. *Mentd.* *Re Parry*, *Powell v. Parry* (1889), 60 L. T. 489; *Wharton v. Masterman*, [1895] A. C. 186.

Real estate disclaimed by trustee in bankruptcy.]—See BANKRUPTCY & INSOLVENCY, Vol. V., p. 945, No. 7746.

B. Trust and Mortgage Estates.

See Law of Property Act, 1922 (c. 16), s. 148; MORTGAGE; TRUSTS & TRUSTEES.

293. Whether escheat of equitable interest—

PART VII. SECT. 1, SUB-SECT. 2.—A. p. Not lease for lives renewable for ever.]—Leases for lives renewable for ever do not escheat to the Crown. *TISDALL v. TISDALL* (1839), 2 L. L. R. 41.—ID

Sect. 1.—Escheat: Sub-sect. 2, B. & C.; sub-sect.

Attainder of cestui que use.]—ANON. (1465), Cary. 11; 21 E. R. 6.

294. — Intestacy of cestui que trust.]—A.-G. v. SANDS (1670), Nels. 130; 3 Rep. Ch. 33; Freem. Ch. 129; Hard. 488; 21 E. R. 808.

*Annotations:—*Consd. Burgess v. Wheate, A.-G. v. Wheate (1759), 1 Eden. 177. *Mentd.* Doyly v. Persall (1673), Freem. Ch. 138; A.-G. v. Duplessis (1752), Park. 144; Downes v. Morris (1844), 13 L. J. Ch. 337; Rittson v. Stordy (1855), 3 Sm. & G. 230; Barrow v. Wadkin (1857), 24 Beav. 1; Sharp v. St. Sauveur (1871), 7 Ch. App. 343.

295. — —.]—M. devised a real estate to trustees & their heirs, upon trust for her son absolutely when he should attain twenty-one, but in case he should die before attaining twenty-one, leaving issue, then for such issue; but in case he should die under twenty-one, without leaving issue, then to the children of P. & E. The son attained twenty-one, & died unmarried in the lifetime of his mother. She left no heir-at-law:—*Held*: the devise vested the estate in the trustees, the subsequent trusts for P. & E. failed, & the surviving trustee was seised of the estate to his own use beneficially.—COX v. PARKER (1856), 22 Beav. 168; 25 L. J. Ch. 873; 27 L. T. O. S. 179; 2 Jur. N. S. 842; 4 W. R. 453; 52 E. R. 1072.

296. — Failure of devise—Trustee holds for heir-at-law.]—A testator devised a share in the New River Co. to A. upon such trust as he should afterwards declare, but never made any declaration of trust as to it. The testator died without leaving any heir-at-law:—*Held*: A. & not the Crown was entitled to it.

A testator made a general devise of all his property to A. upon trust, for purposes or legacies he should make in any codicil he might add to his will; & afterwards made a codicil, which was unattested:—*Held*: A. was not entitled in his own right to the property, but was a trustee for the heir-at-law of the testator.—DAVALL v. NEW RIVER CO. (1849), 3 De G. & Sm. 394; 18 L. J. Ch. 299; 13 L. T. O. S. 88; 13 Jur. 761; 64 E. R. 531. *Annotation:—*Reid. Beale v. Symonds (1853), 16 Beav. 406.

297. — —.]—A testator devised real estate to two persons upon a secret trust, assented to by them, that it should be held for a charity. The devisee of the surviving trustee filed his bill alleging the secret trust, & asking for the direction of the ct.:—*Held*: as there could be no escheat of an equitable interest, the estate was held in trust for the testator's heir-at-law.—SWEETING v. SWEETING (1863), 3 New Rep. 240; 33 L. J. Ch. 211; 9 L. T. 783; 10 Jur. N. S. 31; 12 W. R. 239.

298. — —.]—Where a testatrix, having a general testamentary power of appointment over real estate, subject to a gift over in default of appointment, devised the property to trustees upon trust for A., who died in her lifetime:—*Held*: the property remained vested in the trustees as part of the general estate of the testatrix, subject to a resulting trust for her heir-at-law.

Semble: if the heir-at-law could not be found, the title of the trustees was good as against the Crown.—*Re* VAN HAGAN, SPERLING v. ROCHFORD (1880), 16 Ch. D. 18; 50 L. J. Ch. 1; 44 L. T. 161; 29 W. R. 84, C. A.

*Annotations:—*Distd. *Re* Boyd, Kelly v. Boyd, [1897] 2 Ch. 232. *Reid.* *Re* Scott, Scott v. Hanbury, [1891] 1 Ch. 298; *Re* Elen, Thomas v. McKechnie (1893), 68 L. T. 816; *Coxen v. Rowland*, [1894] 1 Ch. 408; *Re* Hadley, Johnson v. Hadley, [1909] 1 Ch. 20; *Re* Pryce, Lawford v. Pryce (1911), 105 L. T. 51. *Mentd.* *Re* Ickeringill's Estate, Hinsley v. Ickeringill (1881), 17 Ch. D. 151.

— **Trust in favour of alien.]—**See ALIENS, Vol. II., p. 137, Nos. 120–122.

299. — Equitable mortgage.]—Equitable mtgee. may sell against the Crown. *Semble*: no escheat of an equitable interest.—PRESCOTT v. TYLER (1837), 1 Jur. 470.

*Annotations:—*Reid. Hodges v. A.-G. (1839), 8 L. J. Ex. Eq. 28; Masulipatam v. Cavalry Vencata Narrainapah (1861), 8 Moo. Ind. App. 529.

300. — — Failure of heirs of mortgagor—Right of Crown to equity of redemption.]—A died intestate, unmarried & illegitimate, having mortgaged his real estates to B. for 500 years, & having subsequently mortgaged them to B. for an additional sum, by deposit of the title-deeds. The fee-simple was not worth the mortgage-money:—*Held*: the mtgor. could not be deemed a bare trustee for the mtgee. within 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the Crown of the equity of redemption.—ROGERS v. MAULE (1841), 1 Y. & C. Ch. Cas. 4; 62 E. R. 765.

301. — Legal mortgage.]—A. made a mtge. in fee, & died intestate & without heirs:—*Held*: the equity of redemption did not escheat to the Crown, but belonged to the mtgee., subject to the debts.—BEALE v. SYMONDS (1853), 16 Beav. 406; 22 L. J. Ch. 708; 22 L. T. O. S. 61; 1 W. R. 137; 51 E. R. 835.

*Annotations:—*Mentd. Kinderley v. Jervis (1856), 22 Beav. 1; Catley v. Sampson (1864), 33 Beav. 551.

— **Of copyholds.]—**See COPYHOLDS, Vol. XIII., p. 150, Nos. 1950–1957.

302. Effect of Intestates' Estate Act, 1884 (c. 71)—Escheat to Crown.]—A testatrix died without an heir, having devised a house of which she was legally seised in fee simple to her exors., upon trust for sale, & out of the proceeds to pay her debts, funeral expenses, & legacies. There was no gift of residue:—*Held*: the balance of proceeds of sale, after paying the debts, expenses, & legacies, did not belong to the exors. for their own benefit, but escheated to the Crown.—*Re* WOOD, A.-G. v. ANDERSON, [1896] 2 Ch. 596; 65 L. J. Ch. 814; 75 L. T. 28; 44 W. R. 685; 12 T. L. R. 522; 40 Sol. Jo. 651.

*Annotation:—*Mentd. Gresham Life Assco. Soc. v. Crowther, [1914] 2 Ch. 219.

303. — Vesting order.]—Where the Crown has become entitled to the legal estate in the entirety of a trust estate of a testator, & also to a beneficial interest in a moiety thereof, the ct. cannot, upon an application under the Trustee Acts for the appointment of new trustees of the will & a vesting order, make a vesting order against the Crown, but an application must be made to the ct., under Intestates' Estates Act, 1884 (c. 71), s. 5.—*Re* PRATT'S TRUSTS (1886), 55 L. T. 313; 34 W. R. 757.

C. Property of Dissolved Corporations.

See Law of Property Act, 1922 (c. 16), s. 148.

304. Real estate of corporation—Escheat to grantor.]—JOHNSON v. NORWAY (1622), Win. 37; 124 E. R. 32.

305. — —.]—BURGESS v. WHEATE, A.-G. v. WHEATE, No. 286, ante.

306. — —.]—In the case of mere dissolution, as by the death of all the members, the real property of a corpn., does not escheat to the Crown but reverts to the donor or his heir (LORD DENMAN, C.J.).—COLCHESTER CORPN. v. BROOKE (1846), 7 Q. B. 339; 15 L. J. Q. B. 173; 10 Jur. 610; 115 E. R. 518.

*Annotations:—*Mentd. Dimes v. Petley (1850), 15 Q. B. 276; R. v. Betts (1850), 16 Q. B. 1022; Potter v. Berry (1857), 21 J. P. Jo. 756; Tuff v. Warman (1857), 2 C. B. N. S. 740; Morant v. Chamberlin (1861), 6 H. & N. 541; Gann v. Whitstable (Free Fishers) (1865), 11 H. L. Cas. 192; Whitstable Fishers v. Foreman (1867), L. R. 2 C. P. 688; Northumberland v. Houghton (1870), L. R. 5 Exch. 127;

Jolliffe v. Wallasey L. B. (1873), L. R. 9 C. P. 62; *McCarthy v. Metropolitan Board of Works* (1873), L. R. 8 C. P. 191; *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Thames Conservators v. Smeed, Dean*, [1897] 2 Q. B. 334; *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; *The Swift*, [1901] P. 168; *Liverpool & North Wales S. S. Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460; *The Bien*, [1911] P. 40.

See, further, **BANKRUPTCY**, Vol. IV., p. 340, No. 3200; **COMPANIES**, Vol. X., pp. 986, 1033, 1034, Nos. 7165, 7166, 7169; **CORPORATIONS**, Vol. XIII., pp. 436, 437, Nos. 1599–1603.

SUB-SECT. 3.—ESCHEAT TO CROWN.

See *Law of Property Act*, 1922 (c. 16), s. 148.

307. Whether Crown seised—Before office found.]—*YONGE v. CONWEY* (1580), Sav. 7; 123 E. R. 982.

Annotation:—*Reid. Harper v. Charlesworth* (1825), 3 L. J. O. S. K. B. 265.

308. ———.]—*DOWTIE'S CASE*, A.-G. v. DOWTIE (1584), 3 Co. Rep. 9 b; 76 E. R. 643.

Annotations:—*Reid. Reynel's Case* (1612), 9 Co. Rep. 95 a; *Grosse v. Gayer* (1629), Cro. Car. 172. *Mentd. Stukeley v. Butler* (1614), Hob. 168; *Sheffield v. Ratcliffe* (1615), Hob. 334; *Brockham's Case* (1628), Litt. 128; *Stone v. Newman* (1635), Cro. Car. 427; *Foot v. Berkley* (1666), O. Bridg. 527; *Sidney v. Hulme* (1815), 6 Taunt. 177; *Doc d. Beach v. Jersey* (1818), 1 B. & Ald. 550; *Zetland v. Lord Advocate* (1878), 3 App. Cas. 505; *Eastwood v. Ashton*, [1915] A. C. 900.

See, also, **CONSTITUTIONAL LAW**, Vol. XI., p. 576, No. 775.

——— **Before inquisition.]**—See **CONSTITUTIONAL LAW**, Vol. XI., pp. 576, 577, Nos. 776, 777.

Procedure on inquisition of escheat.]—See **CROWN PRACTICE**, Vol. XVI., pp. 247–248, Nos. 450–461.

309. Effect of Land Transfer Act, 1897 (c. 65) —Whether Crown bound by.]—*Land Transfer Act*, 1897 (c. 65), does not bind the Crown, & therefore, the legal estate in escheated land does not, under sect. 1, vest in the Solr. to the Treasury as the Crown's nominee.—*In the Goods of HARTLEY*, [1899] P. 40; 68 L. J. P. 16; 47 W. R. 287.

Annotation:—*Distd. Talbot v. Jevvers*, [1917] 2 Ch. 363.

310. ———.]—*In the Goods of BALL* (1902), 47 Sol. Jo. 129.

311. ———.]—*Re SUAREZ* (No. 2) (1924), 59 L. Jo. 119.

312. Doctrine of notional conversion—Does not apply for or against Crown.]—Although the Crown may claim the personal property of a person dying intestate, leaving no next of kin, yet the royal prerogative does not extend so far as to call upon a Ct. of Equity to convert real estates into personalty for the sake of claiming it as such.—*TAYLOR v. HAYGARTH* (1844), 14 Sim. 8; 2 L. T. O. S. 437; 8 Jur. 135; 60 E. R. 259.

Annotations:—*Distd. Re Bond, Panes v. A.-G.* [1901] 1 Ch. 15. *Folld. Talbot v. Jevvers*, [1917] 2 Ch. 363. *Reid. Powell v. Merrett* (1853), 1 Sm. & G. 381; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Masulipatam v. Cavalry Vencata Narrainapah* (1861), 8 Moo. Ind. App. 529; *Re Bacon's Will, Camp v. Coe* (1886), 31 Ch. D. 460. *Mentd. Downe v. Morris* (1844), 3 Hare, 394; *Beale v. Symonds* (1853), 16 Beav. 406; *Cunnack v. Edwards* (1895), 13 R. 334.

313. ———.]—The equitable doctrine of

notional conversion of land into money or money into land has no application to the rights of the Crown in cases of forfeiture, escheat or *bona vacantia*.—*TALBOT v. JEVERS*, [1917] 2 Ch. 363; 86 L. J. Ch. 731; 117 L. T. 430, C. A.

314. Money in court arising from sale of land of lunatic—Under 9 Geo. 4, c. 78.]—A fund in ct. arising from the sale of freeholds of a lunatic, being under 9 Geo. 4, c. 78, s. 2, to be considered as realty, the heir-at-law of the lunatic having died insane whilst a felon under transportation, without ever having had an opportunity to elect to take the fund as personalty:—*Held*: the fund must be considered as remaining impressed with the character of realty, & the heir-at-law of the felon, & not the Crown, was entitled to the fund.—*Re WHARTON* (1854), 5 De G. M. & G. 33; 23 L. J. Ch. 522; 22 L. T. O. S. 298; 18 Jur. 299; 2 W. R. 248; 43 E. R. 781, L. J. J.

Annotations:—*Consd. Re Alston, Sinclair v. Willes*, [1917] 2 Ch. 226; *Talbot v. Jevvers*, [1917] 2 Ch. 363.

315. Regrant by Crown—To person discovering escheat.]—It is perfectly familiar, that where an interest of such a kind is given to charity, or, where there is an escheat for want of heirs, & the fact is not communicated, it is usual to petition the king, stating that there is such an interest, & praying some reward upon the ground of discovery, if it can be made out. That is familiar practice, whether well or ill founded. It occurred in my experience, when Solicitor-General & A.-G., in several instances as to escheat; & the ordinary rule upon an escheat is for the Crown to give a lease, as good a lease as it can give, to the person making the discovery (*LORD ELDON, C.*).—*MOGGRIDGE v. THACKWELL* (1803), 7 Ves. 36; 32 E. R. 15, L. C.; *affd.* (1807), 13 Ves. 416, H. L.

Annotations:—*Reid. Cary v. Abbot* (1802), 7 Ves. 490; *Mills v. Farmer* (1815), 1 Mer. 55; *Reeve v. A.-G.* (1843); 3 Hare, 191; *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876. *Mentd. Morice v. Dunham* (1804), 9 Ves. 399; *Palce v. Canterbury Archbp.* (1807), 14 Ves. 364; *Ominanney v. Butcher* (1823), Turn. & R. 260; *A.-G. v. Ironmongers' Co.* (1833), 3 L. J. Ch. 11; *Ellis v. Selby* (1836), 5 L. J. Ch. 214; *Martin v. Margham* (1844), 14 Sim. 230; *Nightingale v. Goulbourn* (1848), 2 Ph. 594; *Marsh v. Means* (1857), 30 L. T. O. S. 89; *In the Goods of Tierney* (1861), 5 L. T. 247; *Lyons Corp'n. v. Bengal Advocate-General* (1876), 1 App. Cas. 91; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Biscoe v. Jackson* (1887), 56 L. T. 753; *Re Slevin, Slevin v. Hepburn*, [1891] 1 Ch. 373; *Re Pyne, Lilley v. A.-G.*, [1903] 1 Ch. 83; *Bourne v. Keane*, [1919] A. C. 815; *Re Eades, Eades v. Eades*, [1920] 2 Ch. 353; *Re Willis, Shaw v. Willis*, [1921] 1 Ch. 44.

316. ———.]—In the year 1827, letters of preference of escheated property in the Island of Jamaica were granted under the Great Seal of the Island, by the terms of which it was provided, that the grantee should, within twelve months from the date thereof, or for such further time as the Governor of the Island should limit & appoint, take the necessary steps to prosecute the rights of the Crown to the escheated property, otherwise the preference thereby given was to be void. The grantee entered into possession & received the rents & profits, but took no further steps to prosecute the escheat to final judgment for the

the proper officer, & the usual receipt given for it as quit rent:—*Held*: the right of the Crown to the land on the determination of the estate tail, was barred by 48 Geo. 3, c. 47, the case not coming within any of the exceptions in the first section of that Act.—*TUTHILL v. ROGERS* (1844), 6 I. Eq. R. 429.—*IR.*

t. Rights of the Crown.]—Where a person has died leaving no will, & no blood relations surviving him, the estate becomes the property of the Crown after forty years. The Crown cannot, prior to the expiry of forty

PART VII. SECT. 1, SUB-SECT. 3.

q. Whether grounds for refusing administration.]—The fact that deceased's property has escheated to the Crown is no ground for refusing the issue of letters of administration.—*CRANSTON v. NATIONAL TRUST CO., LTD.* (1920), 1 W. W. R. 852; 51 D. L. R. 474; 15 Alta. L. R. 284.—*CAN.*

r. Universal law.]—It is a matter of universal law that on the death of the last owner without heirs, his real property escheat to the Crown.—*MASULIPATAM v. NARAINAPAH* (1860),

3 L. T. 221.—*IND.*

s. Barred by adverse possession.]—By letters patent, lands were granted to G. in tail male, & the amount of quit-rent prescribed by Act of Settlement was reserved. In 1681 G. conveyed to S. & his heirs, saving the estate & right of the Crown. In 1776, the estate tail determined by failure of issue male. The representatives of S. remained in possession of the lands down to the filing of the bill in 1841, & dealt with the estate as an absolute estate in fee. The rent reserved by the letters patent was regularly paid to

Sect. 1.—Escheat: Sub-sects. 3 & 4. Sect. 2: sects. 1 & 2.]

Crown. Upon an information filed in 1835, by the A.-G. of Jamaica, praying that the grantee might be declared accountable to the Crown, in respect of the rents & profits received by him since he had been in possession:—*Held*: the grantee was bound to prosecute the escheat to final judgment for the Crown within a proper time; & he was liable to account to the Crown for the rents & profits received by him, from the time of entering into possession.—*MASON v. A.-G. OF JAMAICA* (1843), 4 Moo. P. C. C. 228; 13 E. R. 289; *sub nom. MASON v. O'REILLY*, 7 Jur. 1071, P. C.

SUB-SECT. 4.—ESCHEAT OF COPYHOLDS.

See COPYHOLDS, Vol. XIII., pp. 150–152, Nos. 1950–1973; Law of Property Act, 1922 (c. 16), s. 148.

SECT. 2.—BONA VACANTIA.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1922 (c. 16), s. 150.

317. General rule.]—A bastard dies intestate without wife or issue; the king is entitled, & the ordinary of course grants administration to the patentee or grantee of the Crown.—*JONES v. GOODCHILD* (1729), 3 P. Wms. 33; 2 Eq. Cas. Abr. 168; 24 E. R. 958, L. C.

Annotations:—*Refd.* *Loy v. Duckett* (1841), (r. & Ph. 305. *Mentd.* *Pluck v. Digges* (1831), 5 Bli. N. S. 31; *Reynolds v. Wright* (1858), 25 Beav. 100; *Wright v. Chappell* (1869), 20 L. T. 369.

318. —.]—If a person dies intestate, & without leaving any sort of relations in blood, administration is granted to the nominee of the Crown, but the most remote relation defeats the king's title.—*STOTE v. TYNDALL* (1757), 2 Lee, 394. *Annotation*:—*Refd.* *Dyke v. Wallis* (1862), 2 Sw. & Tr. 466.

319. —.]—A. R., a bastard, spinster, domiciled in the County Palatine of Lancaster, having died intestate in the county, the Treasury Solicitor applied for letters of administration as the nominee of the Crown. The application was opposed by the solr. for the Duchy of Lancaster, as nominee of her Majesty in right of her Duchy & County Palatine of Lancaster:—*Held*: (1) the right to goods of persons dying intestate without leaving husband, widow, or next of kin has, from the earliest times, been vested in the Crown, & the Church never had any beneficial interest in the goods of intestates, but a right of jurisdiction & administration & of possession for that purpose; (2) Edward III. having by Charter granted to John of Gaunt the county of Lancaster as a county Palatine "*et quaecumque alia libertates et jura regalia ad Comitum Palatinum pertinentia adeo integre et libere sicut Comes Cestrie infra eundem Comitatum Cestrie dinoscitur obtinere*," such grant carried the right to *bona vacantia* as *jura regalia* to the County Palatine; & Her Majesty having succeeded to all the rights of the said Duchy by a title distinct from her title to the Crown, was entitled in right of her Duchy to the goods of a bastard dying intestate in the said

years from the date of death, waive its claim to the estate, there being no vested right in the Crown until the expiry of the forty years.—*Ex p. LEEUW* (1905), 22 S. C. 340.—S. AF.

a. *High treason.*—Possessor's attainder for high treason vests the

estate in the Crown absolutely out & out.—*PERTH (EARL) v. ELPHINSTONE (LORD)* (1871), L. R. 2 Sc. & Div. 139.—SCOT.

PART VII. SECT. 2, SUB-SECT. 1.

b. *Casual revenues of Dominion & Provinces.*—*Bona vacantia* within a

Duchy.—*DYKE v. WALFORD* (1848), 5 Moo. P. C. C. 434; 6 State Tr. N. S. 699; 6 Notes of Cases 309; 12 Jur. 839; 13 E. R. 557, P. C.

Annotations:—*As to* (1) *Consd. Re Barnett's Trusts*, [1902] 1 Ch. 847. *Refd. Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612. *As to* (2) *Refd. A.-G. of Ontario v. Mercer* (1883), 8 App. Cas. 767; *R. v. A.-G. for British Columbia* (1923), 40 T. L. R. 13. *Generally, Mentd.* *Gorham v. Exeter Bp.* (1850), 15 Q. B. 52; *R. v. Suffolk JJ.* (1852), 18 Q. B. 416; *A.-G. v. Brunning* (1859), 4 H. & N. 94; *A.-G. v. British Museum Trustees*, [1903] 2 Ch. 598.

320. —.]—The prisoner was convicted upon an indictment charging her with stealing numerous articles, laid as the property of the ordinary. The evidence was, that the articles, which belonged to a deceased person, were after her death found in the possession of the prisoner: that search had been made for a will, & none found: & that a small portion only of the articles had been seen in the house of the deceased after her death:—*Held*: the property was rightly laid in the ordinary.—*R. v. JOHNSON* (1857), Dears. & B. 340; 27 L. J. M. C. 52; 30 L. T. O. S. 158; 21 J. P. 774; 4 Jur. N. S. 55; 6 W. R. 64; 7 Cox, C. C. 379, C. C. R.

321. —.]—The personal estate of an intestate who leaves no next of kin belongs absolutely to the Crown as part of the *Droits* of the Crown. The fact that these *Droits* are now by statute paid into the Treasury, & made to form part of the Public Revenue, makes no difference in this matter.

Money paid to one Sovereign in this right cannot, if improperly paid, be recovered from that Sovereign's successor.

The nominee of the Crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. If he improperly pays to the Crown part of the intestate's effects, though such payment is made under authority of a warrant under the Sign Manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled.

Upon his death that liability only continues against his personal representatives, & not against his successor in office.—*A.-G. v. KÖHLER* (1861), 9 H. L. Cas. 654; 5 L. T. 5; 8 Jur. N. S. 467; 9 W. R. 933; 11 E. R. 885, H. L.

Annotations:—*Mentd.* *Eames v. Hacon* (1880), 16 Ch. D. 407; *Re Gosman* (1880), 15 Ch. D. 67; *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552; *Re Sharpe, Re Bennett, Masonic & General Life Assce. Co. v. Sharpe*, [1892] 1 Ch. 154.

322. Crown's right cannot be defeated—By gift over expressed to be to defeat right.]—A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, & in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers & provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then & in every such case the estate, interest or benefit should belong to & be held in trust for her father for life, & after his death, for her mother. W. having died intestate, the Crown claimed the fund:—*Held*: the fund vested absolutely in W., at her death, & the gift over was repugnant & void; & consequently the Crown was entitled to the fund.—

province fall within the term "royalties" as used in B. N. A. Act, 1867, s. 110, & although arising from personal estate, form part of the casual revenues of that province.—*R. (A.-G. FOR CANADA) v. A.-G. FOR BRITISH COLUMBIA & RITHET*, [1922] 3 W. W. R. 269.—CAN.

Re WILCOCKS' SETTLEMENT (1875), 1 Ch. D. 229; 45 L. J. Ch. 163; 33 L. T. 719; 24 W. R. 290.

SUB-SECT. 2.—WHAT ARE BONA VACANTIA.

See Law of Property Act, 1922 (c. 16), s. 150.

323. Debt due to deceased suicide.]—Declarations stated that the testator, at the time of his death, was indebted to J. Y. in £200 & interest, upon a promissory note. That after the death of J. Y., the note being unpaid, it was found before the coroner, upon view of the body of J. Y. then lying dead, by the oaths of lawful men, that J. Y. was *felo de se*, *prout patet per recordum* of the inquisition; by reason of which inquisition & felony, J. Y. forfeited the note, etc., to the King. That the King, by grant under his sign manual, assigned the note to pltf. as mentioned in a certain other inquisition, & delivered the note to pltf. of which defts., after testator's death, had notice:—*Held*: the declaration sufficiently showed the note to be a security for a debt, & the debt & security passed to the Crown by operation of law, & were assignable by the Crown without indorsement.—*LAMBERT v. TAYLOR* (1825), 4 B. & C. 138; 6 Dow. & Ry. K. B. 188; 3 L. J. O. S. K. B. 160; 107 E. R. 1010.

Annotations:—*Mentd.* *Doe d. Watt v. Morris* (1835), 1 Hodg. 215; *Plummer v. Lee* (1837), 5 Dowl. 755; *Gwynne v. Burnell* (1840), 1 Scott, N. R. 711; *R. v. Toole* (1867), 11 Cox, C. C. 75.

324. Intestate leaving widow & no next of kin—Crown entitled to half personal estate.]—*CAVE v. ROBERTS*, No. 193, *ante*.

325. Unclaimed shares in public company.]—E. W. being entitled to twenty shares in a company, by his will gave them to H. W., his wife, who survived E. W., & became absolutely entitled to the shares, & died, having disposed of all her property by will. The shares were never claimed by H. W., nor by any other person, during 150 years from testator's decease, when, at the expiration of that period, pltf. claimed them. The beneficial interest in five of the shares had devolved on pltf.'s deceased wife in her lifetime; & pltf. having administered to her, & having obtained administration *de bonis non* with her will annexed, to H. W., & administration *de bonis non* with his will annexed to E. W., & likewise administration to all the intermediate parties through whom he claimed in right of his deceased wife, filed a bill against the governing officers of the company, for payment to himself of the fund by which the original twenty shares were then represented in their hands:—*Held*: he was entitled to receive

payment of one-fourth of the fund only; & in default of any party appearing to be beneficially entitled to the residue of the fund, the Crown was entitled thereto, & such residue ought to be brought into ct. & secured.—*LOY v. DUCKETT* (1841), Cr. & Ph. 305; 5 Jur. 1050; 41 E. R. 507, L. O.

Annotations:—*Mentd.* *Adams v. Barry* (1845), 2 Coll. 285; *Pennington v. Buckley* (1848), 6 Hare, 451; *Partington v. A.-G.* (1869), L. R. 4 H. L. 100; *Trevor v. Hutchins*, [1896] 1 Ch. 844.

See, also, COMPANIES, Vol. IX., pp. 404 *et seq.*, Vol. X., pp. 1145, 1217, 1218.

326. After acquired property—Of wife of felon.]—*COOMBS v. QUEEN'S PROCTOR*, No. 185, *ante*.

327. — Of pardoned felon.]—G. was convicted of felony in 1812, & sentenced to death; his sentence was commuted into transportation for life. In 1841 he received an absolute pardon from the governor of the penal colony, which was approved by the Crown. In 1855 he became entitled under a contingency in a will, which had taken effect, to a share in certain personal estate, as one of the testator's next of kin:—*Held*: as against the Crown, G. was entitled, under Transportation Act, 1824 (c. 84), s. 26, to his share in this personal estate.—*GOUGH v. DAVIES* (1856), 2 K. & J. 623; 25 L. J. Ch. 677; 27 L. T. O. S. 181; 20 J. P. 515; 4 W. R. 618; 69 E. R. 931.

Annotation:—*Reid.* *Talbot v. Jeyers* (1917), 117 L. T. 430.

328. — Of outlaw.]—By the death of an intestate certain personal property descended on B., an outlaw, & C. his sister. A. judgment-creditor of B. filed a bill against him & C. for the administration of the estate & for satisfaction of the debt out of B.'s share. C. pleaded that B. was an outlaw, & that his property was vested in the Crown, but did not aver the enrolment of the outlawry:—*Held*: the plea was good.—*TAYLOR v. WEMYSS* (1869), L. R. 8 Eq. 512; 39 L. J. Ch. 65; 20 L. T. 599; 17 W. R. 639.

329. Proceeds of sale under Settled Land Act, 1882 (c. 38).]—Land was devised by an owner in fee simple to one for life with no devise over. Testator died in 1882, without an heir. The land was sold by the tenant for life under the powers of the Settled Lands Acts, & a fund representing the proceeds of sale remained in the hands of trustees appointed for the purposes of the Acts. On the death of the tenant for life:—*Held*: the fund was a money fund which vested in the Crown as *bona vacantia*.—*Re BOND, PANES v. A.-G.*, [1901] 1 Ch. 15; 73 L. J. Ch. 12; 82 L. T. 612; 49 W. R. 126; 44 Sol. Jo. 467.

Annotation:—*Reid.* *Talbot v. Jeyers*, [1917] 2 Ch. 363.

See, also, Nos. 312–314, *ante*.

330. Personal property of intestate domiciled

of the bank might deem expedient. M. died, intestate, unmarried, without next of kin, & the Public Trustee administered the estate:—*Held*: there was no resulting trust in favour of the bank either solely or jointly with M. & the proceeds of the policy went to the Crown as *bona vacantia*.—*Re MAWDSLEY* (1916), 12 Tas. L. R. 83.—*AUS.*

f. Presumption of death of next of kin—Property passing on.]—A. dies in Sept. 1896, B., her son, had previously left Newfoundland and had not been heard of after Mar. 1895. Administration to his estate is granted to pltf. in 1903. In an action by pltf. against def., who is administrator of A.'s estate, to compel the distribution of her estate amongst his next of kin now living:—*Held*: the administrator of the estate of the mother be at liberty to distribute her estate as though the son did not survive the mother, & the estate of the mother being *bona*

D

PART VII. SECT. 2, SUB-SECT. 2.

c. Intestate leaving husband & no issue or next of kin—Crown taking half of wife's estate.]—The husband, of a married woman dying intestate & leaving no children or known next of kin, takes one half only of his wife's estate, the Crown taking the other half as *bona vacantia*.—*A.-G. FOR VICTORIA v. EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD.* (1915), 19 C. L. R. 404.—*AUS.*

d. Testator leaving widow or husband & no next of kin—Crown entitled to half personal estate.]—A testator by will made a specific bequest to his wife for life, & bequeathed the residue of his estate to trustees for sale & conversion & out of the proceeds to pay his debts & legacies, but made no disposition of the residue. The trustees realised the personal estate, & after paying the debts & legacies, had a large surplus on their hands. Testator had no next of kin:—*Held*: the

Crown was entitled to so much of the moiety as represented personal estate.—*A.-G. v. M'PHERSON* (1877), 3 V. L. R. 270.—*AUS.*

e. Policy on life of bank officer—Assigned to bank as security.]—M. a bank officer, in pursuance of an endowment scheme insured his life & assigned the policy to the bank upon a deed of trust. The bank paid the premiums deducting one moiety from the officer's salary. The deed of trust provided that if M. died with not less than ten years service the bank should retain the moiety of premium paid by it & if he died with more than ten years service, should retain a portion diminishing with his length of service, & hold the balance of the proceeds in trust for his widow, children, & dependants, as he would by his will appoint & in default of appointment for the widow, children, father, mother, brothers & sisters of M. & his legal personal representatives as the directors

DESCENT AND DISTRIBUTION.

Sect. 2.—Bona vacantia: Sub-sects. 2, 3, 4, 5 & 6.]

abroad.]—A soldier died in India, a bachelor, bastard, & intestate, leaving personal estate in this country:—*Held*: the Crown was entitled to the estate as *bona vacantia*, the right claimed not being in the nature of a succession.—*In the Estate of BELL* (1908), 52 Sol. Jo. 600.

See, also, CONFLICT OF LAWS, Vol. XI., p. 369, Nos. 489, 490.

Personal property of dissolved corporation.]—*See* CORPORATIONS, Vol. XIII., p. 437, No. 1604.

Property held by trustee in bankruptcy.]—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., p. 340, No. 3200.

Failure of objects of friendly society.]—*See* FRIENDLY SOCIETIES.

SUB-SECT. 3.—RIGHTS OF CROWN AGAINST EXECUTOR TO UNDISPOSED OF RESIDUE.

See EXECUTORS & ADMINISTRATORS; Law of Property Act, 1922 (c. 16), s. 150 (3).

SUB-SECT. 4.—PROCEEDINGS BY CROWN TO RECOVER.

See Law of Property Act, 1922 (c. 16), s. 150.

331. Grant to third party "for the use & benefit of Crown"—Administrator answerable for debt of intestate.]—The effects of an intestate having vested in the Crown by forfeiture, if letters of administration are granted to A. in consequence of a warrant from the King, & they run in the usual form, *viz.* "to pay debts, etc." but with this additional clause, "for the use & benefit of His Majesty," A. shall be answerable as administrator for the debts of the intestate, & shall not be permitted to give evidence tending to question the validity of the letters of administration.—*MEGIT v. JOHNSON* (1780), 2 Doug. K. B. 542; 99 E. R. 344.

332. — Crown refusing to proceed — Grant revoked at instance of creditor.]—Administration to the Crown's nominee decreed, but not extracted, revoked at the instance of a creditor, without a fresh warrant; & an administration granted to the creditor, with the consent of the Queen's proctor, & upon the original decree & advertisements on behalf of the Crown.—*In the Goods of STEINORTH* (1856), Dea. & Sw. 270; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.

333. Limited grant in favour of Crown.]—Where a seaman died a bachelor, a bastard, & intestate leaving a sum due for wages, as well as other personal estate, the ct. declined to decree a general grant of administration of his personal estate to the Solicitor for the Treasury, the provisions of 11 Geo. 4, c. 20, not having been complied with, but decreed a grant save & except the deceased's pay & prize-money.—*In the Goods of BEAVAN* (1865), L. R. 1 P. & D. 15; 35 L. J. P. & M. 25; 13 L. T. 608; 11 Jur. N. S. 982; 14 W. R. 147.

vacantia be paid to the Crown.—*Re CAIRNS, BROWNING v. WINTER* (1906), 9 Nfld. L. R. 187.—NFLD.

g. Personal estate of deceased intestate with no next of kin.]—*R. v. TRUSTS GUARANTEE CO.* (1916), 26 D. L. R. 137; 54 C. C. R. 107.—CAN.

h. British North America Act, 1867 (c. 3)—Right of Crown.]—By sect. 109 of the above Act, "all lands, mines, minerals, & royalties belonging to the

several Provinces" are to belong to the Province in which the same are situated or arise. Unless *bona vacantia* came within the above words, they belonged to the Crown in the right of the Dominion by sect. 102:—*Held*: in the construction of sect. 109 the *ejusdem generis* rule was not applicable, & the Crown took in the right of the Province.—*R. v. A.-G. FOR BRITISH COLUMBIA* (1923), 40 T. L. R. 13.—CAN.

334. — Partial intestacy.]—Where a bastard having no relations, makes a will disposing of a part only of his or her property, the Crown has a right to a grant save & except, or to a *cacterorum* grant, but not to a general grant of administration, & the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will.—*In the Goods of RHOADES* (1866), L. R. 1 P. & D. 119; 35 L. J. P. & M. 125.

SUB-SECT. 5.—PROCEEDINGS BY NEXT OF KIN AGAINST CROWN.

335. Claim against Crown—Advance out of fund not made to claimant.]—Pltfs. claimed, as next of kin of an intestate, a fund which was in the possession of deft. as the nominee of the Crown, & after the master had reported against pltf.'s title, the ct. directed certain issues for the purpose of trying it. Pltfs. applied for an advance out of the fund, to enable them to try the issues; but this, which was opposed by the Crown, the ct. refused.—*NYE v. MAULE* (1839), 4 My. & Cr. 342; 8 L. J. Ch. 329; 3 Jur. 669; 41 E. R. 133, L. C.

Annotations:—*Reid. Johnston v. Todd* (1841), 3 Beav. 218; *Coombs v. Brookes* (1849), 13 Jur. 784.

336. — Effect of death of Sovereign.]—*A.-G. v. KÖHLER*, No. 321, *ante*.

337. — Effect of death of nominee of Crown.]—*A.-G. v. KÖHLER*, No. 321, *ante*.

338. Pedigree—Evidence.]—*ROBSON v. A.-G.* (1843), 10 Cl. & Fin. 471; 1 L. T. O. S. 526; 8 E. R. 820, H. L.; *previous proceedings, sub nom. MONKTON v. A.-G.* (1831), 2 Russ. & M. 147, L. C.

Annotations:—*Consd. Slaney v. Wado* (1836), 7 Shu. 595. *Reid. Davies v. Lowndes* (1843), 6 Man. & G. 471; *Rishton v. Nesbitt* (1844), 2 Mood. & R. 554. *Mentd. Nye v. Maule* (1839), 3 Jur. 669; *Lord Advocate v. Douglas* (1842), 9 Cl. & Fin. 173; *Mushadee Sherazee v. Meerza Shoostry* (1851), 7 Moo. P. C. C. 382.

339. — Information acquired from solicitor.]—*Re PALMES, PALMES v. R.*, [1901] W. N. 146.

340. — How pleaded.]—The pedigree of parties claiming to be related to a deceased intestate, as against the Queen's Proctor's allegation of bastardy, must be set out, but it is sufficient to aver that B. was the legitimate child of A. & his lawful wife, without stating the time or place of the marriage, or the name of the wife or the date of the birth of B.—*DYKE v. WALLIS* (1862), 2 Sw. & Tr. 466; 6 L. T. 227; 10 W. R. 631; 164 E. R. 1077; *sub nom. QUEEN'S PROCTOR v. WALLIS*, 31 L. J. P. M. & A. 97; 26 J. P. 487; 8 Jur. N. S. 417.

341. — Not by way of particulars.]—The pedigree of parties claiming to be the next of kin of a deceased intestate, against the Queen's Proctor claiming administration on the ground of bastardy, must be set out in their pleadings & not by way of particulars.—*GRIFFIN v. GREENWOOD* (1868), 19 L. T. 661; 33 J. P. 135.

342. Whether interest payable by Crown—On fund in hands of Crown nominee.]—A., on behalf of the Crown, took out administration to the estate

PART VII. SECT. 2, SUB-SECT. 4.

k. Directing inquiries for next of kin.]—In proceedings where inquiries have been directed for next of kin, if no persons come in after due inquiry & prove their claims, property in the hands of the administrator on trust for the next of kin passes to the Crown as *bona vacantia*.—*Re MENDAY* (1916), 16 N. S. W. S. C. R. 442; 33 N. S. W. N. 141.—AUS.

of B., who, it was alleged, had died without leaving any next of kin, &, as such administrator, sold out a sum of stock belonging to B., & paid the proceeds into the Treasury. Some years after, a suit was instituted by the next of kin of B. against A., & a decree obtained in his favour:—*Held*: interest was payable on the proceeds of the sale of the stock since the time of the sale.—*TURNER v. MAULE* (1849), 3 De G. & Sm. 497; 18 L. J. Ch. 454; 14 L. T. O. S. 62; 14 Jur. 165; 64 E. R. 578.

Annotations:—*Consd.* *Re Dewell, Edgar v. Reynolds* (1858), 4 Drew. 269. *Refd.* *A.-G. v. Köhler* (1861), 9 H. L. Cas. 654.

343. ———.]—On the death of an intestate no next of kin appeared. The Crown nominated the Crown solr. to take out administration. The administrator held the fund, paid all outgoing, &, after a certain time, handed over the fund to the King's Proctor for the use of His Majesty. Afterwards pl'ts. established their title:—*Held*: the Crown must restore the fund, with interest, the interest to be computed from the time when all payments on the part of the estate had been made.—*Re DEWELL, EDGAR v. REYNOLDS* (1858), 4 Drew. 269; 31 L. T. O. S. 50; 4 Jur. N. S. 399; 6 W. R. 404; 62 E. R. 104; *sub nom.* *EDGAR v. REYNOLDS*, 27 L. J. Ch. 562.

Annotations:—*Ap'd.* *A.-G. v. Köhler* (1861), 9 H. L. Cas. 654. *Consd.* *Re Gosman* (1880), 15 Ch. D. 67. *Refd.* *Partington v. Reynolds* (1858), 6 W. R. 615; *Lawrence v. Maule* (1859), 4 Drew. 472; *Bauer v. Mitford* (1860), 3 L. T. 575; *Re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230.

344. ———.]—Where property, no next of kin appearing, had been taken possession of by the solr. to the Treasury, who had paid off all the debts of the intestate, & then paid over the balance to the Crown, &, after some years, the claim of the next of kin was established, & the solr. of the Treasury ordered to pay over the principal amount, with interest, to the next of kin, the interest as well as the principal is chargeable with duty.—*PARTINGTON v. A.-G.* (1869), L. R. 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. PARTINGTON* (1864), 3 H. & C. 193, Ex. Ch.

Annotations:—*Refd.* *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Bell v. Master in Equity of Supreme Court of Victoria* (1877), 2 App. Cas. 560. *Mentd.* *Fleet v. Perrins* (1869), 9 B. & S. 575; *In the Goods of Harding* (1872), L. R. 2 P. & D. 394; *A.-G. v. Cleave* (1873), 31 L. T. 86; *Colquhoun v. Brooks* (1888), 21 Q. B. D. 52; *Smart v. Tranter* (1888), 40 Ch. D. 165; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *A.-G. v. De Prévillé*, [1900] 1 Q. B. 223; *A.-G. v. Selborne*, [1902] 1 K. B. 383; *Northumberland v. I. R. Comrs.*, [1911] 2 K. B. 343; *Dyson v. A.-G.* [1912] 1 Ch. 158; *A.-G. v. Milne*, [1914] A. C. 765; *Drummond v. Collins* (1915), 84 L. J. K. B. 1690; *I. R. Comrs. v. Sheffield & South Yorkshire Navigation Co.*, [1916] 1 K. B. 882; *Re Abergavenny, Nevill v. I. R. Comrs.*, [1923] 2 K. B. 18.

345. ——— On funds paid over by executor of will on intestacy.]—The trustees & exors. of a will administered the estate, & upon its being decided in a suit instituted for the purpose that there was an intestacy, & no heir or next of kin being dis-

covered, the trustees assigned the leasehold property to the solr. for the Treasury, to be held for the benefit of the Crown. The claimants six years afterwards established their claim as next of kin of the testator, & the ct. declared them entitled:—*Held*: the Crown was not chargeable with interest on the rents & profits received from the property while in its possession.—*Re GOSMAN* (1881), 17 Ch. D. 771; 50 L. J. Ch. 624; 45 L. T. 267; 29 W. R. 793, C. A.

346. Costs of party protecting estate—Though found not to be next of kin.]—*Semble*: if a person, believing himself to be next of kin of the deceased, should dispute the claim of the Crown to the property & succeed in the suit, thereby protecting the property for those who have a right to it, he would be entitled to have his costs out of the estate, even though it should turn out that he was no relation whatever of the intestate.—*DYKE v. WILLIAMS* (1871), L. R. 2 P. & D. 239; 40 L. J. P. & M. 33; 24 L. T. 805; 35 J. P. 744; *sub nom.* *DYKE v. WILLIAMS, In the Goods of ELMSLEY*, 19 W. R. 784.

Costs of Crown.]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 531–533, Nos. 349, 351, 352, 358–360.

SUB-SECT. 6.—DUCHIES OF LANCASTER AND CORNWALL.

See Law of Property Act, 1922 (c. 16), s. 150.

347. Duchy of Lancaster—Origin of right.]—*DYKE v. WALFORD*, No. 319, *ante*.

348. ——— Grant *de bonis non*.]—Where an intestate had died leaving no known relatives, & his estate had been partly administered by his widow, who died leaving a will, the ct. made a grant *de bonis non* to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow.—*In the Goods of AVARD* (1886), 11 P. D. 75; 56 L. T. 673.

349. Duchy of Cornwall—Grant to nominee of Duke.]—C. died in Cornwall, intestate, without known relations. The ct. granted letters of administration of his estate for the use of His Royal Highness the Prince of Wales as Duke of Cornwall; but, *semble*: without prejudice, to the rights of the Crown.—*CORNWALL (Duchy SOLICITOR) v. CANNING* (1880), 5 P. D. 114; *sub nom.* *In the Goods of CANNING*, 41 L. T. 737; 28 W. R. 278.

Annotation:—*Mentd.* *In the Goods of Cope* (1890), 15 P. D. 107.

350. ———.]—On motion for grant of letters of administration of an intestate's effects to Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit.—*In the Goods of GRIFFITH* (1884), 9 P. D. 63; 53 L. J. P. 30; 48 J. P. 312; 32 W. R. 524.

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DESTRUCTIVE INSECTS.

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See ALIENS ; HUSBAND AND WIFE ; INFANTS AND CHILDREN ; LUNATICS ; AND PERSONS OF
UN SOUND MIND.

DISCHARGE, ORDER OF.

See BANKRUPTCY AND INSOLVENCY.

DISCLAIMER.

See BANKRUPTCY AND INSOLVENCY.

DISCONTINUANCE.

See PRACTICE AND PROCEDURE.

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DISCOVERY, INSPECTION, AND INTERROGATORIES.

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<i>Bankers' Books, Inspection of</i>	„ BANKERS.	<i>Mandamus to produce Documents</i>	„ CROWN PRACTICE.
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<i>Company, Inspection of Books of</i>	„ COMPANIES.	<i>Particulars</i>	„ PLEADING.
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<i>Inspection of Documents of Corporation by Member</i>	COMPANIES; CORPORATIONS.		

Part I.—In General.

SECT. 1.—NATURE AND EXTENT.

1. **General rule.**—The general rule is, that a deft. is bound to discover all the facts within his knowledge, & to produce all documents in his possession, which are material to the case of pltf. However disagreeable it may be to make the disclosure, however contrary to his personal interest, however fatal to his claims, he is compelled to set forth, on oath, all he knows, believes, or thinks in relation to the matters in question.—*FLIGHT v. ROBINSON* (1844), 8 Beav. 22; 13 L. J. Ch. 425; 8 Jur. 888; 50 E. R. 9.

Annotations:—*Reid. Kerr v. Gillespie* (1844), 7 Beav. 572; *Woods v. Woods* (1844), 4 Hare, 83; *Mansor v. Dix* (1855), 1 K. & J. 451; *Chartered Bank of India, Australia & China v. Rich* (1863), 32 L. J. Q. B. 300; *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602; *O'Shea v. Wood*, [1891] P. 237.

SECT. 2.—EFFECT OF JUDICATURE ACTS AND RULES OF THE SUPREME COURT.

2. **Effect in mode of procedure.**—Any information which, before the passing of the Jud. Acts, could have been obtained in equity by filing a bill of discovery, can now be obtained by inter-

rogatories in any cause before the High Ct. although the cause may have been entered for trial before the Jud. Acts came into operation.—*RAMSDEN v. BREARLEY*, No. 1515, *post*.

3. —.]—Under the Jud. Acts the right to discovery is regulated by the rules previously existing in the Ct. of Ch.—*ANDERSON v. BANK OF BRITISH COLUMBIA*, No. 823, *post*.

4. —.]—*Semble*: the practice of the Ct. of Ch. as to discovery of documents is not materially altered by the Jud. Acts.—*DICKSON v. HARRISON* (1878), 47 L. J. Ch. 686.

5. —.]—The new Act of Parliament [the Judicature Act] abolishes the old system of pleading both at Common Law & equity, & substitutes a new one, but it is preceded by the following note, “where no other provision is made by the Act or these rules, the present procedure & practice remain in force” (*JESSEL, M.R.*).—*WILSON v. CHURCH*, No. 35, *post*.

6. —.]—The proper practice as to the discovery of documents no longer depends upon the orders of the Ct. of Ch., or the C. L. P. Acts, or the custom or practice of the common law cts. It depends upon the orders & rules of the Jud. Acts. The extended principles of the Ct. of Ch.

PART I. SECT. 1.

a. *As evidence—Not necessarily admissible.*—*Semble*: although a party to a cause may be entitled to call for the production of documents in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence.—*CANADA CENTRAL RY. CO. v. McLAREN* (1883), 8 A. R. 564.—CAN.

b. *As aid to fair & proper trial.*—The whole machinery of pleadings, particulars & discovery by production of documents & examination of the parties, is for the purpose of enabling an action to be fairly & properly tried.—*PEARLMAN v. NATIONAL LIFE ASSURANCE CO.* (1917), 39 O. L. R. 141; 12 O. W. N. 72.—CAN.

c. *As incident of relief—When party entitled to relief.*—A bill to set aside leases for fraud, made the solr., who had prepared them, a deft., charging him with being a party to the fraud, praying costs against him,

& interrogating him as to his being privy to the fraud, & as to transactions regarding the preparation of the leases. The solr. pleaded that he knew nothing as to the matters save as the attorney of the other deft., & therefore was privileged from giving discovery. The plea did not deny the fraud or the facts stated in the bill as evidence of it:—*Held*: pltf., being entitled to relief, was entitled to the discovery as incidental to the relief.—*KELLY v. JACKSON* (1849), 13 I. Eq. R. 129.—IR.

d. *Extends to physical examination of person injured—Where nature of injuries in issue.*—The legislation now found in Jud. Act, s. 70, was not intended to do more than give to a party the right, for purposes of discovery only, to the physical examination of the opposite party. The physical examination must, like all examinations for discovery, be confined to the facts in issue, & until the issues are defined a physical examination cannot properly be made. The ex-

amination is strictly confined to a mere examination of the person of the party examined & the physician making it is not entitled to ask questions.—*SALTER v. MAHER* (1922), 69 D. L. R. 539; 51 O. L. R. 516.—CAN.

PART I. SECT. 2.

2 i. *Effect in mode of procedure.*—Since Jud. Act, 1877, the right to discovery as to the proprietorship of a newspaper, conferred by 6 & 7 Wm. 4, c. 76, s. 19, & 32 & 33 Vict. c. 24, may be enforced by interrogatories in an action against the alleged proprietor for a libel published in the newspaper; & deft. in such action cannot protect himself from answering the interrogatories, on the ground that a criminal prosecution for the alleged libel is pending against deft., & that the interrogatories tend to criminate him.—*LEFROY v. BURNSIDE* (1879), 4 L. R. Ir. 340.—IR.

e. *On right of subject—To discovery against the Crown.*—In a

were followed rather than the narrower practice of the cts. of common law (BRETT, L.J.).—JONES v. MONTE VIDEO GAS CO., No. 380, *post*.

7. —.]—They [the Judicature Acts] do not alter the rules as to discovery except so far as there are express rules on the subject. Subject to the rules the old practice remains (JESSEL, M.R.).—A.-G. v. GASKILL, No. 1314, *post*.

8. —.]—The questions arising as to interrogatories & discovery are now governed, not exclusively by what was the practice in Ch., or exclusively by what was the practice at common law, but by the rules under the Jud. Acts (BRETT, L.J.).

Before the Jud. Acts there was a difference between the practice at common law & in chancery as regards discovery from parties. But all these matters are now regulated by the rules under the Jud. Acts (BAGGALLAY, L.J.).—BOLCKOW v. FISHER, No. 1752, *post*.

9. —.]—The rule applicable to proceedings in the Ct. of Ch. before the Jud. Acts as to the sufficiency of an affidavit in which a party claims protection from the production of documents is equally applicable to an affidavit in which the like protection is claimed under the Rules & Orders of the Jud. Act.—A.-G. v. EMERSON, No. 389, *post*.

10. —.]—R. S. C., Ord. 31, merely provides that the parties shall be entitled to discovery in accordance with the terms of the order in cases where, according to the law & practice in cts. of law or equity, there would have been a right to discovery previously to the Jud. Acts (WATKIN WILLIAMS, J.).—HUNNINGS v. WILLIAMSON, No. 90, *post*.

11. —.]—The right of discovery under the present rules of the Supreme Ct. is not in principle more extensive than it formerly was in the Ct. of Ch. (LORD SELBOURNE, C.).—LYELL v. KENNEDY, No. 123, *post*.

12. —.]—It has been held in many cases that the Jud. Acts have not established a new system to interrogatories. They have merely altered the practice & not the law (STEPHEN, J.).—HUNNINGS v. WILLIAMSON, No. 1331, *post*.

13. —.]—The rules & orders under the Jud. Acts as to discovery & inspection apply only to the mode of procedure (BRETT, L.J.).—KEARSLEY v. PHILIPS, No. 1109, *post*.

14. —.]—The right to discovery is not altered or intended to be altered by these new rules [under the Judicature Acts], is not enlarged, & therefore the right to protection on any ground of privilege remains where it was when the question is a question of discovery (KAY, J.).—ROBERTS v. OPPENHEIM, No. 390, *post*.

cause in the Supreme Ct. of Ontario, commenced by petition of right, against the Crown, the suppliant sought discovery under rule 38 by an affidavit of documents made by some officer on behalf of the Crown:—*Held*: in view of the changes in the rules made in 1913, supported by Jud. Act, R. S. O. 1914, s. 2 (a), in view of other circumstances the general rules respecting production of documents are, subject to the control of the ct., applicable to the Crown as well as to the suppliant in an "action" commenced by petition of right.—CROMBIE v. R. (1922), 69 D. L. R. 548; 51 O. L. R. 512; *reversd*. (1923), 52 O. L. R. 72.—CAN.

PART I. SECT. 3.

1. *By party seeking evidence to prove contract illegal—As defence to pending action—Privilege to illegality no bar.*—This ct. will entertain a bill for

a discovery, & to perpetuate evidence in aid of a defence to an action at law on a contract, although the discovery & evidence are to establish that the contract is void, as corrupt, illegal, & unconstitutional, & that both parties were in *pari delicto*.—LONGFIELD v. AUBREY (1825), 1 Hog. 300.—IR.

g. *By landlord—For copy of tenant's lease.*—The landlord having lost his counterpart, has a right to a discovery from his tenant, & the tenant refusing to permit a copy of his lease to be made on the landlord's application & at his expense, shall pay the costs of the bill of discovery.—PERRY v. NEWENHAM (1827), 1 Mol. 72.—IR.

h. *To aid plaintiff to make title to land—& join necessary parties to action.*—A party entitled to certain sums charged upon real estate, files a bill against the inheritor seeking to discover amongst other things whether

15. —.]—The Act of 1873 [Judicature Act, 1873 (c. 66)] deals with the remedies & not with the rights of parties litigant. It was not intended to affect, & does not affect, the quality of the rights & claims which they bring into ct., & submit to the judgment of the ct., whether as plffs. or as defts. But it does not follow that its provisions cannot affect the substance as well as the form of the procedure by means of which these rights are to be ascertained & enforced. Discovery is matter of remedy, & not matter of right (LORD WATSON).

Under the existing system, it is not necessary to apply to one branch of the ct. as auxiliary to another. There is no longer any need of praying for discovery in the statement of claim which is substituted for a bill. Pltf. in every action is entitled to discovery as ancillary to the relief which he claims in the action (LORD HERSCHELL).—IND, COOPE & CO. v. EMMERSON, No. 503, *post*.

16. —.]—NOBEL BROTHERS PETROLEUM PRODUCTION CO. v. STEWART & CO. (1891), 35 Sol. Jo. 546.

SECT. 3.—ACTION FOR DISCOVERY.

17. *Against shipowner—Consignor of goods with fraudulent trade marks.*—An action will lie against shipowners who have shipped goods bearing counterfeits of pltf.'s trade marks for discovery of the names of the consignor from whom the goods were received.—ORR v. DIAPER (1876), 4 Ch. D. 92; 46 L. J. Ch. 41; 35 L. T. 468; 25 W. R. 23.

18. *To aid arbitration proceedings.*—AINS-WORTH v. STARKIE, [1876] W. N. 8; Bitt. Prac. Cas. 78; 1 Char. Cham. Cas. 84.

19. *Not to aid proceedings in foreign court.*—CROWE v. DEL RIO (1769), 9 Sim. 185, n.; 59 E. R. 332.

Annotations:—*Expld.* Bent v. Young (1838), 9 Sim. 180. *Consd.* Dreyfus v. Peruvian Guano Co. (1889), 41 Ch. D. 151. *Refd.* Morris v. Morris (1847), 2 Ph. 205.

20. —.]—Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign ct.—BENT v. YOUNG (1838), 9 Sim. 180; 7 L. J. Ch. 151; 2 Jur. 202; 58 E. R. 327.

Annotations:—*Folld.* Dreyfus v. Peruvian Guano Co. (1889), 41 Ch. D. 151. *Refd.* Transatlantic Co. v. Pietroni (1860), John. 604.

21. —.]—Pltf. filed a bill of discovery to obtain inspection of documents in deft.'s possession in England, in aid of proceedings about to be taken for the recovery of land in India:—*Held*: the property claimed being in India, & deft. being capable of being sued in India, an English ct. was not the proper tribunal to decide upon pltf.'s claim, & a bill of discovery could not be maintained

there were any other incumbrances in existence who ought to be made parties to pltf.'s suit, & also a discovery of all such deeds as would, in case of a sale under the decree of the ct., be necessary for the purpose of enabling pltf. to make title to a purchaser:—*Held*: as to these matters, pltf. was entitled to the discovery he sought from deft.—CLAYTON v. GLENGALL (1837), Craw. & D. Abr. C. 70.—IR.

k. *Joinder of prayer for other relief—Effect of.*—Where a bill is framed & only sustainable for discovery, & concludes by praying "such other & further relief, etc., as to this ct. may seem fit," this is a good ground of demurrer.—MALEY v. HODGENS (1831), Glascock, 41.—IR.

l. — *Does not change nature of action.*—HODGENS v. SCOTT (1827), 2 Mol. 436.—IR.

m. — *Injunction—Not ground*

Sect. 3.—Action for discovery. Sect. 4.]

in aid of such a claim.—**REINER v. SALISBURY (MARQUIS)** (1876), 2 Ch. D. 378; 24 W. R. 843.

Annotation:—**Mentd.** *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

22. ——The ct. will not entertain an action for discovery only in aid of proceedings in a foreign ct.—**DREYFUS v. PERUVIAN GUANO CO.** (1889), 41 Ch. D. 151; 58 L. J. Ch. 471; 60 L. T. 216; 5 T. L. R. 323.

23. Solely to enforce production—Whether maintainable.—A firm of merchants residing abroad brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. Deft. put in a defence stating that the person appointed by defts. was a clerk in a rival & unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. Pltfs. moved under R. S. C., Ord. 25, r. 4, to strike out the defence:—**Held**: although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he could not insist on their being produced to an improper person & the defence disclosed a reasonable answer to the claim.

Qu.: whether an action for the sole purpose of enforcing the production of documents to a particular person will lie.—**DADSWELL v. JACOBS** (1887), 34 Ch. D. 278; 56 L. J. Ch. 233; 55 L. T. 857; 35 W. R. 261, C. A.

Annotation:—**Consd.** *Bevan v. Webb*, [1901] 2 Ch. 59.

SECT. 4.—JOINDER OF PARTIES FOR PURPOSE OF DISCOVERY.

24. Where fraudulent transaction alleged—Liability for costs of discovery—Party privy to the fraud not benefiting thereby.—A party alleged to be privy to a fraud may be made a party to a bill to set aside the fraudulent transaction, for the purpose of discovery & costs. Should he die, his personal representatives unless his estate is alleged to be in some way benefited by the fraud are not proper parties to a suit of this description.—**WALSHAM v. STANTON** (1863), 1 Hem. & M. 322; 2 New Rep. 312; 32 L. J. Ch. 557; 8 L. T. 633; 9 Jur. N. S. 1261; 11 W. R. 771; 71 E. R. 140.

Annotation:—**Mentd.** *Bent v. Yardley* (1865), 2 Hem. & M. 602.

25. ——**Personal representative not answerable.**—**WALSHAM v. STANTON**, No. 24, ante.

26. Solicitors.—**LEGARD v. FOOT** (1673), *Cas temp. Finch* 82; 23 E. R. 44.

27. ——(1) Attorney, submitting to produce title deeds of his client in his possession as

for dismissing action.]—A bill of discovery cannot be dismissed under rule 93, although it prays an injunction *ad interim*.—**WELSH v. FITZSIMMONS** (1835), 4 Ir. L. Rec. N. S. 51.—**IR.**

n. Grounds for relief—Ignorance of plaintiff—On matters as to which information sought.—By an agreement between pltf. & deft., deft. appointed pltf. his sole & exclusive agent to sell lands. The agreement provided that deft. should pay to pltf. as commission or compensation 10 per cent of the gross selling price of "all lands which are sold" during the continuance of the agreement, whether sold by pltf. or by deft. or by any other person, & that such payment should be due & payable & should be made out of the first instalment of purchase-price,

when & as received by deft. Pltf. sold portions of the lands, & claimed commission on a sale made by deft. of the remainder of the lands to a co.:—**Held**: while an action for discovery alone will lie, in such action it would be necessary for pltf. to allege some facts as to absence of knowledge on his part, which would give a ground for such relief; & pltf. could not succeed upon his claim for discovery of the sale made by deft.—**KENNERLEY v. HEXTALL** (1913), 23 W. L. R. 205; 10 D. L. R. 501; 3 W. W. R. 699.—**CAN.**

PART I. SECT. 4.

o. Bankrupt—When discovery sole purpose of proceedings.—In no circumstances is it proper to make an insolvent a deft. for the purpose of dis-

covery only.—**KERR v. READ** (1875), 22 Gr. 529.—**CAN.**

the ct. shall direct, may be called upon to produce them if the principal could himself have been called upon to do so.

(2) It is not generally necessary to make an attorney a party because he has title deeds in his possession.

(3) *Qu.*: whether the exor. of an attorney can avail himself of the attorney's privilege not to disclose the concern of his client.—**FENWICK v. REED** (1816), 1 Mer. 114; 35 E. R. 618.

Annotations:—*As to (1) & (2) Consd.* *Adams v. Fisher* (1838), 3 My. & Cr. 526. *Generally, Mentd.* *Price v. Carter* (1837), 1 Jur. 233; *A.-G. v. Chesterfield* (1854), 18 Beav. 596.

28. ——(1) A solr., who is implicated in a case of fraud, may be made a party to a bill, seeking relief in respect of that fraud, merely for the purpose of discovery, the only relief asked against him being that he should be ordered to pay the costs (**LORD WESTBURY, C.**).

(2) A bkpt. who has been engaged in a fraudulent transaction may be made a party to a bill for discovery, but if the discovery is ancillary to relief improperly sought against him, he may demur, & the delivery up of documents which the bkpt. only holds for his assignees is not relief in respect of which it is necessary to make him a party.—**GILBERT v. LEWIS** (1862), 1 De G. J. & Sm. 38; 1 New Rep. 111; 32 L. J. Ch. 347; 7 L. T. 541; 9 Jur. N. S. 187; 11 W. R. 223; 46 E. R. 15, L. C.

Annotations:—*As to (2) Consd.* *Manchester Fire Assco. v. Wykes* (1875), 33 L. T. 142. *Generally, Mentd.* *Lewis v. Mathews* (1866), L. R. 2 Eq. 177; *Re Tarsey's Trust* (1866), L. R. 1 Eq. 561; *Hartford v. Power* (1868), 16 W. R. 822; *Massy v. Rowen* (1869), L. R. 4 H. L. 288; *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28; *Bland v. Dawes* (1881), 50 L. J. Ch. 252.

29. ——The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery & costs, is confined to cases in which deft. fills the position of agent, including that of attorney or solr. or arbitrator.—**WEISE v. WARDLE** (1874), L. R. 19 Eq. 171; 23 W. R. 208.

Annotation:—**Mentd.** *Tabor v. Cunningham* (1875), 24 W. R. 153.

30. ——A mere witness [solicitor] cannot be made a party to an action however essential the discovery which he can give might be to deft. (**JESSEL, M.R.**).—**BERRY v. KEEN** (1882), 51 L. J. Ch. 912; 26 Sol. Jo. 312, C. A.

Annotations:—**Mentd.** *Foxwell v. Van Grutten*, [1897] 1 Ch. 64; *Marshall v. Charteris*, [1920] 1 Ch. 520.

31. ——To make solrs. or others parties to an action without seeking any relief against them, except payment of costs or discovery, is vexatious.—**BURSTALL v. BEYFUS** (1884), 26 Ch. D. 35; 53 L. J. Ch. 565; 50 L. T. 542; 32 W. R. 418, C. A.

Annotations:—**Mentd.** *Amos v. Herne Bay Pavilion Promenade & Pier Co.* (1886), 54 L. T. 264; *Hannay v. Smurthwaite*, [1893] 2 Q. B. 412.

32. Corporation or company.—A pltf. cannot

covery only.—**KERR v. READ** (1875), 22 Gr. 529.—**CAN.**

p. Partner—With no locus standi in proceedings except as witness.—In proceeding upon a reference under a decree, the master cannot order a person to be made a party to the suit against whom any relief is sought; & where in proceeding under a decree for the administration of testator's estate, the master directed D., who had been in partnership with testator up to the time of his death, to be made a party, & requiring him with the exors. to bring in under oath an account of the partnership dealings, against which D. appealed:—**Held**: the object of making D. a party was for the purpose either of relief or discovery, & in either view pltf. could not obtain it in this

make deft. a corpn., in whom he shows no liability, & against whom he prays no relief, merely for the purpose of discovery; & a corpn. so made a party may demur.—**SAUNDERS v. SAUNDERS** (1855), 3 Drew. 387; 25 L. J. Ch. 26; 26 L. T. O. S. 66; 1 Jur. N. S. 1008; 4 W. R. 27; 61 E. R. 951.

33. — Officer of.]—The rule that officers of a corpn. may be made co-defts. to a bill against the corpn., applies to a bill for discovery as well as to a bill for relief; & members of the corpn. may be joined with the officers.—**GLASSCOTT v. COPPER-MINERS CO.** (1840), 11 Sim. 305; 10 L. J. Ch. 30; 5 Jur. 264; 59 E. R. 892.

34. — —.]—Production of documents upon oath cannot be obtained from the secretary of a co. who has not been made a party to a suit against the co.—**A. G. v. EAST DEREHAM CORN EXCHANGE CO.** (1857), 3 W. R. 486.

35. — —.]—In an action against a corpn., where an officer of the corpn. against whom no relief was claimed was made a deft. for the purpose of discovery:—**Held**: (1) inasmuch as under R. S. C., Ord. 31, r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as deft., & under Ord. 16, r. 14, his name should be struck out; (2) effect of Jud. Act on mode of procedure discussed (*see* No. 5, *ante*).—**WILSON v. CHURCH** (1878), 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.

Annotations:—As to (1) Distd. **Berkley v Standard Discount Co.** (1878), 9 Ch. D. 643. **As to (2) Refd.** **Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.**, [1900] 2 Ch. 1. **Generally, Mentd.** **Amos v. Horne Bay Pavilion Promenade & Pier Co.** (1886), 54 L. T. 264; **Cunnack v. Edwards** (1894), 64 L. J. Ch. 344; **McCleane v. Gyles** (No. 2), [1902] 1 Ch. 911. **Studley v. Studley** (1913), 108 L. T. 657.

36. — — Bankruptcy after bill filed.]—A bill, by one of the members, against H., the secretary of an insurance assocn., by the rules of which the committee were empowered to settle all claims, & the secretary was directed to draw for & collect all claims passed by the committee, was filed seeking discovery of the names of the members of the committee, & to enforce contributions from the members of the assocn. After bill filed H. became bkpt., & put in a plea of bkpcy.:—**Held**: H. was properly made a party for the purpose of discovery, & properly so remained, notwithstanding his bkpcy., & the plea was overruled.—**PEPPER v. HENZELL, WOODS v. HENZELL, REED v. HENZELL** (1865), 2 Hem. & M. 486; 34 L. J. Ch. 531; 13 L. T. 63; 11 Jur. N. S. 840; 13 W. R. 962; 71 E. R. 552.

37. — — Resignation after bill filed.]—A person properly made a party for discovery, as secretary to a co., cannot evade making such discovery simply by resigning his situation after the filing of the bill.—**ACOMB v. LANDED ESTATES CO., LTD.** (1866), 14 L. T. 57; 14 W. R. 387.

38. Witness.]—One merely a witness cannot be made a deft. for discovery of what he is examinable to, unless interested; but he ought to plead thereto & support it by answer disclaiming interest & not demur.—**PLUMMER v. MAY** (1750), 1 Ves. Sen. 426; 27 E. R. 1121.

Annotations:—Folld. **Fenton v. Hughes** (1802), 7 Ves. 287. **Expld.** **Tooth v. Canterbury, Dean & Chapter** (1829), 3 Sim. 49. **Consd.** **Kerr v. Rew** (1840), 5 My. & Cr. 154. **Refd.** **Portugal (Queen) v. Glyn** (1840), 7 Cl. & Fin. 466; **Chaffers v. Day** (1855), 3 W. R. 263; **Gilbert v. Lewis** (1862), 2 John. & H. 452. **Mentd.** **Armitage v. Wadsworth** (1815), 1 Madd. 189.

39. — —.]—Bill for discovery in aid of an

action. Demurrer by a mere witness allowed though the discovery would be more effectual than the examination at law, & notwithstanding a charge of interest in deft.—**FENTON v. HUGHES** (1802), 7 Ves. 287; 32 E. R. 117.

Annotations:—Distd. **Tooth v. Canterbury, Dean & Chapter** (1829), 3 Sim. 49. **Expld.** **Irving v. Thompson** (1839), 9 Sim. 17. **Consd.** **Kerr v. Rew** (1840), 5 My. & Cr. 154; **Portugal (Queen) v. Glyn** (1840), 7 Cl. & Fin. 466. **Refd.** **Powell v. Yeatts** (1813), cited in 9 Sim. 26; **Whitworth v. Davis** (1813), 1 Ves. & B. 545; **Manchester Fire Assce. v. Wykes** (1875), 33 L. T. 142; **O'Shea v. Wood**, [1891] P. 237.

40. — —.]—Demurrer by an officer of the bank allowed, upon the ground that, as to the discovery sought from him he was merely a witness.—**How v. Best** (1820), 5 Madd. 19; 56 E. R. 801.

41. — —.]—(1) A bill of discovery in aid of a defence to an action cannot be sustained against a person who is not a party to the record at law, although charged in the bill to be solely interested in the subject of the action.

A loan raised in 1853, for Don Miguel, as King of Portugal, for the use of his govt., consisted partly of bills of exchange, in two parts, drawn upon bankers in London, who accepted the first parts in the course of their business for a customer. The second parts, having been remitted to the treasury of Portugal, indorsed to the treasurer of the royal treasury there, on account of the loan, came, after the dethronement of Don Miguel, into the possession of Queen Donna Maria, & were by her orders indorsed by the treasurer to Soares in London, with instructions to recover the amount. An action having been brought by Soares on the bills, against the acceptors, they filed a bill of discovery, in aid of their defence, against him & the Queen of Portugal, charging that she was interested in the bills of exchange:—**Held**: as the Queen of Portugal was not a party to the record at law, she was not a proper party to the bill of discovery.

(2) Bills filed by or against underwriters, as they pray some relief, do not form an exception to the rule; but if to a bill of discovery in aid of a defence to an action brought on a policy of insurance by the agent alone his principal is made a deft., the latter may demur, although he is exclusively interested in the subject of the action.

(3) Bills of discovery are permitted for the purpose of obtaining from the adversary at law discovery of matters, which, being admitted by him, may aid the defence to the action, but not for the purpose of obtaining evidence. Accordingly a bill of discovery does not lie against a person who may be a witness for deft. in the action.—**PORTUGAL (QUEEN) v. GLYN** (1840), 7 Cl. & Fin. 466; **West**, 258; 7 E. R. 1147, H. L.; *reversg.* **S. C. sub nom. GLYN v. SOARES** (1836), 1 Y. & C. Ex. 644.

Annotations:—As to (1) Folld. **Manchester Fire Assce. v. Wykes** (1875), 33 L. T. 142. **Refd.** **Lawrence v. Mathews** (1837), Donnelly, 231; **Irving v. Thompson** (1839), 9 Sim. 17; **Kerr v. Rew** (1840), 5 My. & Cr. 154; **Price v. Chippendale** (1841), 4 Y. & C. Ex. 469. **Generally, Mentd.** **Brunswick v. Hanover (King)** (1844), 6 Beav. 1.

42. — —.]—A. having dealings with B., C., & D., who traded under the firm of B. & Co., & having become indebted to them on several transactions, entered into a covenant with them for payment of the whole amount. B. & D. afterwards died, & C. retired from the firm, & assigned her interest to E. The business of the firm was continued by E. & F. under the firm of

mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness.—**HOPPER v. HARRISON** (1880), 28 Gr. 22.—**CAN.**

q. Agents & arbitrators.]—Where in action by a creditor to set aside

a conveyance of land by his debtor as fraudulent, the debtor was made a deft., & charges were made though no relief was asked against him, his name was struck out, upon his own application, notwithstanding that he had

delivered a defence, in which he denied the charges against him & alleged facts which came properly in issue between plff. & the other defts. The only object of making the debtor or grantor a party would be for the purpose of

Sect. 4.—Joinder of parties for purpose of discovery.

Sect. 5. Part II. Sects. 1 & 2.]

B. & Co., & A. continued his dealings with that firm, & made various payments to them. Upon a bill brought to restrain an action on the covenant brought by C. against A. :—*Held* : although on the ground of an apparent unity of interest between C. & E., a bill of discovery, in aid of his defence to the action, might be sustained against them by A., with a view to ascertain the relation which subsisted between them, yet such a bill was not sustainable against F. or any of the *quondam* partners of the firm of B. & Co., they being merely witnesses in the matter between A., C., & E.—*JONES v. MAUND* (1839), 3 Y. & C. Ex. 347.

43. —.]—A manufacturer effected a policy of insurance against fire upon his factory, machinery, & stock in trade. The factory & its contents were burnt down, & soon afterwards the manufacturer became bkpt. The insurance co. disputed the claim on the ground that it was fraudulent & excessive. The trustee in the bkpcy. brought an action against the co. on the policy, & the co. thereupon filed a bill against the trustee & the manufacturer to obtain discovery & to restrain the action till full discovery had been made :—*Held* : the bill could not be sustained, inasmuch as the manufacturer was merely a witness over whom pltf. in the action at law had no control, & as it was not proved that any discovery for the purpose of the defence could be got from the trustee.—*MANCHESTER FIRE ASSURANCE CO. v. WYKES* (1875), 33 L. T. 142; 23 W. R. 884, L. JJ.

44. —.]—*BERRY v. KEEN*, No. 30, *ante*.

45. Bankrupt—Action against assignees.]—Demurrer allowed by a bkpt. to a bill joining him with his assignees in charges & prayer for relief.

Qu. : whether a bkpt. can be made a party merely for discovery, & to maintain an injunction.

—*WHITWORTH v. DAVIS* (1813), 1 Ves. & B. 545; 35 E. R. 212.

Annotations :—*Refd.* *Kerr v. Hew* (1840), 5 My. & Cr. 154; *Portugal (Queen) v. Glyn* (1840), 7 Cl. & Fin. 466; *Gilbert v. Lewis* (1862), 2 John. & H. 452.

46. —.]—*GILBERT v. LEWIS*, No. 28, *ante*.

47. Auctioneers—Fraudulent sale—Action for rescission.]—In an action for rescission & costs brought by a purchaser of a property which he alleged without contradiction, that he was induced to purchase by the fraudulent mock bidding of such auctioneers :—*Held* : auctioneers as well as the vendors were proper defts.

Semble : it would not have been open to him to make them parties for the mere purpose of discovery.—*HEATLEY v. NEWTON* (1881), 19 Ch. D. 326; 51 L. J. Ch. 225; 45 L. T. 455; 30 W. R. 72, C. A.

Annotations :—*Mentd.* *In the Goods of Patrick* (1889), 58 L. J. P. 36; *Frankenburgh v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.

SECT. 5.—MANDAMUS TO COMPEL INSPECTION.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 315–316, Nos. 1275–1291.

Parish books & other ecclesiastical documents.]—*See* Nos. 620, 629, 631, 632, *post*.

Public documents.]—*See* No. 643, *post*.

Companies' books.]—*See* COMPANIES, Vol. X., p. 1128, Nos. 7945, 7949.

—Right of inspection.]—*See, generally*, COMPANIES, Vol. IX., pp. 192, 209, Nos. 1207–1209, 1295, 1296; Vol. X., pp. 787, 788, 1106, 1128, Nos. 4928–4930, 7773, 7940–7949.

Corporation documents.]—*See* CORPORATIONS, Vol. XIII., pp. 302–305, 348, 349, 422–425, Nos. 336–370, 864–868, 876–879, 1423–1482.

Court rolls.]—*See* COPYHOLDS, Vol. XIII., p. 38, Nos. 431, 437–439.

Register of Bank of England.]—*See* BANKERS & BANKING, Vol. III., p. 133, No. 87.

Part II.—Discovery of Documents.

SECT. 1.—NATURE AND EXTENT.

48. General rule.]—A Ct. of Equity does not compel discovery for the mere gratification of curiosity, but in aid of some other proceeding either pending or intended (*LEACH, V.C.*).—*CARDALE v. WATKINS* (1820), 5 Madd. 18; 56 E. R. 801.

Annotation :—*Refd.* *Darthez v. Leo* (1836), 2 Y. & C. Ex. 5.

49. —.]—The discovery which a Ct. of Equity gives is not the mere oath of the party to a general fact, but an answer upon oath to every collateral circumstance charged as evidence of the general fact (*LEACH, V.C.*).—*SANDERS v. KING* (1821), 6 Madd. 61; 56 E. R. 1013.

Annotations :—*Consd.* *Thring v. Edgar* (1825), 2 Sim. & St. 274. *Refd.* *Hardman v. Ellames* (1834), 2 My. & K. 732; *Harland v. Emerson* (1834), 8 Bl. N. S. 62.

discovery & costs; & the right to make a person a party for these purposes is confined to cases in which deft. fills the position of agent or arbitrator; & even that practice has been disapproved.—*BANK OF HAMILTON v. WINTERS* (1911), 16 W. L. R. 218.—CAN.

PART II. SECT. 1.

48 i. General rule.]—Whenever discovery is sought in aid of an issue which must be determined at the hearing, pltf. is entitled to it to help him prove the issue; but where it is

sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretionary, until pltf. has established his fundamental right at the hearing.—*GRAHAM v. TEMPERANCE & GENERAL LIFE ASSURANCE CO. OF N. AMERICA* (1895), 16 P. R. 536.—CAN.

48 ii. —.]—Pltf. moved for a further & better affidavit on production from defts. The master said that discovery extends to everything which may, not which must, assist appcts.'

50. —.]—(1) A pltf. is entitled to discovery from deft., not only of that which constitutes his pltf.'s title, but also for the purpose of repelling what he anticipates will be the case set up by deft. This does not extend, however, to a discovery of the evidence upon which the anticipated case of deft. is to be supported.

(2) The object of 21 Jac. 1, c. 14, was to put a deft. litigating with the Crown in the same situation as any other deft.; but this statute does not apply in equity, where, in the matter of discovery, the Crown & a subject litigating together are precisely on the same footing as ordinary parties.

(3) *Semble* : a deft. cannot protect himself from discovery on the ground of disclosing the evidence of his title, where his only allegation of title is negating the title of pltf.

case. An order was made for a better affidavit.—*CARRY v. TORONTO BELT LINE Co.* (1912), 21 O. W. R. 348; 3 O. W. N. 751; 1 D. L. R. 908.—CAN.

48 iii. —.]—As a general rule the order for discovery should not be made where there are reasonable grounds for believing it would be illusory by reason of there being no documents in existence. But if there be *prima facie* evidence of the existence of documents, one party is entitled to appeal to the oath of the other as to such documents being in his possession or power (*PALLES, C.B.*).—*POWELL v*

Where the bill charges that deft. is in possession of documents which relate to the matters in question in the suit, deft. cannot protect himself from setting out a list & description of such documents by merely alleging his belief that they do not contain evidence of or tend to show pltf.'s title, but he is bound distinctly to negative the allegations in the bill.—*A.-G. v. LONDON CORPN.* (1850), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L. J. Ch. 314; 14 L. T. O. S. 501; 14 Jur. 205; 42 E. R. 95, L. C.

Annotations:—As to (1) Apld. Goodman v. Holroyd (1864), 15 C. B. N. S. 839; *Saunders v. Jones* (1877), 7 Ch. D. 435. *Consd. A.-G. v. Storey* (1912), 107 L. T. 430. *Refd. Flitcroft v. Fletcher* (1856), 25 L. J. Ex. 94; *Horton v. Bott* (1857), 2 H. & N. 249; *London Gas-Light Co. v. Chelsea Vestry* (1859), 6 C. B. N. S. 411; *Ingilby v. Shafto* (1863), 33 Beav. 31; *Stoate v. Rew* (1863), 14 C. B. N. S. 209; *Towne v. Cocks* (1874), L. R. 9 Exch. 45; *Bowlicke v. Graham* (1880), 50 L. J. Q. B. 396; *Marriott v. Chamberlain* (1886), 54 L. T. 714. *As to (2) Apld. A.-G. v. Newcastle-upon-Tyne Corpn.*, [1897] 2 Q. B. 384. *Refd. Emerson v. Maddison*, [1906] A. C. 569; *A.-G. v. Storey* (1912), 107 L. T. 430. *Generally, Mentd. A.-G. v. Hammer* (1858), 27 L. J. Ch. 837.

51. —.]—Where the parties to an action are rivals in trade & interrogatories are administered by the one to the other of them, if the ct. or a judge is satisfied that such interrogatories have been fully & sufficiently answered, & that it would be oppressive & vexatious to compel production of books of account, no order for that purpose will be made.

An action was brought by the A.-G. at the relation of numerous tramway car manufacturers to restrain a tramways co. incorporated by special Act of Parliament, from manufacturing & supplying rolling stock to other cos. by means of capital not authorised to be so applied. The ct. allowed pltf's. to interrogate as to what capital defts. were employing in such manufacture, but refused to order defts. to produce their books of account & documents for the purpose of showing whether the answers which they had given to the interrogatories were true.

Their [plaintiffs'] right is to get some kind of discovery either by way of answers to interrogatories, or by means of an affidavit of documents. That is a matter more or less of discretion. If the ct. is satisfied that they have answered fairly & fully, & that it would be oppressive & vexatious to compel them to produce the books

& documents which in this case is what is required, it would be a monstrous thing to compel these defts. to produce all their books to their rivals in trade. It would be a thing which the ct. ought not to do unless it is absolutely necessary for the purposes of administering justice in the case (*LINDLEY, L.J.*).

Under the orders that now exist a discretion is given to every judge to say whether or not discovery of the opponent's books shall be ordered or not (*SMITH, L.J.*).—*A.-G. v. NORTH METROPOLITAN TRAMWAYS CO.* (1895), 72 L. T. 340, C. A.

52. —.]—*A.-G. v. NEWCASTLE-UPON-TYNE CORPN.*, No. 162, *post*.

SECT. 2.—DISCOVERY AND PRODUCTION DISTINGUISHED.

53. *General rule.*—(1) The practice of the cts. is against the proposition that the question of production & the question of discovery are the same.

Pltf. filed a bill alleging that he was entitled by inheritance to certain estates, that defts. were in possession, & that he could not bring an action because there was a term outstanding created by an indenture dated in 1762. The bill contained the usual allegation as to documents. Pltf. interrogated defts. as to the documents; & defts., by their answer, said they had not, & never had, in their possession the deed of 1762. They admitted that they had in their possession or power certain documents, but they were such as related to their own title, & did not, to the best of their information & belief, show any title in pltf.; but they were advised & believed that pltf. was not entitled to call upon them to make any discovery, or to set forth a list or schedule of such documents. Pltf. took out a summons for discovery & production in chambers, but the chief clerk declined to make an order, on the ground that pltf. ought to have excepted to the answer. Upon the exceptions & adjourned summons coming on together:—*Held*: (2) the exceptions would be overruled on the undertaking of defts. not to set up the term of years as the defence to an action; (3) upon the adjourned summons, defts. should make the usual affidavit

HEFFERNAN (1879), 4 L. R. Ir. 703.—IR.

r. As aid to fair trial.—When pltf. has amended his claim, the trial of the action having been entered on, discovery may be granted so as to place both parties in a fit state to have a fair trial.—*THOMPSON v. NORTHERN TRUST CO.* (1922), 70 D. L. R. 41.—CAN.

a. Extent — Documents marked "without prejudice"—*Discovery aiding party stranger to negotiations.*—When statements, which would have been admissions, if unqualified, are pertinent to the issue & the question of their admissibility turns on the fact that they were made without prejudice in negotiations for a compromise, they may be ordered to be disclosed on discovery at the instance of a stranger to the negotiations. While the right to withhold disclosure where negotiations are without prejudice or where letters are written without prejudice is generally said to be founded on public policy, the more logical foundation for the rule is that a statement without prejudice is a conditional or merely hypothetical statement.—*SCHETKY v. COCHRANE*, [1918] 1 W. W. R. 821; 24 B. O. R. 496.—CAN.

t. — Documents evidencing illegal contract—Not granted in favour

of person privy to illegality.—The ct. will not compel nor enforce any discovery respecting a contract made in evasion, & contrary to the intent & meaning or policy of a statute. Where the bill stated several distinct matters of agreement, all of which might be described as partnership transactions, & the prayer was "for an account of all & every the said several co-partnership transactions & that deft. might be decreed to pay the sum found to be due," deft. having demurred to the prayer for an account of "all & every the said co-partnership transactions, etc." to several of which deft. had fully answered, & did not pretend that an account should be refused:—*Held*: the ct. would not enforce any discovery in respect of the contract, called in the bill "the partnership," it being against the policy of the law, & pltf. being *particeps criminis*.—*FITZGERALD v. ARTHURE* (1839), 1 L. Eq. R. 184.—IR.

a. — Documents evidencing extra-judicial statements—Not granted for purpose of contradicting witness at the hearing.—A motion having been made by pursuers in an action for the amount of insurance on a ship which had been wrecked, for commission & diligence to recover affidavits & protests taken by the passengers in the ship, about the time of, or soon after

her loss or wreck, & relating to that event, the intention being to use the documents in cross-examining the passengers upon the trial, the ct. refused the motion, observing that whatever might be the practice in England, it was incompetent in Scotland to contradict a witness by reference to extra-judicial statements; & further that it was a novel & inadmissible object of a diligence to recover documents for such purpose.—*M'LOSKEY v. GLASGOW MARINE INSURANCE CO.* (1843), 5 Dunl. (Ct. of Sess.) 1013.—SCOT.

PART II. SECT. 2.

b. Discovery to ascertain existence of documents—*In party's possession or power*—*Production after existence admitted.*—Supreme Court in Equity Act, 1890 (c. 4), s. 59 (1), does not empower the ct. to order the production of documents discovered to be in the possession or power of one of the parties. The sect. is limited to discovering whether documents are in his possession or power. If admitted to be, their production may be ordered under sect. 61 (2).—*HEGAN v. MONTGOMERY* (1896), 1 N. B. Eq. Rep. 247.—CAN.

c. Necessity for affidavit on discovery—*Disclosing existence of docu-*

DISCOVERY, INSPECTION, AND INTERROGATORIES.

Sect. 2.—Discovery and production distinguished.
Sect. 3: Sub-sect. 1.]

as to the discovery of the documents in their possession.—*QUIN v. RATCLIFF* (1860), 3 L. T. 363; 6 Jur. N. S. 1327; 9 W. R. 65.

54. —.]—In an action against a managing owner of ships for an account, he cannot protect himself against setting out books & documents relating to the ship's accounts in his affidavit of documents, or in answer to interrogatories, by alleging that the accounts & books are kept by a firm of which he is a member & that the action is brought against him in his individual capacity only; but he must discover all documents whether in his possession or in that of his firm.

The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession, whether you are bound to produce them or not (*JESSEL, M.R.*).—*SWANSTON v. LISHMAN* (1881), 45 L. T. 360; 4 Asp. M. L. C. 450, C. A.

Annotation:—Refd. Rattenberry v. Monro (1910), 103 L. T. 560.

SECT. 3.—IN WHAT PROCEEDINGS GRANTED.

SUB-SECT. 1.—IN GENERAL.

55. **Administration of assets.**—A creditor of a testator, although not either a pltf. or a deft., may, after decree in an administration suit, with a view to establish his debt in equity against the testator's estate, obtain an order that the testator's exor. may make an affidavit stating the documents in his possession relating to the claim of the creditor.—*Re M'VEAGH'S ESTATE, M'VEAGH v. CROALL* (1863), 1 De G. J. & Sm. 399; 1 New Rep. 531; 32 L. J. Ch. 521; 8 L. T. 100; 11 W. R. 457; 46 E. R. 159, L. JJ.

Annotations:—Consd. Kennedy v. Wakefield (1870), 39 L. J. Ch. 827. *Mentd. Snowden v. Met. Ry.* (1863), 1 De G. J. & Sm. 408.

See, further, EXECUTORS & ADMINISTRATORS.

56. **Arbitration proceedings.**—An arbitrator improperly refused to require pltf. to produce his books. Upon application before award:—*Held*: a rule to rescind the order of reference would be made absolute unless the books were produced before the arbitrator.—*HART v. DUKE* (1862), 32 L. J. Q. B. 55; 9 Jur. N. S. 119; 11 W. R. 75.

Annotations:—Consd. Kirk & Randall v. East & West India Dock Co. (1886), 55 L. T. 245. *Mentd. James v. James* (1889), 22 Q. B. D. 669.

57. —.]—In a reference by consent out of ct. under Arbitration Act, 1889 (c. 49), the arbitrator has jurisdiction to order either party to make discovery of documents or to answer interrogatories on oath by virtue of clause (f) of

the first schedule, which provides after certain express directions that the parties shall do all other things which during the reference the arbitrators or umpires may require.—*KURSELL v. TIMBER OPERATORS & CONTRACTORS, LTD.*, [1923] 2 K. B. 202; 92 L. J. K. B. 607; 129 L. T. 21; 87 J. P. 79; 39 T. L. R. 419; 67 Sol. Jo. 557; 28 Com. Cas. 376, D. C.

—.]—*See, further, ARBITRATION, Vol. II., pp. 351, 431, 432, Nos. 270, 813-819.*

58. **Companies Acts—Proceedings under—No action pending between parties.**—Where proceedings were taken under Cos. Act, 1862 (c. 89):—*Held*: the ct. had jurisdiction to make an order for an affidavit of documents under R. S. C., Ord. 31, rr. 11, 12, though no action was in progress between the parties.—*Re NATIONAL FUNDS ASSURANCE Co.* (1876), 24 W. R. 774, C. A.

59. —.]—In opposition to a petition presented by a shareholder whose shares were fully paid up, for a compulsory winding-up order, the managing director filed an affidavit, in which he stated what were the liabilities & assets of the co. as shown by the co.'s books. The solr. of petitioner gave notice in writing to the solr. of the co. that he would attend at the co.'s office upon the morrow morning to inspect the books which had been referred to, & on his attending in pursuance of the notice given the previous afternoon, the secretary of the co. refused inspection of the books, & also of the register of mtges.:—*Held*: (1) the refusal to allow the solr. to inspect was a refusal to petitioner; (2) as regarded the register of mtges., petitioner, his solr. or agent, was under Cos. Act, 1862 (c. 89), s. 43, entitled to inspect it; (3) as regarded the co.'s books, the notices required by R. S. C., Ord. 31, rr. 14, 15 *et seq.*, had not been given, & therefore there would be no order to inspect.

(4) Although it may not be necessary, in giving a notice for production of documents under Ord. 31, r. 15, to follow the very words of the form given in the appendix, still the formalities required by that rule & rr. 16, 17, must, substantially, be observed, & the party applied to will be protected in the manner contemplated by those formalities.—*Re CREDIT Co.* (1879), 11 Ch. D. 256; 48 L. J. Ch. 221; 27 W. R. 380.

Annotations:—As to (1) Refd. Bevan v. Webb, [1901] 2 Ch. 59. *As to (2) Apld. Bevan v. Webb*, [1901] 2 Ch. 59.

60. —.]—An action was brought by a shareholder in a co., on behalf of himself & other the shareholders of the co., against the directors & another deft. alleging a conspiracy to defraud the co., & that they had been defrauded thereby, & claiming damages to be paid to the co. The co. were made defts.:—*Held*: (1) the co. were an "other party" to the action within the meaning

ments—Irrespective of privilege.—Where discovery, as distinguished from production for the purpose of inspection, of documents, is sought, an affidavit of such documents must be given, though their production when applied for could be successfully opposed on the ground of immateriality.—*CUSHING SULPHITE Co. v. CUSHING* (1903), 23 C. L. T. 231; 2 N. B. Eq. Rep. 469, 472.—CAN.

d. **Documents discovered—Not necessarily admissible as evidence.**—There is a distinction to be observed between the right to discovery & the right to put in evidence at the trial what has been discovered. On the trial the third party has no higher right to use the statements or admissions than that which a party to negotiations conducted "without prejudice" would have who sought to introduce them in evidence.—*SCHETKY v. COCHRANE*,

[1918] 1 W. W. R. 821; 24 B. C. R. 6.—CAN.

e. **Order for discovery—Must precede order for production—Objections raised on order for production.**—An order for discovery & inspection of documents will not be made at the same time. The order for discovery is first made, & if inspection is then asked for the other side has an opportunity of raising just objections.—*MOFFET v. MOFFET* (1886), 5 N. Z. L. R. 167.—N.Z.

PART II. SECT. 3, SUB-SECT. 1.

56 i. **Arbitration proceedings.**—*Semble*: where the parties to an arbn. refuse to take up an award, the award should not be ordered to be produced, the terms of the award being immaterial.—*Re LYDERS ARBITRATION v.*

FYFE & CUMING (1909), 28 N. Z. L. R. 1000.—N.Z.

f. **Action for account of profits.**—Fraud being alleged by pltf., servants in an action for an account of profits, pltf. were held entitled to discovery of a document in the possession of deft. (master) showing the basis of the statement of net profits furnished by the deft.:—*Held*: upon appeal, production of the document was properly ordered, having regard to the general rules relating to discovery & the other claims made in the action.—*CUTTEN v. MITCHELL* (1905), 10 O. L. R. 734; 6 O. W. R. 497, 552, 629.—CAN.

g. **Action for champerty & maintenance—Not granted.**—Discovery was not enforceable in equity in cases of champerty & maintenance, nor should it be under the equivalent remedies

of R. S. C., Ord. 31, r. 12, & could be called on to make discovery of documents; (2) an objection by a deft. that the discovery of documents might tend to criminate him could only be taken to the production of the documents alleged to have that effect, & not to the order for discovery, & should be taken upon oath.—*SPOKES v. GROSVENOR HOTEL Co.*, [1897] 2 Q. B. 124; 66 L. J. Q. B. 572, 598; 76 L. T. 677, 679; 45 W. R. 545, 546; 13 T. L. R. 426, 431, C. A.

Annotations:—As to (1) *Apld. Cory v. Cory*, [1923] 1 Ch. 90. As to (2) *Folld. National Asscn. of Operative Plasterers v. Smithies*, [1906] A. C. 434.

— **In winding up.**—*See, generally, COMPANIES*, Vol. X., pp. 891 *et seq.*

61. Conspiracy — Action for.—*SPOKES v. GROSVENOR HOTEL Co.*, No. 60, *ante*.

62. — — —.—(1) Pltf., who was a member of deft. trade union, brought an action against the trade union & the trustees thereof to recover damages for conspiracy to persuade & coerce certain workmen not to fulfil their contracts with pltf., & not to enter into further contracts with him, & for an injunction. Pltf., upon a summons for directions, asked for an order for discovery of documents. Defts. contended that an order for discovery should not be made in an action of conspiracy:—*Held*: pltf. was entitled to an order for discovery, the objection that the discovery might tend to criminate defts. being one that could only be taken to the production of the documents alleged to have that effect.

(2) It is no objection to an interrogatory, & no ground for taking it off the file, if relevant, that the answer might tend to incriminate the person to whom it is exhibited. The objection must be taken on oath.—*NATIONAL ASSCN. OF OPERATIVE PLASTERERS v. SMITHIES*, [1906] A. C. 434; 75 L. J. K. B. 861; 95 L. T. 71; 22 T. L. R. 678, H. L.

63. Copyright — Infringement of.—*ECCLESIASTICAL GAZETTE & CLERGY LIST & CLERICAL GUIDE, LTD. v. NISBET (JAMES) & Co.* (1901), 110 L. T. Jo. 493, C. A.

— *See, also, COPYRIGHT & LITERARY PROPERTY*, Vol. XIII., p. 226, Nos. 656–658.

64. Election petition—Telegraphic messages.—*Parliamentary Elections Act*, 1868 (c. 125), s. 2, says that the ct. shall, subject to the provisions of the Act, have the same powers, jurisdiction, & authority with reference to an election petition, & the proceedings thereon, as it would have if such petition were an ordinary cause within their jurisdiction.

Upon an application for an order for discovery of telegraphic messages:—*Held*: the ct. had power to make the order.—*COVENTRY PETITION* (1869), 19 L. T. 742.

65. — — —.—The Post Office will not be ordered to produce for inspection telegrams sent by & to candidates & their agents unless strong grounds are shown why the judge should interpose his authority.—*TAUNTON ELECTION PETITION* (1874), 30 L. T. 130.

66. — — — Marked register of voters.—A petitioner against the return of a borough member to Parliament, on praying for a scrutiny & alleging that he wished to save incurring unnecessary

expense by refraining from bringing evidence to invalidate votes which had at the time of the election been rejected by the returning officer, is not entitled to see the rejected ballot papers & the counterfoils thereof, but the ct. will allow him to inspect & take copies of the marked register deposited with the clerk of the Crown in Ch.—*STOWE v. JOLLIFFE* (1874), L. R. 9 C. P. 446; 43 L. J. C. P. 173; 30 L. T. 299; *sub nom. STOWE v. JOLLIFFE* (No. 1), *PETERSFIELD ELECTION PETITION*, 22 W. R. 946.

Annotation:—*Apld. James v. Henderson* (1874), 43 L. J. C. P. 238.

67. — — —.—Leave to inspect the marked register of voters returned by the presiding officer to the clerk of the Crown in Chancery under Ballot Act, 1872 (c. 33), will be granted where the petition against the return of a candidate at a parliamentary election charges bribery & treating, although it does not pray a scrutiny.—*JAMES v. HENDERSON* (1874), 43 L. J. C. P. 238; 30 L. T. 527; 38 J. P. 663.

68. — — — Order against sitting member.—In a parliamentary election petition the ct. or a judge at chambers has no jurisdiction to make orders against the sitting member for inspection & discovery of documents.—*MOORE v. KENNARD* (1883), 10 Q. B. D. 290; *sub nom. MOORE v. KENNAIRD*, *Re SALISBURY ELECTION PETITION*, 52 L. J. Q. B. 285; 48 L. T. 236; 47 J. P. 343; 31 W. R. 610.

69. Endowed Schools Act, 1869 (c. 56) — Proceedings under.—The Endowed Schools Comrs. have jurisdiction to compel a college in a University to make discovery of matters relating to an endowment of which the colleges are trustees for exhibitioners selected from a particular district, & whose exhibitions are tenable at the University.—*Re "THE MEYRICKE FUND"* (1872), L. R. 13 Eq. 269; 41 L. J. Ch. 187; 25 L. T. 787; 20 W. R. 258; *affd.*, 7 Ch. App. 500; L. C. & L. JJ.

Annotation:—*Mentd. A.-G. v. Christ Church Oxford*, [1894] 3 Ch. 524.

70. Inquiry pro interesse suo.—*ALTON v. HARRISON, POYSER v. HARRISON*, [1869] W. N. 81.

71. Libel & slander.—In an action of libel, deft. must if he has not got the original letters containing the alleged libel, state in his affidavit what he has done with them.—*ANON.* (1875), Bitt. Prac. Cas. 24; 1 Char. Cham. Cas. 109.

— *See, generally, LIBEL & SLANDER.*

72. Motion for new trial—Documents previously produced in evidence.—The ct. will not grant a rule for the inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial.—*PRATT v. GOSWELL* (1861), 9 C. B. N. S. 706; 3 L. T. 669; 142 E. R. 277.

73. Patent cases.—The inspection meant by 15 & 16 Vict., c. 83, s. 42, is not an inspection of the books of the opposite party, but an inspection of the instruments or machinery constituting the patented invention or the alleged infringement of it.—*VIDI v. SMITH* (1854), 3 E. & B. 969; 2 C. L. R. 1573; 23 L. J. Q. B. 342; 23 L. T. O. S. 231; 1 Jur. N. S. 14; 118 E. R. 1404.

Annotation:—*Reid. Elwood v. Christy* (1865), 18 C. B. N. S. 494.

hesitation in ordering an inspection of the books of a public body than of the books of a private firm.—*WALLACE & FIORI HOSPITAL CONTRIBUTORS v. SOUTHLAND HOSPITAL & CHARITABLE AID BOARD* (No. 1) (1889), 8 N. Z. L. R. 259.—N.Z.

1. Election petition—Against Local Government authorities — Where no provision for access by public to election documents.—In a petition

given by Jud. Act.—*WELBOURNE v. CANADIAN PACIFIC RY. Co.* (1894), 16 P. R. 343.—CAN.

h. Compensation — Under compulsory sale of land.—The Supreme Ct. has no power to order discovery in a claim for compensation to be heard by a Compensation Ct. under the Land for Settlements Act & Public Works Act. Where a claim is based upon the value of land as a going business, the

ct., in a case in which it has power to do so, will order discovery & inspection of the books so that they may be examined by an expert for the purpose of ascertaining what the profits have been.—*CLIFFORD v. LANDS MINISTER* (1903), 23 N. Z. L. R. 508.—N.Z.

k. Procedure by mandamus.—The rules for discovery & inspection in an action apply in proceedings for a *mandamus*; & the ct. will have less

granted: Sub-sect. 1.]

74. — Petition for revocation — Patents, Designs & Trade Marks Act, 1888 (c. 57), s. 26.]—(1) The ordinary practice as to discovery is applicable to a petition for the revocation of a patent under the above sect.

(2) Petitioner will be allowed to deliver interrogatories on the usual terms.—*Re HADDAN'S PATENT* (1884), 54 L. J. Ch. 126; 51 L. T. 190; 33 W. R. 96; Griffin's Patent Cases 108.

75. — Infringement of.]—In an action for infringement of letters patent, defts. raised as a defence that the articles the subject of the patents were manufactured wholly or mainly outside the United Kingdom. Pltfs. applied for an order for particulars as to this defence & for leave to administer interrogatories as to it. Defts. applied for an order for discovery. The application for particulars was refused & an order was made for discovery by pltfs. The question of interrogatories was directed to stand over until after discovery. On appeal:—*Held*: (1) pltfs. were entitled to particulars of the defence & defts. were not entitled to discovery as long as the issues to be raised were not defined; (2) at the present stage interrogatories would not be ordered; (3) liberty would be given to defts. & pltfs. respectively when the issues had been defined, to make fresh applications for discovery & interrogatories, as they should think fit.—*THERMOS, LTD. v. ISOLA, LTD.* (1910), 27 R. P. C. 195, C. A.

Annotation:—As to (1) (2) & (3) Expld. & Distd. British Thomson-Houston Co. v. Duram, [1915] 1 Ch. 823.

76. — —.]—*REDDAWAY & CO., LTD. v. FLYNN* (1912), 30 R. P. C. 16, C. A.

77. — —.]—Where in an action for infringement of letters patent deft. by his defence denies the validity of the patent & also pleads manufacture mainly outside the United Kingdom under Patents & Designs Act, 1907 (c. 29), s. 25 (2) (b), & by his defence & particulars of objection clearly defines the issues:—*Held*: as regards pltfs.' cause of action for infringement of the patent the order for discovery was rightly made, but as regards the cause of action pleaded by deft. under the above sub-sect., the discovery must be limited to documents showing the imports from persons named in the defence & documents showing the amount of manufacture by pltfs.—*BRITISH THOMSON-HOUSTON CO., LTD. v. DURAM, LTD.*, [1915] 1 Ch. 823; 84 L. J. Ch. 816; 113 L. T. 28, C. A.

—.]—*See, generally, PATENTS & INVENTIONS.*

78. Petition or reference — Under private statute.]—Where under private Acts, etc., the ct. has jurisdiction to proceed in a summary way by petition, it is not usual, on directing a reference to ascertain the parties entitled, to direct the production of deeds & documents, & to examine the parties.

One such reference having been made, the ct. refused, with costs, an application of a second claimant, for a second order containing special directions.—*Re LONDON DOCK CO.* (1848), 11 Beav. 78; 17 L. J. Ch. 111; 11 L. T. O. S. 1; 12 Jur. 405; 50 E. R. 746; *subsequent proceedings, sub*

nom. HYDE v. EDWARDS (1849), 1 Mac. & G. 410, L. C.

79. — —.]—In directing a reference under a private Act of Parliament, the ct. will make the same provision for the production of deeds & the examination of parties & witnesses, as in the case of a reference in a suit.—*HYDE v. EDWARDS* (1849), 12 Beav. 255, n.; 1 Mac. & G. 410; 1 H. & Tw. 552; 13 L. T. O. S. 462; 41 E. R. 1323, L. C.

Annotation:—Refd. A.-G. v. Worcester (1851), 9 Hare, 328.

80. Title to tithes.]—A pltf. in a tithe cause, lessee of a vicar, was ordered on motion on the part of deft. to bring in & deliver to his clerk in ct., books, papers, etc., stated in affidavits to be in his possession, & to belong to the vicar, who was not a party to the suit.—*FOREMAN v. COOPER* (1822), 11 Price, 515; 147 E. R. 550.

81. —.]—A bill by an impropriate rector, against occupiers, for an account of tithes & against a portionist, requiring a discovery from the latter of the deeds under which he claimed to be entitled to the portion of tithes, to which the bill admitted him to be entitled, alleged that the deeds would show not only the title of the portionist to the tithes claimed by him, but also the title of pltf. to the tithes demanded by him of the occupiers. Demurrer by the portionist to the discovery was allowed.—*COMPTON v. GREY (EARL)* (1826), 1 Y. & J. 154; 148 E. R. 625.

Annotation:—Refd. O'Rourke v. Darbishire, [1920] A. C. 581.

82. —.]—A ct. of equity will compel a discovery & production of documents in aid of proceedings at law to try a disputed right under Tithe Commutation Act, 1836 (c. 71), notwithstanding special provisions are contained in that Act for those purposes.—*MORRIS v. NORFOLK (DUKE)* (1840), 9 Sim. 472; 9 L. J. Ch. 273; 4 Jur. 1007; 59 E. R. 441.

83. Trade marks.]—In an action brought in the Ch. Div. to restrain deft. from passing off his goods as those of pltf., pltf. by his writ also claimed damages, or in the alternative an account of deft.'s sales & profits. An order was made that the questions of fact arising in that action be tried by a special jury before a judge at the sitting in Middlesex. Before the trial had taken place, pltf. applied for a further affidavit of documents, & a further answer to interrogatories by deft., the object being to obtain production of deft.'s books & discovery of the sales which he had made of the articles which it was alleged he was passing off as of pltf.'s manufacture. Pltf. had not then made his election between damages & an account of profits. The application was refused on the ground that it was premature. On appeal, pltf.'s counsel offering to waive an account of profits:—*Held*: the former order did not deal with the trial of the action, but by questions of fact meant questions of fact on which pltf.'s title to relief depended, & until pltf. had established such title by the verdict of a jury on the questions of fact, he was not entitled to the discovery of sale or production of books.

The ct. is always unwilling to make an order before the right to relief is established, for dis-

against the election of councillors for an urban district, where no regulations have been prescribed by the council of the county in which the urban district is situate as to documents in the custody of the returning officer, other than ballot papers & counterfoils, being open for public inspection, the ct. will grant an absolute order for the inspection of such documents.—*Re*

PEMBROKE URBAN DISTRICT COUNCIL ELECTION PETITION, [1908] 2 I. R. 158.—*IR.*

*m. — Not a "proceeding in action"—For purpose of discovery.]—*Proceedings under Election Petitions Act, 1880, are not proceedings in an action in the Supreme Ct. The word "trial" in the Act means the hearing

of the petition, & the judges constituting the ct. have the power of a judge at *nisi prius* only at the hearing. In election cases, therefore, one judge sitting in chambers has not the power to grant an order for discovery.—*WAITEMATA ELECTION PETITION* (1894), 12 N. Z. L. R. 351.—*N.Z.*

n. Not obtainable as of right.]—A

covery which may be injurious to deft. & will only be useful to pltf. if he succeeds in establishing his title to relief (COTTON, L.J.).—FENNESSY v. CLARK (1887), 37 Ch. D. 184; 57 L. J. Ch. 398; 58 L. T. 289; 4 T. L. R. 127, C. A.

84. — Names of customers.]—Although in considering whether the rule that a deft. who submits to give discovery must make full discovery is to be applied, the ct. does not in general weigh nicely the materiality of the discovery sought, still, if the discovery is such as might be used for purposes prejudicial to deft. irrespective of the suit, the ct. will look narrowly to the question whether there is a reasonable prospect of its being of material service to pltf. at the hearing.

Defts. in a suit to restrain infringement of trademarks having sealed up certain parts of entries & letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Ct. of Lancaster to unseal the names of customers, & of places, & the prices, forming parts of such entries, & to unseal the portions of letters & copies of letters which contained the names of the writers & of the persons to whom the letters which were copied were sent, & the places to & from which the letters were sent, & the description of the marks to be placed, or which had been placed, on the goods referred to in such letters:—*Held*: Defts. ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to defts. in their trade, & was not likely to assist pltf. in making out their case at the hearing; but the order of the Vice-Chancellor was in other respects right.—CARVER v. PINTO LEITE (1871), 7 Ch. App. 90; 41 L. J. Ch. 92; 25 L. T. 722; *sub nom.* CARTER v. PINTO LEITE, 20 W. R. 134, L. JJ.

Annotations:—*Consd.* Heugh v. Garrett (1875), 44 L. J. Ch. 305. *Apld.* Lea v. Saxby (1875), 32 L. T. 731. *Refd.* Orr v. Diaper (1876), 4 Ch. D. 92.

85. — — —.]—P. brought an action against the B. Co. for an injunction to restrain them from passing off their sauce as his by the use of the term "Yorkshire Relish." At the trial an injunction was granted with an account of profits. Defts. delivered their accounts, showing the sales of the sauce complained of, but did not give the names & addresses of their customers. On application of pltf., the judge ordered defts. to deliver to pltf. a list of the names & addresses of such customers:—*Held*: the order was right, & defts. must deliver the list ordered.—POWELL v. BIRMINGHAM VINEGAR BREWERY CO., LTD. (1896), 14 R. P. C. 1, C. A.

Annotation:—*Folld.* Saccharin Corpn. v. Chemicals & Drugs Co., [1900] 2 Ch. 556.

86. — Names of persons induced to buy defendant's goods.]—In an action to restrain the infringement of his trademark, pltf. alleged that the user of his trademark by deft. was calculated to induce, & had in fact induced, divers persons to purchase the goods of deft. as & for the goods of pltf. After delivery of defence denying pltf.'s allegation:—*Held*: deft. was entitled to discovery of the names & addresses of the divers persons alleged to have been induced to purchase the goods of deft. as & for the goods of pltf., not-

withstanding that such persons might be called at the trial as witnesses on behalf of pltf.—HUMPHRIES & CO. v. TAYLOR DRUG CO. (1888), 39 Ch. D. 693; 59 L. T. 177; 37 W. R. 192.

87. — — —.]—In an action to restrain defts. from fraudulently selling inferior qualities of goods manufactured by pltf. as their best quality, & from falsely & maliciously representing that the goods of pltf.' manufacturers were inferior to those of defts.' manufacture, pltf. were ordered to give particulars of the names & addresses of the persons to whom the goods had been sold, as well as the times & places of such sales:—*Held*: pltf., by giving particulars of the times & places of the alleged sales, were giving to defts. all the information that they required to enable them to meet the case made by pltf.; & it was not necessary to give particulars of the names & addresses of the purchasers.—DUKE & SONS v. WISDEN & CO. (1897), 77 L. T. 67; 13 T. L. R. 481; 41 Sol. Jo. 606, C. A.

88. — Removal from register.]—In proceedings to remove trade marks belonging to a firm from the register, after all the evidence had been put in with the exception of the cross-examination of two witnesses which was to take place in ct., appct. took out a summons asking that resps. might be ordered to make an affidavit of documents relating to the matters in question. By the direction of the ct. appct. stated in writing the grounds upon which he sought to have the marks removed:—*Held*: (1) (by KEKEWICH, J.), an order ought to be made following the usual form as far as possible, but directing that resps. should give the discovery by a named member of their firm who should be the one to be examined in ct.; the documents to be produced should be those relating to certain specified questions, & notwithstanding the generality of the order resps. should not be bound to set forth in schedules, or otherwise to mention, all the labels or other documents constituting a class; but it should suffice, as regarded each class of labels or other documents, to mention a specimen or specimens fairly representative of the whole; (2) (by C. A.), the order was oppressive at that stage of the proceedings; & the order must be discharged without prejudice to any order which the judge at the trial might think fit to make as to production of documents.

(3) Practice of ct. as to discretion to grant or refuse discovery reviewed (*see* No. 287, *post*).—*Re* WILLS' TRADE-MARKS, [1892] 3 Ch. 201; 67 L. T. 453, C. A.

—.]—*See, generally*, TRADE MARKS, TRADE NAMES, & DESIGNS.

89. Workmen's compensation—Application to county court judge.]—A county ct. judge sitting to hear an application for compensation under Workmen's Compensation Act, 1906 (c. 58), is acting as an arbitrator only, & has no jurisdiction to make an order for discovery before hearing either by affidavit of documents or by interrogatories.—SUTTON v. GREAT NORTHERN RY. CO., [1909] 2 K. B. 791; 79 L. J. K. B. 81; 101 L. T. 175; 2 B. W. C. C. 428.

Annotations:—*Apld.* Taylor v. Cripps, [1914] 3 K. B. 989. *Consd.* Kursell v. Timber Operators & Contractors, [1923]

party in an action is not entitled as of right to an order for discovery of documents by the opposite party, but must show, by *prima facie* evidence, that there are documents to be discovered, & that they are material to the issue.—ELSON v. CANADIAN PACIFIC RY. CO. (1897), 6 B. C. R. 71.—CAN.

o. Must be in pending action.]—A

dispute having arisen as to whether the services rendered by appcts. amounted to salvage, appcts. before issue of any summons applied for an order compelling resps. to disclose all documents relative to the value of the ship's stores & cargo, & necessary to enable appcts. to arrive at a fair valuation thereof & to formulate a claim for salvage, & for the

appointment of valuers to appraise such cargo:—*Held*: as there was no action pending between the parties, appcts. had adopted a wrong procedure, & the order should be refused.—MESSINA BROTHERS, COLES & SEARLE v. HANSEN & SCHRADER, LTD. (1911), C. P. D. 781.—S. AF.

p. Right must be in dispute.—As
m 2

Sect. 3.—In what proceedings granted: Sub-sects. 1, 2 & 3.]

2 K. B. 202. *Refd.* Turner v. Kingsbury Collieries, [1921] 3 K. B. 169.

, generally, MASTER & SERVANT.

Admiralty proceedings.]—See Sub-sect. 3, *post*.

Bankruptcy proceedings.]—See BANKRUPTCY & INSOLVENCY, Vol. V., pp. 621, 622, Nos. 5592–5608.

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County court.]—See COUNTY COURTS, Vol. XIII., p. 499, Nos. 492, 493.

Foreign court—Aid of proceedings in.]—See Part I., Sect. 3, *ante*.

Latin & English informations.]—See CROWN PRACTICE, Vol. XVI., pp. 219, 234, Nos. 78, 292–295.

Lunacy.]—See Sect. 4, sub-sect. 4, A., *post*.

Mandamus—To enforce civil right.]—See Nos. 692, 693, *post*.

Proceedings relating to commons.]—See COMMONS, Vol. XI., pp. 37, 85, Nos. 507–510, 1045.

Proceedings by & against the Crown.]—See Sect. 4, sub-sect. 2, *post*.

SUB-SECT. 2.—ACTION FOR FORFEITURE AND PENALTIES.

Action for forfeiture.]—See Nos. 125–127, *post*.

90. Action for penalties.]—Pltf. sought discovery of documents from deft. in an action for penalties:—*Held*: (1) discovery could not be ordered; (2) effect of the Jud. Acts on mode of procedure in discovery discussed (*see* No. 10, *ante*).—*HUNNINGS v. WILLIAMSON* (1883), 10 Q. B. D. 459; 52 L. J. Q. B. 400; 48 L. T. 581; 47 J. P. 390; 31 W. R. 924; *sub nom.* *HUMMINGS v. WILLIAMS*, 52 L. J. Q. B. 273; *sub nom.* *HEMINGS v. WILLIAMSON*, 48 L. T. 392; 31 W. R. 336.

Annotations:—As to (1) *Distd.* *Harvey v. Lovekin* (1884), 10 P. D. 122. *Expld.* *Martin v. Treacher* (1886), 16 Q. B. D. 507. *Consd.* *Moxborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111. *Refd.* *Derby Corp'n. v. Derbyshire County Council* (1897), 77 L. T. 107. *As to* (2) *Refd.* *Martin v. Treacher* (1886), 16 Q. B. D. 507.

91. — On a bond.]—BISHOP v. BISHOP (1640), 1 Rep. Ch. 142; 21 E. R. 532.

92. — By common informer.]—A bill for discovery of money won at play under 9 Ann. c. 14, s. 3, does not lie for a common informer suing

to adjustment of rights.]—Where there is no right in dispute between parties to be adjusted, no order for discovery can be made, & the judge has no jurisdiction to adjourn the summons for discovery to some future stage of the proceedings, when such adjustment might be necessary.—*MILLS v. ISAAC* (1892), 11 N. Z. L. R. 434.—N. Z.

PART II. SECT. 3, SUB-SECT. 2.

90 i. Action for penalties.]—The double tolls imposed by Timber Slide Cos. Act, R. S. O. 1887 (c. 180), s. 42, for false statements, are imposed by way of punishment, & not as compensation; & therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced.—*PICKEREL RIVER IMPROVEMENT CO. v. MOORE* (1896), 17 P. R. 287.—CAN.

g. — Production improperly ordered—How production resisted.]—It is improper in an action to recover penalties under Extra-Provincial Corporations Act, 63 Vict., c. 24 (O), to

issue the usual *præcipe* order for production of documents by defts. Such order having been issued:—*Held*: defts. were not bound to file an affidavit & claim privilege, but were entitled to have the order set aside.—*JOHNSTON v. LONDON & PARIS EXCHANGE* (1903), 6 O. L. R. 49; 2 O. W. R. 468, 492, 501.—CAN.

r. — Where liability barred by Statute of Limitations—Plaintiff entitled to discovery.]—TALBOT v. SMITH (1794), Ridg. L. & S. 360.—IR.

s. Action on covenant—To recover penal sum due on breach—Not penalty disentitling plaintiff to discovery.]—When a penalty is imposed upon the doing of an act which a party covenants not to do, he cannot refuse to discover whether he has done it or not, on the ground that it will subject him to a penalty. If a man enter into a covenant of this nature for payment of a sum of money if he do a particular act, he cannot protect himself from a discovery if he do the act, under the allegation that that discovery will

for penalties.—*ORME v. CROCKFORD* (1824), M'Cle. 185; 13 Price, 376; 147 E. R. 1022.

Annotations:—Expld. *Martin v. Treacher* (1886), 16 Q. B. D. 507. *Folld.* *Hobbs v. Hudson* (1890), 38 W. R. 682. *Refd.* *Case LXI.* (1875), Bitt. Prac. Cas. 27; *Moxborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111.

93. — —.]—In an action for penalties by a common informer, leave will not be granted to pltf. to call upon deft. for discovery of documents.—*WHITELEY v. BARLEY* (1887), 56 L. J. Q. B. 312; 3 T. L. R. 519, D. C.

94. — For poundbreach & rescue.]—An action for poundbreach & rescue of chattels distrained for non-payment of tithe rentcharge, in which pltf. claims treble damages under 2 Will. & Mar. Sess. 1, c. 5, s. 4, is a penal action, & pltf. therefore not entitled to an affidavit of documents.—*JONES v. JONES* (1889), 22 Q. B. D. 425; 58 L. J. Q. B. 178; 60 L. T. 421; 37 W. R. 479, D. C. *Annotations:—Apprvd. & Folld.* *Hobbs v. Hudson* (1890), 25 Q. B. D. 232. *Refd.* *Saunders v. Wiel* (1892), 67 L. T. 207.

SUB-SECT. 3.—ADMIRALTY, ECCLESIASTICAL, MATRIMONIAL, PRIZE AND PROBATE.

Admiralty.]—See ADMIRALTY, Vol. I., pp. 191, 192, Nos. 1056–1068.

95. Ecclesiastical court.]—This ct. will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Ct., because they are capable of coming at that discovery themselves.—*DUNN v. COATES* (1738), 1 Atk. 288; *West temp. Hard.* 526; 26 E. R. 185, L. C.

Annotations:—Expld. *Harvey v. Lovekin* (1884), 10 P. D. 122. *Refd.* *Redfern v. Redfern*, [1891] P. 139. *Mentd.* *British Empire Shipping Co. v. Somes* (1857), 3 K. & J. 433.

96. —.]—The old rule that the ct. would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Ct. is not applicable to the case of a bill for discovery in aid of proceedings in the Probate Ct., that ct. not having the same power of compelling discovery as the Ecclesiastical Ct. had.—*FULLER v. INGRAM* (1859), 28 L. J. Ch. 432; 32 L. T. O. S. 370; 5 Jur. N. S. 510; 7 W. R. 302.

Annotation:—Refd. *Peacock v. Lowe* (1867), L. R. 1 P. & D. 478, n.

97. —.]—REDFERN v. REDFERN, No. 99, *post*.

98. Matrimonial causes — Assessment of damages against co-respondent.]—P. petitioned for dissolution of marriage & for assessment of damages. On summons, at the instance of co- resp.:—*Held*: petitioner must bring into the

subject him to a penalty; because after having covenanted to pay money for doing the act, he cannot be heard to say that it is a penalty, in order to protect himself from discovering whether he has done the act. If he choose to do the act, he must pay the stipulated sum.—*FRENCH v. MACALE* (1842), 4 I. Eq. R. 574; 1 Con. & Law. 459; 2 Dr. & War. 269.—IR.

PART II. SECT. 3, SUB-SECT. 3.

t. Admiralty—Limited use of evidence on trial.]—In admiralty matters a judge can give an order for discovery instead of having interrogatories, notwithstanding that there is nothing in the rules about it; but such discovery can be used at trial only when it is impossible to have oral evidence.—*POINT ANNE QUARRIES v. THE WHALEN* (1921), 68 D. L. R. 627; 20 Exch. C. R. 483.—CAN.

a. Matrimonial causes—Evidence of possession of material documents.]—An order for discovery on a petition for divorce will be made against a

istry letters written by resp. to him, or file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.—*POLLARD & HEMMING* (1864), 3 Sw. & Tr. 3; 11 L. T. 749; 164 E. R. 1413.

Annotation:—*Redf. Redfern v. Redfern*, [1891] P. 139.

99. — **R. S. C., Ord. 68, r. 1 (d).**—In a petition by a husband for dissolution of marriage, petitioner applied for an order that resp., who was minor, should make the usual affidavit as to documents. The only issue in the suit was that adultery. Butt, J., decided on the authority of *Mayor v. Collins*, No. 1379, *post*, that as resp. was infant, such an order could not be made against her:—*Held*: (1) as *Mayor v. Collins* turned upon the rules of the Supreme Ct., it was not applicable, since by R. S. C., Ord. 68, r. 1 (d), those rules did not apply to proceedings for divorce; (2) in the present case an order ought not to be made, for discovery ought not to be required from a party in divorce proceedings when it was sought for no other purpose than to prove such party guilty of adultery.

(3) *Qu.*: whether an order for discovery cannot be made against an infant in proceedings for divorce.

(4) The power of the Ecclesiastical Cts. to require discovery has long been established & recognised (ANDLEY, L.J.).—*REDFERN v. REDFERN*, [1891] P. 139; 60 L. J. P. 9; 64 L. T. 68; 55 J. P. 37; 1 W. R. 212; 7 T. L. R. 157, C. A.

Annotations:—As to (2) *Expld. Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. *Redf. Evans v. Evans*, [1904] P. 378; *Hensley v. Hensley & Nevin* (1920), 122 L. T. 814; *Franklin v. Franklin & Minshall*, [1921] P. 407. As to (3) *Redf. Curtis v. Mundy*, [1892] 2 Q. B. 178.

100. — **Not to prove adultery.**—In a complex suit:—*Held*: the wife must file an affidavit to give discovery of documents, limited to her counter-charges other than that of adultery.—*SCHOOLCRAFT v. SCHOOLCRAFT & RUHMOOR* (1891), 5 L. T. 794.

101. — ——.]—*REDFERN v. REDFERN*, No. 9, *ante*.

102. — ——.]—Where, in a suit for dissolution of marriage, the only issue is that of adultery, the ct. will not make an order for discovery.—*THOMAS v. THOMAS & HEGNAUR* (1918), 4 T. L. R. 434; 62 Sol. Jo. 637.

103. — **Not against King's Proctor.**—The ct. refused to order the King's Proctor to give discovery of documents to petitioner in a divorce suit.—*D. v. D.* (1909), 25 T. L. R. 411; 53 Sol. Jo. 59.

104. — **Nullity of marriage—Guardian ad litem.**—A person prosecuting a suit for nullity of marriage in this Division on behalf of a person of unsound mind not so found by inquisition is as compellable to disclose documents as the person on whose behalf the suit is brought would be if he himself were prosecuting the same & of sound mind.—*PASPATI v. PASPATI*, [1914] P. 110; 83 L. J. P. 56; 110 L. T. 751; 30 T. L. R. 390; 58 Sol. Jo. 400.

105. **Prize Court—Prize Court Rule, Ord. 9, r. 1.**—A cargo of hides & tanning materials consigned in a Swedish ship from South America to

a Swedish port was seized in Sept. 1915, in the course of the voyage. A writ was issued claiming the condemnation of the cargo as contraband. The consignee, a Swedish subject, claimed the cargo & alleged by his affidavits that it had been bought by him partly for his tanning business in Sweden, & partly for sale to customers in that country. The President made the following order for discovery; "that claimant do within 21 days make discovery on oath of all books of account, letter books, & usual commercial documents relating to the matters in question, including claimant's business books from Jan. 1, 1914, up to the date of seizure, showing all purchases from the shippers of the goods seized during the same period, or of goods similar thereto, & of the sales of such goods by claimants, & all contracts, policies of insurance, cables & correspondence relating to the purchases & sales; & also, the same books & documents relating to such goods, or goods similar thereto, which were sold by claimant for delivery in Germany during the same period." The order was made subject to evidence being filed that the Procurator-General had reason to suspect that the cargo had an enemy destination:—*Held*: (1) there was jurisdiction under Prize Ct. Rules, Ord. 9, r. 1, to make the order; (2) the documents particularised therein related to the question in the action; (3) the discretion of the President to make the order should not be interfered with.—*THE CONSUL CORFITZON*, [1917] A. C. 550; 86 L. J. P. 136; 116 L. T. 674; 33 T. L. R. 456; 61 Sol. Jo. 576; 14 Asp. M. L. C. 66, P. C.

Annotation:—As to (1) *Redf. The Kronprinzessin Victoria*, [1919] A. C. 261.

106. — ——.]—A Prize Ct. administering international law is not affected by the municipal law of any country as to what discovery may or may not be made by its subjects.—*THE BARON STJERNBLAD*, [1918] A. C. 173; 87 L. J. P. 11; 117 L. T. 743; 34 T. L. R. 106; 14 Asp. M. L. C. 178, P. C.

Annotation:—*Mentd. The Falk, etc.*, [1921] 1 A. C. 787.

107. — ——.]—Conditional contraband, namely, coffee, was shipped from Brazil in July, 1915, in a Swedish ship under bills of lading by which it was to be delivered to applts. at a port in Sweden, where they carried on business. The coffee was seized at Kirkwall on Aug. 24, 1915. At that date the property in the coffee had passed to applts., who were purchasers & had the real control over it. Applts. intended to dispose of it to the German Govt. It was alleged that the Swedish Trade Law of Apr. 1916, precluded applts. from making full discovery of their trading books:—*Held*: it was impossible for a Prize Ct., an international tribunal, to allow its investigation of the truth of matter brought before it to be limited by the restrictions of the municipal law affecting one of the parties.—*THE KRONPRINZESSIN VICTORIA*, [1919] A. C. 261; 88 L. J. P. 17; 120 L. T. 75; 35 T. L. R. 74; 14 Asp. M. L. C. 391, P. C.

Annotations:—*Mentd. The Kronprins-Gustaf*, [1919] P. 182; *The Noordam*, [1919] P. 57; *The Kronprinsessan Margareta, The Parai, etc.*, [1921] 1 A. C. 486.

108. — ——.]—*THE BALTO*, No. 326, *post*.

party upon the uncontradicted affidavit of the solr. for the opposite party to the effect that the party against whom the order is sought has material documents in his possession or power.—*BISHOP v. BISHOP* (1909), 43 L. L. T. 38.—*IR*.

b. *Probate action—Discovery postponed—Until proof of allegation invalidating will.*—In an action against

defts., as exors. & residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, & for administration & partition:—*Held*: until pl'tfs. established the alteration charged, they were not entitled to discovery of instruments affecting the estate of

testator.—*HURST v. BARBER* (1888), 12 P. R. 467.—*CAN*.

c. — *Power of court to order third party to facilitate inspection—(f documents essential to grant of administration.)*—Where the ct. has given leave to take out a grant of letters of administration *ad colligenda bona*, & a person other than the person to whom

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registry letters written by resp. to him, or file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.—*POLLARD v. POLLARD & HEMMING* (1864), 3 Sw. & Tr. 613; 11 L. T. 749; 164 E. R. 1413.

Annotation:—*Refd.* *Redfern v. Redfern*, [1891] P. 139.

99. — R. S. C., Ord. 68, r. 1 (d).]—In a petition by a husband for dissolution of marriage, petitioner applied for an order that resp., who was a minor, should make the usual affidavit as to documents. The only issue in the suit was that of adultery. Butt, J., decided on the authority of *Mayor v. Collins*, No. 1379, *post*, that as resp. was an infant, such an order could not be made against her:—*Held*: (1) as *Mayor v. Collins* turned upon the rules of the Supreme Ct., it was not applicable, since by R. S. C., Ord. 68, r. 1 (d), those rules did not apply to proceedings for divorce; (2) in the present case an order ought not to be made, for discovery ought not to be required from a party to divorce proceedings when it was sought for no other purpose than to prove such party guilty of adultery.

(3) *Qu.*: whether an order for discovery cannot be made against an infant in proceedings for divorce.

(4) The power of the Ecclesiastical Cts. to require discovery has long been established & recognised (LINDLEY, L.J.).—*REDFERN v. REDFERN*, [1891] P. 139; 60 L. J. P. 9; 64 L. T. 68; 55 J. P. 37; 39 W. R. 212; 7 T. L. R. 157, C. A.

Annotations:—*As to* (2) *Expld.* *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. *Refd.* *Evans v. Evans*, [1904] P. 378; *Hensley v. Hensley & Nevin* (1920), 122 L. T. 814; *Franklin v. Franklin & Minshall*, [1921] P. 407. *As to* (3) *Refd.* *Curtis v. Mundy*, [1892] 2 Q. B. 178.

100. — Not to prove adultery.]—In a complex suit:—*Held*: the wife must file an affidavit & give discovery of documents, limited to her counter-charges other than that of adultery.—*SCHOOLCRAFT v. SCHOOLCRAFT & RUHMOOR* (1891), 65 L. T. 794.

101. — —.]—*REDFERN v. REDFERN*, No. 99,

102. — —.]—Where, in a suit for dissolution of marriage, the only issue is that of adultery, the ct. will not make an order for discovery.—*THOMAS v. THOMAS & HEGNAUR* (1918), 34 T. L. R. 434; 62 Sol. Jo. 637.

103. — Not against King's Proctor.]—The ct. refused to order the King's Proctor to give discovery of documents to petitioner in a divorce suit.—*D. v. D.* (1909), 25 T. L. R. 411; 53 Sol. Jo. 359.

104. — Nullity of marriage—Guardian ad litem.]—A person prosecuting a suit for nullity of marriage in this Division on behalf of a person of unsound mind not so found by inquisition is as compellable to disclose documents as the person on whose behalf the suit is brought would be if he himself were prosecuting the same & of sound mind.—*PASPATI v. PASPATI*, [1914] P. 110; 83 L. J. P. 56; 110 L. T. 751; 30 T. L. R. 390; 58 Sol. Jo. 400.

105. Prize Court—Prize Court Rule, Ord. 9, r. 1.]—A cargo of hides & tanning materials consigned in a Swedish ship from South America to

a Swedish port was seized in Sept. 1915, in the course of the voyage. A writ was issued claiming the condemnation of the cargo as contraband. The consignee, a Swedish subject, claimed the cargo & alleged by his affidavits that it had been bought by him partly for his tanning business in Sweden, & partly for sale to customers in that country. The President made the following order for discovery; "that claimant do within 21 days make discovery on oath of all books of account, letter books, & usual commercial documents relating to the matters in question, including claimant's business books from Jan. 1, 1914, up to the date of seizure, showing all purchases from the shippers of the goods seized during the same period, or of goods similar thereto, & of the sales of such goods by claimants, & all contracts, policies of insurance, cables & correspondence relating to the purchases & sales; & also, the same books & documents relating to such goods, or goods similar thereto, which were sold by claimant for delivery in Germany during the same period." The order was made subject to evidence being filed that the Procurator-General had reason to suspect that the cargo had an enemy destination:—*Held*: (1) there was jurisdiction under Prize Ct. Rules, Ord. 9, r. 1, to make the order; (2) the documents particularised therein related to the question in the action; (3) the discretion of the President to make the order should not be interfered with.—*THE CONSUL CORFITZON*, [1917] A. C. 550; 86 L. J. P. 136; 116 L. T. 674; 33 T. L. R. 456; 61 Sol. Jo. 576; 14 Asp. M. L. C. 66, P. C.

Annotation:—*As to* (1) *Refd.* *The Kronprinzessin Victoria*, [1919] A. C. 261.

106. — —.]—A Prize Ct. administering international law is not affected by the municipal law of any country as to what discovery may or may not be made by its subjects.—*THE BARON STJERNBLAD*, [1918] A. C. 173; 87 L. J. P. 11; 117 L. T. 743; 34 T. L. R. 106; 14 Asp. M. L. C. 178, P. C.

Annotation:—*Mentd.* *The Falk, etc.*, [1921] 1 A. C. 787.

107. — —.]—Conditional contraband, namely, coffee, was shipped from Brazil in July, 1915, in a Swedish ship under bills of lading by which it was to be delivered to applts. at a port in Sweden, where they carried on business. The coffee was seized at Kirkwall on Aug. 24, 1915. At that date the property in the coffee had passed to applts., who were purchasers & had the real control over it. Applts. intended to dispose of it to the German Govt. It was alleged that the Swedish Trade Law of Apr. 1916, precluded applts. from making full discovery of their trading books:—*Held*: it was impossible for a Prize Ct., an international tribunal, to allow its investigation of the truth of matter brought before it to be limited by the restrictions of the municipal law affecting one of the parties.—*THE KRONPRINZESSIN VICTORIA*, [1919] A. C. 261; 88 L. J. P. 17; 120 L. T. 75; 35 T. L. R. 74; 14 Asp. M. L. C. 391, P. C.

Annotations:—*Mentd.* *The Kronprins-Gustaf*, [1919] P. 182; *The Noordam*, [1919] P. 57; *The Kronprinsessan Margareta, The Parana, etc.*, [1921] 1 A. C. 486.

108. — —.]—*THE BALTO*, No. 326, *post*.

party upon the uncontradicted affidavit of the solr. for the opposite party to the effect that the party against whom the order is sought has material documents in his possession or power.—*BISHOP v. BISHOP* (1909), 43 L. L. T. 38.—*IR.*

b. Probate action — Discovery postponed—Until proof of allegation invali-

dating will.]—In an action against defts., as exors. & residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, & for administration & partition:—*Held*: until plffs. established the alteration charged, they were not entitled to discovery of instruments affecting the estate of

testator.—*HURST v. BARBER* (1888), 12 P. R. 467.—*CAN.*

c. — Power of court to order third party to facilitate inspection—Of documents essential to grant of administration.]—Where the ct. has given leave to take out a grant of letters of administration *ad colligenda bona*, & a person other than the person to whom

Sect. 3.—In what proceedings granted: Sub-sects. 3

109. Probate action.]—FULLER v. INGRAM, No. 96, *ante*.

110. — Power of court.]—The Ct. of Probate has power to order any document sufficiently described, & shown to be material to the inquiry going on before it, to be brought into the Registry, & also to order either party to file additional affidavit as to scripts. It has also probably a more extensive power to make general orders as to the discovery & inspection of documents, but the exercise of that power must be regulated by fixed rules sanctioned by the L. C. under Ct. of Probate Act, 1857 (c. 77), s. 30.—**PEACOCK & PEAKE v. LOWE** (1867), L. R. 1 P. & D. 478, n.; 36 L. J. P. & M. 91; 16 L. T. 641.

*Annotation:—*Consd. **Hunt v. Anderson** (1868), L. R. 1 P. & D. 476.

111. — —.]—The Ct. of Probate possesses powers as extensive as the Ct. of Ch. & the Superior Cts. of Common Law to compel a discovery by virtue of Ct. of Probate Act, 1857 (c. 77), s. 36, such powers being auxiliary to the trial of questions of fact by a jury before the ct. itself. The Ct. of Probate will exercise its power of compelling a discovery in cases where a discovery would be granted by the Ct. of Ch., in order that parties may not be compelled to resort to the Ct. of Ch. for assistance in the prosecution of a suit in the Ct. of Probate.—**HUNT v. ANDERSON** (1868), L. R. 1 P. & D. 476; 37 L. J. P. & M. 27; 18 L. T. 33; 32 J. P. 247; 16 W. R. 583.

*Annotation:—*Distd. **O'Shea v. Wood**, [1891] P. 237.

112. — —.]—AUSTIN v. COLLETT (1907), *Times*, Dec. 7.

SUB-SECT. 4.—ACTION FOR RECOVERY OF LAND.

113. By plaintiff—To test validity of his claim.]—Bill lies to discover the title of a person bringing ejectment, & to see if it is not in some other.—**METCALF v. HERVEY** (1749), 1 Ves. Sen. 248; 27 E. R. 1011.

*Annotations:—*Refd. **Bowman v. Lygon** (1792), 1 Anst. 1; **Horton v. Bott** (1857), 2 H. & N. 249; **Stoate v. Rew** (1863), 11 W. R. 595.

114. By defendant—Whether to discover nature of estate.]—DUNSTABLE v. HORTON (1308-9), *Selden Society Y. B.*, Vol. I., 2 Edw. II., p. 55.

115. — —.]—The bill stated pltf.'s title to an undivided moiety of an estate, & that pltf. had purchased the other moiety, but that defts. alleged that they were entitled to that moiety under a settlement & a will antecedent to pltf.'s purchase. The prayer was for a declaration of the rights of the parties, & a partition. The bill required defts. to discover whether they had not represented that they were entitled under the settlement & will, & to set forth the contents of those instruments & the nature of their title, & to set forth a schedule of documents in their power in the usual way. Defts., in their answer, submitted that they were not bound to make this discovery; &, after admitting the possession of certain documents, denied having in their power any others relating in any manner to the title of

pltf. On exceptions to a report of the Master finding the answer sufficient:—*Held*: (1) defts. were bound to set forth whether they had made the alleged representations as to their title, but not whether such representations were true, or to discover the nature of their title; (2) they must set forth a schedule of all documents in their power.—**POTTER v. WALLER** (1848), 2 De G. & Sm. 410; 64 E. R. 183.

*Annotation:—*Mentd. **Bolton v. Bolton** (1868), L. R. 7 Eq. 298, n.

116. — Where plaintiff's title *prima facie* good.]—To a bill by one who claimed estates, either as heir *ex parte maternâ* of G., the person last seised or as a remainderman under the limitations of some prior settlement, charging that G. had only a life interest in the property, as would appear if the contents of a certain deed executed in 1730, & within the power of deft., were set forth, & praying, besides discovery in aid of an ejectment, the removal of outstanding terms, & other relief connected with the action at law, deft. pleaded that, in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, & subsequently devised them to deft., but took no notice of the deed of 1730, & did not state any part of its contents:—*Held*: the plea would be overruled.

I am of opinion that, deft. relying upon that subsequent title, not connecting it in any way with the ground of the title upon which pltf. stands, not denying that title or any substantial part of it, not denying the possession of the deed of 1730, & not denying its existence, such a plea cannot be sustained (**LORD LYNTHURST, C.**).—**HUNGATE v. GASCOIGNE** (1830), 1 Russ. & M. 698; 39 E. R. 268.

117. — Whether must make affidavit of documents.]—POTTER v. WALLER, No. 115, *ante*.

118. — —.]—QUIN v. RATCLIFF, No. 53, *ante*.

119. — —.]—ANON., [1876] W. N. 22; 2 Char. Cham. Cas. 61; Bitt. Prac. Cas. 97.

120. — —.]—Deft. in an action for the recovery of land of which he is in possession may be compelled by order under R. S. C. 1875, Ord. 31, r. 12, to make an affidavit of his documents of title, although he may have a right to object to produce them.—**NEW BRITISH MUTUAL INVESTMENT CO., LTD. v. PEED** (1878), 3 C. P. D. 196; 26 W. R. 354.

*Annotations:—*N.F. **Daniel v. Ford** (1882), 47 L. T. 575. **Fold. Wrentmore v. Hagley** (1882), 46 L. T. 741. *Refd.* **Philipps v. Philipps** (1879), 40 L. T. 815.

121. — —.]—In an action for the recovery of land deft. may be compelled to make an affidavit of documents in his possession, relating to the matter in question under R. S. C. 1875, Ord. 31, r. 12.—**WRENTMORE v. HAGLEY** (1882), 46 L. T. 741.

122. — —.]—Pltf. in an action in the nature of an ejectment action claiming by a purely legal title, cannot obtain discovery from defts. unless before the Jud. Acts a bill for discovery in aid of such action could have been sustained.

Where a pltf. claiming possession through an heir-at-law & subsequent devisees pleaded in his statement of claim only wills & the probates of such wills:—*Held*: such pltf. was not entitled to

such leave has been given is in possession of papers of deceased, without an inspection of which the grant cannot be prepared, but of which the person so given leave cannot obtain inspection, then the ct. will order the person in possession of such papers to lodge them in ct.—*In the Goods of WILSON* (No. 1) (1907), 42 L. L. T. 38.—IR.

PART II. SECT. 3, SUB-SECT. 4.

113 i. By plaintiff—To test validity of his claim.]—Rival heirs are treated in the same way as heir & devisee with respect to the inspection of documents. Inspection of deeds in the hands of a person claiming as heir, will not be

granted to a deft. in an ejectment on title, although the affidavit states that they are required solely for the purpose of making out a pedigree by the recitals, even upon terms not to take advantage of any outstanding terms which the inspection might disclose.—**GRACE v. HUSKEY** (1854), 6 Ir. Jur. 243.—IR.

an order for an affidavit of documents in deft.'s possession.—**DANIEL v. FORD** (1882), 47 L. T. 575.

123. ———.]—(1) In an action for the recovery of land, pltf. is entitled to discovery as to all matters relevant to his own & not to deft.'s case, & deft. must file a proper affidavit of documents.

(2) In an action for the recovery of land, pltf. claimed as assignee of co-heiresses of a deceased intestate owner of the land, & deft. relied on his possession & also set up Stat. Limitations:—*Held*: pltf. was entitled to interrogate deft. as to matters relevant to the pedigree & heirship of his assignors & as to alleged admissions by deft. that his possession of the land was as trustee for the intestate & her heirs, even though pltf. might have other means of proving the facts inquired after, & deft. must answer the interrogatories in substance subject to any privilege against particular discovery which he might be entitled to claim.

(3) Effect of the Jud. Acts on mode of procedure discussed (*see* No. 11, *ante*).—**LYELL v. KENNEDY** (No. 1) (1883), 8 App. Cas. 217; 52 L. J. Ch. 385; 48 L. T. 585; 31 W. R. 618, H. L.; *reversg.* (1882), 20 Ch. D. 484, C. A.; *subsequent proceedings* (1883), 9 App. Cas. 81, H. L.; (1884), 27 Ch. D. 1, C. A.

Annotations:—*As to* (1) **Apld.** **Daniel v. Ford** (1882), 47 L. T. 575. **Distd.** **Ponsonby v. Hartley**, [1883] W. N. 44; **Horton v. Donnington** (1886), 2 T. L. R. 739. **Refd.** **Wrentmore v. Hagley** (1882), 46 L. T. 741. *As to* (2) **Refd.** **Leeke v. Portsmouth Corpn.** (1912), 106 L. T. 627. *As to* (3) **Consd.** **Hunnings v. Williamson** (1883), 10 Q. B. D. 459; **Roberts v. Oppenheim** (1884), 26 Ch. D. 724. **Refd.** **Bllder v. Bridges** (1885), 29 Ch. D. 29. *Generally, Refd.* **Hall v. Truman, Hanbury** (1885), 52 L. T. 82; **Hall v. Truman, Hanbury** (1885), 29 Ch. D. 307. **Mentd.** **Companhia de Mocambique v. British South Africa Co., De Sousa v. Same**, [1892] 2 Q. B. 358.

124. Not where plaintiff's allegations vague.]—Bill stating generally, that under some deeds in the custody of defts., pltf. was entitled to some interest in some estates in their possession, prayed a discovery & delivery of the title deeds, possession of the estate & an account:—*Held*: demurrer to the whole bill was allowed.—**RYVES v. RYVES** (1797), 3 Ves. 343; 30 E. R. 1044, L. C.

Annotations:—**Refd.** **A.-G. to Prince of Wales v. St. Aubin** (1811), Wight. 167; **Houghton v. Reynolds** (1843), 2 Hare, 264.

125. ——— Action to enforce forfeiture.]—(1) Deft. in an action to recover possession of demised premises on a forfeiture for breach of covenant may be ordered to make an affidavit of documents.

(2) He may refuse to disclose any documents which would establish the case of forfeiture against him.—**SEAWARD v. DENNINGTON** (1896), 44 W. R. 696; 12 T. L. R. 528; 40 Sol. Jo. 668, C. A.

Annotations:—*As to* (1) **N.F.** **Mexborough v. Whitwood U. D. C.**, [1897] 2 Q. B. 111. *As to* (2) **Refd.** **Spokes v. Grosvenor Hotel Co.**, [1897] 2 Q. B. 124.

126. ———.]—In an action to enforce a forfeiture of a lease for breach of covenant the ct. will not grant discovery of documents or leave to administer interrogatories for the purpose of establishing the forfeiture.—**MEXBOROUGH (EARL) v. WHITWOOD URBAN DISTRICT COUNCIL**, [1897] 2 Q. B. 111; 66 L. J. Q. B. 637; 76 L. T. 765; 45 W. R. 564; 13 T. L. R. 443, C. A.

Annotations:—**Refd.** **Titus Astle v. Mansfield** (1905), 22 R. P. C. 356; **Powis v. Negus**, [1923] 1 Ch. 186.

127. ———.]—A lessor brought an action against lessees, trustees for the P. Co. for forfeiture of their lease on the ground that they had in breach of a covenant contained in the lease assigned or parted with possession to two other

cos. without the license of the lessor. The two cos. were also made defts., the relief claimed against them being possession of the demised premises. These defts. by their defence denied that the lessees had assigned or parted with possession of any part of the demised premises to them or that they were in possession of any part of the premises. Pltf. served a *subpoena duces tecum* on the secretary of both cos. requiring him to produce specified books of the cos.:—*Held*: while the ct. would not grant discovery by way of a *subpoena duces tecum* against the secretary of a co. in aid of a claim for forfeiture of that co.'s lease, this *subpoena* was valid & effective, because the two deft. cos. did not claim to be in possession by virtue of any derivative title under the lease, so that the action against them was not for forfeiture.—**POWIS (EARL) v. NEGUS**, [1923] 1 Ch. 186; 92 L. J. Ch. 295; 128 L. T. 733; 39 T. L. R. 141.

128. After issue joined.]—**ANON.**, [1876] W. N. 11; Bitt. Prac. Cas. 91.

SECT. 4.—BY AND AGAINST WHAT PERSONS OBTAINED.

SUB-SECT. 1.—PARTIES.

129. General rule.]—Cargo owners sued ship-owners for alleged breach of a warranty of seaworthiness contained in a bill of lading by which the cargo was lost. Pltfs. were insured to the extent of three fourths of the loss, & after the commencement of the action the underwriters paid to pltfs. the amount so insured & the action was thenceforward conducted by their solrs. The underwriters had during the loading of the ship procured an inspection of her condition by a surveyor who had made a report to them thereon which was in the possession of their solrs. Defts. claimed discovery of the document & applied for a stay of the action until it should be produced:—*Held*: they were not entitled to such discovery.

It is not a case in which one person is using the name of another merely as a nominal pltf. for the purpose of bringing an action in which he alone is really interested; for pltfs. here have a real & substantial interest of their own in the action. These facts seem to me to take the case out of those decisions by which discovery has been given as against a party not nominally a party to an action, on the ground that he really was the party to the action. The rules with regard to discovery proceed on the basis that the right to discovery is as against a party to an action, & *prima facie* it would be an answer to an application for discovery that the person against whom it was sought was not a party. Within certain limits ascertained by the decisions this right has been extended as against a person who, though in truth & in substance he is the party to the action, is not so in form; but it does not appear to me that those decisions apply to the case of underwriters who, under such circumstances as exist in the present case, are seeking to enforce a remedy which exists directly for the benefit of the assured, though indirectly & by way of subrogation its enforcement may benefit the underwriters (**COLLINS, M.R.**).—**NELSON (JAMES) & SONS, LTD. v. NELSON LINE (LIVERPOOL), LTD.**, [1906] 2 K. B. 217; 75 L. J. K. B. 895; 95 L. T. 180; 54 W. R. 546; 22 T. L. R. 630; 10 Asp. M. L. C. 265; 11 Com. Cas. 228, C. A.

Sect. 4.—By and against what persons obtained:
Sub-sect. 1.]

130. Discovery only between parties.]—The books of comrs. ought not to be inspected, unless they are parties.

As the comrs. are not parties to the action, pltf. ought not to have the liberty of inspecting & taking copies of their books (*per* CUR.).—**ABERY v. DICKENSON** (1755), Say. 250 ; 96 E. R. 870.

131. —.]—If, in a bill for discovery in aid of the defence to an action, a pltf., who is not a party to the record at law, be joined with co-pltfs., defts. in the action, the bill is demurrable.—**GLYN v. SOARES** (1835), 3 My. & K. 450 ; 4 L. J. Ch. 250 ; 40 E. R. 171 ; *subsequent proceedings* (1836), 1 Y. & C. Ex. 644 ; *sub nom.* **PORTUGAL (QUEEN) v. GLYN** (1840), 7 Cl. & Fin. 466, H. L.

*Annotations:—*Consd. **Darthez v. Lee** (1836), 2 Y. & C. Ex. 5 ; **Irving v. Thompson** (1839), 9 Sim. 17. *Refd.* **Davies v. Quarterman** (1840), 4 Y. & C. Ex. 257 ; **Kerr v. Rew** (1840), 5 My. & Cr. 154 ; **Anderson v. Wallis** (1842), 12 L. J. Ch. 291. *Mentd.* **Lawrence v. Mathews** (1837), Donnelly, 234.

132. —.]—**PORTUGAL (QUEEN) v. GLYN**, No. 41, *ante*.

133. —.]—A bill of discovery in aid of the defence to an action at law cannot be maintained against a person interested in the action, unless he is a party to the record at law.

In an action on a policy of marine insurance, brought by the agent in whose name the policy was effected:—*Held*: the person named in the declaration as the real person assured was not to be considered a party to the record at law, so as to be liable to a bill of discovery.—**KERR v. REW** (1840), 5 My. & Cr. 154 ; 9 L. J. Ch. 148 ; 3 L. T. 448 ; 4 Jur. 525 ; 41 E. R. 329, L. C.

*Annotations:—*Consd. **Portugal (Queen) v. Glyn** (1840), 7 Cl. & Fin. 466 ; **Manchester Fire Assce. v. Wykes** (1875), 33 L. T. 142.

134. —.]—On a bill to set aside a deed filed by one pltf. only, praying that, if necessary, it might be taken as on behalf of creditors generally, it appeared that A., claiming under the deed, had a power of appointment, & that she had appointed under her power ; pltf. moved for production of documents in the hands of the trustee of the deed, offering to confirm the appointment of A. The appointees were not parties:—*Held*: production could not be enforced in the absence of those persons.—**FORD v. DOLPHIN** (1852), 1 Drew. 222 ; 61 E. R. 436.

135. —.]—It is not consistent with the practice of the ct. to make an order for production of documents on the solr. of a party against whom discovery is sought.

A pltf. will not in general be allowed production

from a deft. until he has delivered a statement of claim.

A pltf. issued a writ of summons against several defts., the indorsement of claim comprising a great variety of seemingly unconnected matters ; & then, before delivering a statement of claim, took out a summons for the production, " by the solr. of defts. & others named in " a schedule to an affidavit of even date, of certain documents specified in the schedule ; stating by the affidavit that the specified documents were in the possession of the persons named, & that the whole of the documents related to the action, & were essential to establish pltf.'s case:—*Held*: pltf. was not entitled to the production asked.—**CASHIN v. CRADDOCK** (1876), 2 Ch. D. 140 ; 34 L. T. 52 ; 3 Char. Pr. Cas. 203.

*Annotations:—**Refd.* **Costa Rica Republic v. Strousberg** (1879), 11 Ch. D. 323 ; **Philipps v. Philipps** (1879), 40 L. T. 815.

136. —.]—An order was made by consent of the parties in an action pending in Scotland for certain persons who were not parties to the litigation to attend before a comr. in England, & produce certain documents referred to in the order. These persons having failed to attend before the comr., an order for their attendance was made under 6 & 7 Vict., c. 82, s. 5:—*Held*: there was no jurisdiction given by the sect. to make such an order, inasmuch as it was not an order for the examination of persons as witnesses & for the production of documents by them as ancillary to the examination, but was an order for discovery & production of documents, before the trial by third persons who were not parties to & had no interest in the action.—**BURCHARD v. MACFARLANE, Ex p. TINDALL**, [1891] 2 Q. B. 241 ; 60 L. J. Q. B. 587 ; 65 L. T. 282 ; 39 W. R. 694 ; 7 T. L. R. 526 ; 7 Asp. M. L. C. 93, C. A.

*Annotation:—**Refd.* **Spokes v. Grosvenor & West-End Ry. Terminus Hotel Co.** (1897), 66 L. J. Q. B. 572.

See R. S. C., Ord. 37, r. 7.

137. Person in position of party—Consent to be bound by previous order.]—In an administration suit an order was made, on the application of defts., the trustees of the will, that a contract made by them before the institution of the suit for the sale of part of the testator's estate should be carried into effect, the purchaser consenting to be bound by the order, " as if he were a party to the suit, & the contract were specially the subject thereof." The purchaser having made an application, which was opposed by the trustees, for the reduction of the purchase-money on the ground of adverse claims to part of the property:—*Held*: he was entitled to an affidavit by the trustees as

PART II. SECT. 4, SUB-SECT. 1.

130 i. Discovery only between parties.]—**VULCAN IRON WORKS v. WINNIPEG LODGE NO. 122, IRONMOULDERS' UNION OF NORTH AMERICA** (1908), 9 W. L. R. 208.—CAN.

130 ii. —.]—The ct. will order the inspection of documents affecting the question at issue in the hands of the respective parties, & that copies be interchanged, but will not make an order for the production of documents in the hands of a person not a party to the suit.—**MURPHY v. DOUGHTY** (1867), 15 W. R. 432.—IR.

130 iii. —.]—A person not a party to an action who is alleged by the parties to be in possession of documents relevant to the issue between them cannot be compelled, prior to the trial, to produce such documents for the inspection of the parties to assist them in preparing for trial.

Semble: no machinery apart from the process of *subpoena duces tecum*

exists to compel the production of documents in the possession or control of a person who is not a party to the action.—**BENSON & SIMPSON v. ORENSTEIN ARTHUR KOPPEL, LTD. (CONTROLLERS) (IN LIQUIDATION)** (1918), W. L. D. 45.—S. AF.

d. — *Whose interests are adverse — Though not opposed on the record.]*—The rules of ct., Sask., provide that " any party " may require " any adverse party " to make discovery of the documents in his possession relating to the matters in question in the action ; that every party may call upon " any other party " to produce for inspection any document referred to in the pleadings or affidavits of such party, & that " any party " may be orally examined touching the matters in question by " any party adverse in interest ":—*Held*: " a party adverse in interest " is not necessarily limited to a party with whom an issue is to be adjudicated upon by the ct. in the

action. A party to a cause or matter may be said to be adverse in interest to another party if he has a direct pecuniary or other substantial legal interest adverse to the legal interest of the other party, even though they may be upon the same side of the record & there is no issue on the record that the ct. will be called upon to adjudicate between them.—

Semble: the words " any other party " in rule 256 mean " any other party adverse in interest."—**ROSE & LAFLAMME, LTD. v. CAMPBELL, WILSON & STRATHDEE, LTD. & GRAND TRUNK PACIFIC RY. Co.**, [1923] 4 D. L. R. 92 ; 2 W. W. R. 1067.—CAN.

e. — — — — —.]—A deft. may obtain discovery or inspection as against a co-deft. if the latter can be regarded as an opposite party. Pltf. sued to set aside a mtge. made by his uncle (third deft.) to first and second defts., alleging that, shortly after pltf. had attained his majority, he had

to documents in their possession, relating to the matters in question between him & them.—*DENT v. DENT* (1865), L. R. 1 Eq. 186; 35 Beav. 126; 35 L. J. Ch. 112; 55 E. R. 843.

138. "Other party"—R. S. C., Ord. 31, r. 12—Although no claim against such party.]—*SPOKES v. GROSVENOR HOTEL CO.*, No. 60, *ante*.

139. ———.]—In an action against the director of a co., the co., & a third party, pltf. alleged that he was induced, by the fraud & misrepresentation of the director & the third party, to enter into an agreement to sell shares in the co. to the director at an undervalue, & he asked, as against them, for a declaration that the agreement & the transfer of shares were void & of no effect, & to have the agreement & the transfer set aside. As against the co., he asked to have the register of members rectified by the insertion of his name as a holder of the shares:—*Held*: the co. was an "other party" to the action within the meaning of the above rule & the ct. had jurisdiction to make an order for discovery of documents against the co.—*CORY v. CORY*, [1923] 1 Ch. 90; 92 L. J. Ch. 157, C. A.

140. Partners—Joint order.]—After the dissolution of a partnership one of the two partners commenced an action in the firm name to recover a debt alleged to be due to the partnership, & gave to the other partner, who did not consent to the action & who disclaimed all right to any sum that might be recovered, an indemnity against the costs to be incurred. An order requiring "ptfs." to make a further & better affidavit of documents was served by deft. upon the partner bringing the action, who made a further affidavit & served a copy of the order on his partner, & on the refusal of the latter to make an affidavit, applied for an order of attachment against him on the ground of his non-compliance with the order for a further & better affidavit of documents:—*Held*: the ct. had jurisdiction to make the order of attachment.—*SEAL & EDGELOW v. KINGSTON*, [1908] 2 K. B. 579; 77 L. J. K. B. 965; 99 L. T. 504; 24 T. L. R. 650; 52 Sol. Jo. 532, C. A.

141. Nominal plaintiff—Discovery ordered against—If suing for own benefit.]—Goods shipped by R. & Co. having been lost at sea, the underwriters, who had insured the cargo, paid R. & Co. for a total loss, & then commenced an action against the shipowners in the name of R. & Co. to recover the value of the goods. An order having been made by consent that ptfs. should make an affidavit stating what documents were in their possession relating to the matters in question in the action, & a further order having been made by the Master in Chambers that both members of the firm of R. & Co. should put in a further & better affidavit, the solr. of the underwriters deposed that the members of the firm of R. & Co. were abroad, & would not give any

further discovery, & that the real ptfs. had done all they could do to comply with the order:—*Held*: the case must be treated as if the nominal ptfs. on the record were suing for their own benefit, & the making a further affidavit could not be dispensed with.

If an attachment is moved for against pltf. who does not make an affidavit, & it is shown that he is not in a condition to make one, no ct. will grant an attachment (*COTTON, L.J.*).—*WILSON v. RAFFA-LOVICH* (1881), 7 Q. B. D. 553, C. A.

Annotations:—*Distd.* *Willis v. Baddeley* (1892), 61 L. J. Q. B. 769. *Consd.* *Nelson v. Nelson Line* (Liverpool), [1906] 2 K. B. 217.

142. ——— Discovery against real plaintiff.]—Where the agent of a principal resident abroad brings an action in his own name, deft. is entitled to discovery to the same extent as if the principal were pltf. & to have the action stayed until discovery is made.—*WILLIS & CO. v. BADDELEY*, [1892] 2 Q. B. 324; 61 L. J. Q. B. 769; 67 L. T. 206; 40 W. R. 577; 36 Sol. Jo. 592, C. A.

Annotations:—*Distd.* *Nelson v. Nelson Line* (Liverpool), [1906] 2 K. B. 217. *Refd.* *China Traders' Insee. v. Royal Exchange Assce. Corp.*, [1898] 2 Q. B. 187.

143. ———.]—*NELSON (JAMES) & SONS, LTD. v. NELSON LINE (LIVERPOOL), LTD.*, No. 129, *ante*.

144. Third parties—Having no interest in suit.]—The Dean & Chapter of C., being rectors of a parish, leased all the tithes belonging to the rectory; the lessees filed a bill for tithe of hops against the occupiers, to which the vicar was made a party as claiming that tithe. The occupiers then filed a cross bill against the Dean & Chapter & their lessees, for a discovery & production of documents:—*Held*: demurrer by the Dean & Chapter would be allowed.

It has been said that the Dean & Chapter have an interest in the suit. But it does not appear that they have any interest whatever in it: for supposing ptfs. succeed the Dean & Chapter get nothing & supposing they fail the Dean & Chapter lose nothing.—*TOOTH v. CANTERBURY (DEAN & CHAPTER)* (1829), 3 Sim. 49; 57 E. R. 919.

Annotations:—*Refd.* *Kerr v. Rew* (1810), 5 My. & Cr. 154; *Portugal (Queen) v. Glyn* (1840), 7 Cl. & Fin. 466.

145. ———.]—C., a registered judgment creditor of a legatee, filed a bill against the exors., one of whom carried on the testator's banking business in partnership with N., testator's partner, to establish an equitable charge against testator's assets. By supplemental bill N. was made a party, pltf. charging that he & the other defts. or one of them, carried on testator's business with his assets, & that he claimed an interest in the subject matter of the suit:—*Held*: N., who denied that he claimed any interest, & was thus precluded from demurring, was not bound to answer as to the banking books, pltf. having shown no title by the averments upon his bill to the discovery sought by

been induced to join in the mtge. by the undue influence & threats of his uncle, who represented that the money to be raised by the mtge. was required to pay off the defts. of pltf.'s father. Pltf. further alleged that he had not received any of the money, & that no money had been paid by first & second defts. to third deft. in his presence. First & second defts. took out a summons against third deft. for inspection of certain account books & documents. It was objected that no question was raised in the suit between third deft. & the other defts., & that consequently, under Civil Procedure Code, s. 131, the latter were not entitled to inspection:—*Held*: inspection must be given. It was possible

that, not being able to set aside the mtge. as regarded himself, third deft. was colluding with pltf. Under the circumstances he might be considered a "party opposite" to the first two defts., although eventually the ct. might not be able to make any order between him & them.—*ANANDRAO VITHAL VARADI v. BUDRA MALLA* (1892), I. L. R. 17 Bom. 384.—IND.

1. Person in position of party—Assignee of firm for creditors' benefit—Action by creditors to establish defendant's liability as party.]—In an action by creditors of a firm to establish the liability of deft. as a partner therein, it appeared that the assignee of the firm for the benefit of creditors, having

received all the papers of the firm, was interested in the success of the action, had instigated its being brought, & was providing material in the way of documents, etc., to ptfs. for its efficient prosecution:—*Held*: although the assignee might have no direct beneficial interest in the result, he was to be regarded for the purposes of discovery as a quasi-ptf., & deft. was entitled to have production of all documents in the possession of the assignee, & to examine him for the purpose of such production.—*FROTHINGHAM v. ISBISTER* (1891), 14 P. L. 112.—CAN.

g. "Other party."]—One deft., between whom & pltf. there is no

Sect. 4.—By and against what persons obtained: Sub-sects. 1 & 2.]

him against N.—*CHAFFERS v. DAY* (1855), 3 W. R. 263.

146. —.]—When third parties have appeared under R. S. C., Ord. 16, r. 20, & have been given liberty to defend under rule 21, pltf. has the right to obtain discovery from them.—*MACALLISTER v. ROCHESTER* (Bp.) (1880), 5 C. P. D. 194; 49 L. J. Q. B. 443; 42 L. T. 481; 28 W. R. 584, D. C.

Annotations:—Apld. *Eden v. Weardale Iron & Coal Co.* (1887), 34 Ch. D. 223. *Refd.* *Molloy v. Kilby* (1880), 15 Ch. D. 162; *Pillar v. Roberts* (1882), 21 Ch. D. 198.

147. — *Necessity for notice.*]—*BENYON v. GODDEN*, [1877] W. N. 257.

148. *Parties possessing no interest in discovery.*]—*VERNON v. SWINBURN* (Undated), 2 Eq. Cas. Abr. 78; 22 E. R. 68.

149. —.]—A plea that pltf. has no interest in the subject of the suit is a good plea to a bill for discovery & a commission.

By the Treaty between France & the Allied Powers in 1814, & by subsequent conventions, certain funds were placed at the disposal of the King of Spain, to answer the claims of Spanish subjects upon the French Govt., & those claims were to be adjusted by comrs., & the funds, in the meantime, were, by orders of the King of Spain, deposited with deft. In 1823 the Cortes of Spain voted that these funds should be applied towards the exigencies of the state, & under that vote the Minister of Spain borrowed a large sum from pltf. upon the credit of those funds, & pltf. took bills for the amount upon deft., who, refusing to pay them, pltf. arrested him, & filed this bill for discovery & a commission to examine witnesses in aid of his action. To this bill deft. pleaded the treaties & conventions under which the funds came to his hands for the benefit of the Spanish creditors on the French Govt., & the plea was allowed.—*MENDIZABEL v. MACHADO* (1826), 1 Sim. 68; 5 L. J. O. S. Ch. 20; 57 E. R. 504.

150. —.]—No party can file a bill for discovery unless he has some interest in the discovery. A mere stranger who, on the face of the bill, appears to have no interest, cannot maintain such a bill (*LORD ABINGER, C.B.*).—*DARTHEZ v. LEE* (1836), Donnelly, 2; 2 Y. & C. Ex. 5, 12; 5 L. J. Ex. Eq. 76; 47 E. R. 187.

151. *Between co-defendants—If matter at issue between them.*]—A decree was pronounced, for a sale of real estate, in a partition suit. The decree contained an inquiry of what real & personal estate the late father of defts., who were tenants in common of the property, died seised & possessed, & what had become thereof. Some documents

issue, even though he remains a party to the action, cannot be compelled to make production of documents to pltf.—*WELCH v. MCARTHUR*, [1917] 1 W. W. R. 1343.—CAN.

h. Nominal defendant—Discovery against real defendant.]—Where deft. in an action is merely a nominal deft. & is bringing a counterclaim for the benefit of a person residing out of the jurisdiction who has become subrogated to the rights of the nominal deft., the ct. has jurisdiction to stay the counterclaim until the real deft. has made such discovery as he would have been bound to make had he been deft. on the record.—*COMPANIA NAVIERA VASCONGADA v. HALL (R. & H.), LTD.* (No. 2) (1906), 40 I. L. T. 246.—IR.

151 i. *Between co-defendants—If matter at issue between them.*]—B. was pltf. in an action against C. & Co., & J. & others, in which B. claimed to be

entitled under a charge to a share of commission payable by C. & Co. to J. C. & Co. put in a defence that commission was payable to J. & alleging that by reason of misrepresentation by J. they had a claim for damages against J. which they were entitled to set off against the claim for commission, but set up no counterclaim. J. also put in a defence denying the validity of pltf.'s charge. C. & Co. applied for leave to inspect the documents referred to by their co-deft. J. in his affidavit of documents:—*Held*: inasmuch as there was no right to be adjusted in the action as between C. & Co. & J., no order for discovery as between the co-defts. ought to be made.—*BIRCHAL v. BIRCH, CRISP & CO.* (1914), 48 I. L. T. 12.—IR.

k. — *Action on bill of exchange.*]—Where several persons severally liable on a note or bill are jointly sued at law by the holder, one

relating to the estates were in the hands of some defts., which they declined to produce at the request of the others. A summons was then taken out by those other defts. calling on their co-defts. to make an affidavit as to "all the documents relating to the matters in question in the suit," in their possession:—*Held*: the affidavit must be made as asked, & it was for resps. to show whether the affidavit should be limited in its term.—*KENNEDY v. WAKEFIELD* (1870), 39 L. J. Ch. 827; 22 L. T. 645; 18 W. R. 884.

152. —.]—Discovery by way of interrogatories, production of documents, & inspection of property, may be allowed to a pltf. from a co-pltf., or to a deft. from a co-deft., in cases in which there may be rights to be adjusted between them respectively.

Discovery cannot be allowed to a deft. from a co-deft. with a view to show that co-deft. & not deft. is liable to pltf., as where a deft. sued for subsidence under pltf.'s land proposes to inspect the mines of a co-deft. in adjoining land.—*SHAW v. SMITH* (1886), 18 Q. B. D. 193; 56 L. J. Q. B. 174; 56 L. T. 40; 35 W. R. 188; 3 T. L. R. 216, C. A.; *affg.* S. C. *sub nom.* *SHAW v. PEASE*, 3 T. L. R. 168, D. C.

Annotations:—Apld. *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1896), 74 L. T. 345. *Distd.* *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. *Apld.* *Birchal v. Birch, Crisp*, [1913] 2 Ch. 375. *Refd.* *Eden v. Weardale Iron & Coal Co.* (1887), 34 Ch. D. 223; *Marshall v. Langley*, [1889] W. N. 222; *Cory v. Cory*, [1923] 1 Ch. 90.

153. —.]—A railway co. brought an action against contractors, the contractors putting in a counterclaim with their defence to which they made an insurance corpn. defts., & in which they alleged that the co. had obtained a guarantee from the corpn. which was enforceable against them, & that the co. were trustees of this guarantee for the contractors, & payment of the amount thereof was claimed. The corpn. put in a defence that the guarantee had been released & satisfied, & the co. in reply repudiated any collusion between them & the corpn. In the event of the contractors being successful in obtaining a declaration that the co. were trustees of this guarantee & endeavouring to enforce the guarantee, the defence of the corpn. would be that the co. had released their liability, but this would not preclude the case, because the contractors would reply that release was not binding as against them. The corpn. having taken out a summons for discovery under R. S. C., Ord. 31, r. 12, against the co., their co-defts.:—*Held*: there was "some right between these parties to be adjusted in the action," namely, whether or not the liability of the corpn. under the guarantee was good, & the case fell within the rule.

of the defts. in the action at law cannot obtain discovery against pltf. at law & the other defts. Defts., as between themselves, not being litigating parties, but witnesses; & a bill filed for the purpose is demurrable.—*HAMILTON v. PHIPPS* (1859), 7 Gr. 483.—CAN.

l. *Plaintiff whose husband co-defendant—Liability to procure production for benefit of other defendants—Of documents held by husband for her benefit.*]—A suit was brought by a married woman in which her husband was joined as a deft. Pltf. filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. Defts. applied to compel further production of documents which it appeared that the deft., pltf.'s husband, had in his possession. It was alleged that he held these documents for the benefit of pltf., & that it was intended to use

PART II.—DISCOVERY OF DOCUMENTS.

—ALCOY & GANDIA RAILWAY & HARBOUR CO., LTD. v. GREENHILL (1896), 74 L. T. 345.

Annotation.—*Refd.* Birchall v. Birch, Crisp, [1913] 2 Ch. 375.

154. ——— & counter-claim put in.]—Pltf. claimed as assignee of deft. J. to be entitled to an aliquot part of certain commission which he alleged was due from defts. B. & Co. to deft. J. B. & Co. by their defence alleged that pltf. had no right at all, inasmuch as they had a claim against J. for damages for misrepresentation which they were entitled to set off against any claim by him for commission. They did not, however, put in any counter-claim.—*Held*: B. & Co. were not entitled to an order for discovery against J.—BIRCHALL v. BIRCH, CRISP & CO., [1913] 2 Ch. 375; 82 L. J. Ch. 442; 109 L. T. 275, C. A.

155. ——— Not by respective liability different in kind.]—Pltf. made in the same action claims against two defts., the claim against one deft. being in respect of the alleged breach of a certain stipulation of a contract, & the claim against the other deft. being an alternative claim for negligence by him as agent in effecting a contract without such stipulation contrary to instructions:—*Held*: one of such defts. could not obtain discovery of documents in the action from the other, R. S. C., Ord. 31, r. 12, only providing for discovery between opposite parties.—BROWN v. WATKINS, (1885), 16 Q. B. D. 125; 55 L. J. Q. B. 126; 53 L. T. 726; 34 W. R. 293; 2 T. L. R. 150, D. C.

Annotations.—*Expld. & Apld.* Shaw v. Smith (1886), 18 Q. B. D. 193. *Distd.* Cory v. Cory, [1923] 1 Ch. 90. *Refd.* Eden v. Weardale Iron & Coal Co. (1887), 34 Ch. D. 223; Marshall v. Langley, [1889] W. N. 222; Alcoy & Gandia Ry. & Harbour Co. v. Greenhill (1896), 74 L. T. 345.

156. ——— Not to determine respective liability.]—SHAW v. SMITH, No. 152, *ante*.

157. ——— Inspection by one on affidavit obtained by other.]—Where one of several defts. to an action has obtained an order for an affidavit of documents by pltf., which has been complied with, the ct. has power, on the application of another deft., to order the production to him of the documents mentioned in pltf.'s affidavit, without the necessity of a deposit & another affidavit of documents; but pltf. will be at liberty to withhold on oath or seal up documents or entries which do not affect the matters in question between pltf. & the particular deft.—PARDY'S MOZAMBIQUE SYNDICATE, LTD. v. ALEXANDER, [1903] 1 Ch. 191; 72 L. J. Ch. 104; 88 L. T. 11; 51 W. R. 295.

Annotation.—*Refd.* Cory v. Cory, [1923] 1 Ch. 90.

158. Between co-plaintiffs—Where matter at issue between them.]—SHAW v. SMITH, No. 152, *ante*.

them at the hearing:—*Held*: a better affidavit will only be ordered upon proof of admission under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced; a *feme covert* pltf., whose husband is a deft., is not bound to procure production of documents by her husband for the benefit of his co-defts., & the rule respecting the obtaining of discovery from a co-deft., protected pltf.'s husband from liability to examination by his co-defts.—BROWN v. CAPRON (1874), 6 P. R. 203.—CAN.

m. Party a foreign corporation—Discovery ordered of books out of jurisdiction.]—Discovery will be ordered against a foreign corpn., & it is no answer that its books are abroad.—ROBERTSON v. ST. JOHN CITY RY. CO. (1892) (1825-97), N. B. Dig. 654.—CAN.

n. Party a company—Of which receiver appointed—Discovery of books

not in receiver's custody.]—The opposite party in a suit is entitled to the production of the books of a railway co., although the co. may be in the hands of a receiver, who is entitled to the custody of the books & documents, if he has not actually taken possession of them.—MAXWELL v. MANITOBA & N. W. RY. CO. (1896), 11 Man. L. R. 149.—CAN.

PART II. SECT. 4, SUB-SECT. 2.

161 i. The Crown—Discovery by—Rule as between subject & subject.]—Judiciary Act, 1903, s. 64, provides that in suits to which the Commonwealth is a party the rights of parties shall as nearly as possible be the same as in a suit between subject & subject.—THE COMMONWEALTH v. BAUME (1905), 2 C. L. R. 405.—AUS.

o. ——— Royal Prerogative —Whether affected by ordinary rules of practice.]—The consolidated rules of practice do not take away or lessen the

159. Party claiming interest through another—Assignees of bankrupt.]—Where property & books of account had been seized under an immediate extent in chief, issued against a collector of taxes & his partner in trade, for a debt to the Crown, & a claim had been entered by the assignees of defts., who had become bkpts.:—*Held*: the assignees were entitled to an inspection & copies, etc., of the books, previous to the trial of the issue between them & the Crown.—R. v. WINKLES (1824), M'Cle. & Yo. 33; 148 E. R. 313.

160. ———.]—Pltf., assignee of A., who had become bkpt., sued B. in respect of certain contracts alleged to have been entered into by A. with pltf. on the joint account of A. & B. The ct. allowed B. to inspect the books of A. in the hands of pltf. as his assignee, in order that he might discover what the alleged contracts were.—WHITBOURNE v. PETTIFER (1834), 4 Moo. & S. 182. *Annotation*.—*Refd.* Charnock v. Lumley (1838), 2 Jur. 96.

Lunatics.]—See Sub-sect. 4, *post*.

Parties for purpose of discovery.]—See Part I., Sect. 4, *ante*.

SUB-SECT. 2.—THE CROWN AND FOREIGN STATES.

161. The Crown—Discovery by—Rules as between subject & subject.]—A.-G. v. LONDON CORPN., No. 50, *ante*.

162. ———.]—By information in the Q. B. Div. (Queen's Remembrancer's side) against a corpn., the A.-G. on behalf of the Crown claimed a declaration that the foreshore & bed of a river within certain limits belonged to the Crown. Defts. by their answer claimed to be owners of the same foreshore & bed, within the limits of a port & including the part claimed by the Crown, & to be also conservators of the river; & they set out a list of documents relating to the part claimed by the Crown, & alleged that they had no other relevant documents. The Crown did not except to the answer within the time limited by the Rules of Easter Term, 1866:—*Held*: (1) the Crown had the same right of discovery against the corpn. as a subject had against a subject in an ordinary action, & the omission to except to the answer was no bar to such right; (2) the Crown was entitled to discovery not only of the documents relating to the parts of the river claimed by the information, but also of anything which might tend to show that defts. were not absolute owners of the foreshore & bed of the river to the extent which they claimed to be, including all their acts of ownership as conservators or otherwise, & the documents relating thereto.—A.-G. v. NEWCASTLE-UPON-TYNE

prerogative right of the Crown to refuse discovery. The prerogative right of the Crown exists in British colonies to the same extent as in the United Kingdom; & precise words must be shown to take the prerogative away.—CROMBIE v. R., [1923] 2 D. L. R. 542; 52 O. L. R. 72.—CAN.

p. ——— Whether affected by statute.]—The privilege of the Crown of exemption from discovery is not taken away by Claimants Relief Act, 1853, ss. 1, 4.—WELDEN v. SMITH, [1922] S. A. S. R. 186.—AUS.

q. ———.]—The general words of s. 4 of Claims against Government & Crown Suits Act, 1912, of New South Wales, reproducing Act No. 30 of 1897, s. 4, by implication take away the right of the Crown to resist discovery in an action under those Acts upon a claim against the govt.—JAMIESON v. DOWNIE, [1923] A. C. 691.—AUS.

Sect. 4.—By and against what persons obtained: Sub-sects. 2, 3 & 4, A.]

CORPN., [1897] 2 Q. B. 384; 66 L. J. Q. B. 593; 77 L. T. 203, C. A.

Annotations:—As to (1) Consd. Re Soc. les Affréteurs Réunis & Shipping Controller, [1921] 3 K. B. 1.

163. ——— Discovery against—No power to order.]—In an arbitration for the determination of disputes under a contract between the Shipping Controller on behalf of His Majesty & another party, the arbitrators or umpire have no jurisdiction under Arbitration Act, 1889 (c. 49), s. 2, sched. 1 (f), or otherwise to require the Shipping Controller to make discovery of the documents in his possession or power relating to the matters in question.—*Re SOCIÉTÉ LES AFFRÉTEURS RÉUNIS & SHIPPING CONTROLLER, [1921] 3 K. B. 1; 90 L. J. K. B. 812; 124 L. T. 727; 37 T. L. R. 460.*

Annotation:—Refd. Kursell v. Timber Operators & Contractors, [1923] 2 K. B. 202.

164. ———.]—Where an information was filed by the A.-G., under 43 Geo. 3, c. 58, s. 25, against an army agent, for a discovery of accounts from 1792 to 1802; who pleaded a settled account, by clearing warrants, & the plea having been overruled, afterwards moved to amend the plea, & for the purpose of so doing, that the A.-G. or the Secretary at War might be ordered to produce certain vouchers, accounts, etc., rendered annually, during that period, by deft. to the War Office, & there deposited, & which deft. swore were material to his defence:—*Held*: the proceedings upon the information would be ordered to be stayed until the documents were produced.—*A.-G. v. BROOKS-BANK (1827), 1 Y. & J. 439; 148 E. R. 743; subsequent proceedings, 2 Y. & J. 37.*

Annotations:—Consd. Prioleau v. United States & Johnson (1866), L. R. 2 Eq. 659. Refd. Shepherd v. Morris (1838), 1 Beav. 175.

165. ———.]—An information having been filed by the A.-G. against A., for an account of his dealings & transactions with the govt. as an army agent, A. pleaded in bar of the information a settled account, by means of certain clearing warrants. This plea having been overruled, A. filed his cross bill against the A.-G. & the Secretary at War, alleging that the clearing warrants had been invariably treated as a settled account, but that he had only recently, & since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that defts. had divers papers, etc., by which the truth of the several matters alleged would appear, prayed for a discovery, for a declaration that the clearing warrants amounted to a settled account, & for a perpetual *quictus* from all proceedings by defts. To this bill defts. having demurred, on the ground that they were public officers, & also for want of equity, the demurrer was overruled.—*DEARE v. A.-G. (1835), 1 Y. & C. Ex. 197; 160 E. R. 80.*

Annotations:—Mentd. Dyson v. A.-G., [1911] 1 K. B. 410; Eastern Trust Co. v. McKenzie, Mann, [1915] A. C. 750; Esquimalt & Nanaimo Ry. v. Wilson, [1920] A. C. 358.

163 i. ——— Discovery against—No power to order.]—The Crown held certain lands at Ottawa for the purpose of the Rideau Canal. To its title to a portion of the lands was attached a further condition that no buildings should be erected on such portion. The ct. was of opinion that the breach of the conditions referred to, did not work any forfeiture or let in the heirs. On motion under leave reserved:—*Held*: the heirs, suppliants, were not entitled to discovery or to an inquiry as to the particular uses to which the Crown had put the lands in question, or as to what buildings had been erected thereon.

Seemle: such a declaration & inquiry might be made in a case in which the ct. had jurisdiction to grant relief.—*MAGEE v. R. (1894), 4 Exch. C. R. 63.—CAN.*

r. ——— When represented by nominal defendant under statute.]—In a suit in equity against a nominal deft. appointed under Claims against Colonial Government Act, pltf. is entitled to an order directing deft. to file an affidavit of discovery of documents.—*RICKETSON v. SMITH (1895), 16 N. S. W. Eq. 170; 12 N. S. W. W. N. 14.—AUS.*

166. ——— Petition of right—Petitions of Right Act, 1860 (c. 34).]—In a petition of right there is no power to suppliant to obtain a discovery of documents under sect. 7 of the above Act, & Common Law Procedure Act, 1854 (c. 125), s. 50.—*THOMAS v. R. (1874), L. R. 10 Q. B. 44; 44 L. J. Q. B. 17; 23 W. R. 345.*

Annotations:—Consd. Tomline v. R. (1879), 4 Ex. D. 252; Re Soc. les Affréteurs Réunis & Shipping Controller, [1921] 3 K. B. 1. Refd. Reiner v. Salisbury (1876), 2 Ch. D. 378; Jamieson v. Downie, [1923] A. C. 691.

167. ———.]—In a petition of right the Crown is entitled as against suppliant to an order for the discovery of documents by the combined effects of sect. 7 of the above Act, & R. S. C., Ord. 31, r. 12.—*TOMLINE v. R. (1879), 4 Ex. D. 252; 48 L. J. Q. B. 453; 40 L. T. 542; 27 W. R. 651, C. A.*

Annotation:—Consd. Re Soc. les Affréteurs Réunis & Shipping Controller, [1921] 3 K. B. 1.

—*See, also, CROWN PRACTICE, Vol. XVI., p. 235, Nos. 307–308.*

168. Foreign state—Rule as ordinary litigant.]—*PORTUGAL (QUEEN) v. GLYN, No. 41, ante.*

169. ———.]—A foreign prince who comes voluntarily as a suitor into a ct. of law in England, becomes subject, as to all matters connected with that suit, to the jurisdiction of a ct. of equity.—*ROTHSCHILD v. PORTUGAL (QUEEN) (1839), 3 Y. & C. Ex. 594; 160 E. R. 838.*

Annotation:—Refd. Duff Development Co. v. Kelantan Government, [1923] 1 Ch. 385.

170. ———.]—*PRIOLEAU v. UNITED STATES & JOHNSON, No. 172, post.*

171. ———.]—A foreign sovereign suing in the cts. of this country submits to the jurisdiction to the extent only that (1) he must give discovery; (2) cross proceedings in mitigation of the relief claimed by him can be taken against him.—*SOUTH AFRICAN REPUBLIC v. COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD, [1898] 1 Ch. 190; 77 L. T. 555; 46 W. R. 151; 14 T. L. R. 65; 42 Sol. Jo. 66.*

Annotations:—As to (2) Expld. The Tervaele, [1922] P. 259. Generally, Refd. Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176; Duff Development Co. v. Kelantan Government, [1923] 1 Ch. 385.

172. ——— Officer to make discovery.]—The United States of America suing in the cts. of this country, & thereby submitting themselves to the jurisdiction, stand in the same position as a foreign sovereign, & can only obtain relief subject to the control of the ct. in which they sue, & pursuant to its rules of practice; according to which every person sued in this ct., whether by an individual, by a foreign sovereign, or by a corporate body, is entitled to discovery upon oath touching the matters upon which he is sued, & to file a cross bill for the purpose of obtaining such discovery. Proceedings were accordingly stayed in a suit by the United States of America suing in their corporate capacity, until an answer should have been put in to the cross bill of deft. But:—*Held*: the President of the United States had been improperly made a deft. to the cross bill, as the

deft. appointed under Claims against Colonial Government Act will, in a proper case, be ordered to give discovery to pltf. both in equity & at law.—*MORISSEY v. YOUNG (1896), 17 N. S. W. Eq. 157; 12 N. S. W. W. N. 90; 13 N. S. W. W. N. 52.—AUS.*

represented by Settlement Board.]—The Soldier Settlement Board represents the Crown & is not subject to discovery in an action against it.—*WRIGHT v. PETERS & SOLDIER SETTLEMENT BOARD (1920), 2 W. W. R. 696.—CAN.*

person to give discovery. *Semble*: a demurrer should have been filed to a bill by the United States, where no public officer was put forward as representing their interests who could be called upon to give discovery upon a cross bill.—*PRIOLEAU v. UNITED STATES & JOHNSON* (1866), L. R. 2 Eq. 659; *sub nom.* *U.S.A. v. PRIOLEAU, PRIOLEAU v. U.S.A.*, 36 L. J. Ch. 36; 14 L. T. 700; 12 Jur. N. S. 724; 14 W. R. 1012.

Annotations:—*Consd.* *U.S.A. v. Wagner* (1867), 2 Ch. App. 582. *Refd.* *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487.

173. ———.]—A foreign sovereign state adopting the republican form of government, & recognised by the govt. of Her Majesty, can sue in the Cts. of Her Majesty in its own name so recognised.

Such a state is not bound to sue in the name of any officer of the government, or to join as co-pltf. any such officer on whom process may be served, & who may be called upon to give discovery upon a cross bill.

The ct. may stay proceedings in the original suit, until the means of discovery are secured in the cross suit (*LORD CHELMSFORD, C.*; *LORD CAIRNS, L.J.*).—*U.S.A. v. WAGNER* (1867), 2 Ch. App. 582; 36 L. J. Ch. 624; 16 L. T. 646; 15 W. R. 1026, L. C. & L. JJ.

Annotations:—*Consd.* *Liberia Republic v. Imperial Bank* (1873), L. R. 16 Eq. 179. *Folld.* *Peru Republic v. Weguelin, Weguelin v. Peru Republic* (1875), L. R. 20 Eq. 140. *Refd.* *Penedo v. Johnson* (1873), 29 L. T. 452; *Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co.* (1900), 83 L. T. 58. *Mentd.* *Costa Rica Republic v. Erlanger, Erlanger v. Costa Rica Republic* (1875), 45 L. J. Ch. 145.

174. ———.]—A republic suing in its own name, was ordered to make an affidavit of documents “by one or more of its officers or ministers.”—*LIBERIA REPUBLIC v. IMPERIAL BANK* (1873), L. R. 16 Eq. 179; 42 L. J. Ch. 574; *subsequent proceedings* (1874), 9 Ch. App. 569, L. JJ.; *sub nom.* *LIBERIA REPUBLIC v. ROYE* (1876), 1 App. Cas. 139, H. L.

Annotations:—*Consd.* *Penedo v. Johnson* (1873), 22 W. R. 103. *Refd.* *Higginson v. Hall* (1879), 10 Ch. D. 235; *Nelson v. Nelson Line (Liverpool)*, [1906] 2 K. B. 217.

175. ———.]—The proceedings in an original suit by a foreign govt. were stayed until pltf. in that suit had given the name or names of persons who could be made deft. or defts., in a cross-suit by the same parties against the foreign govt., for the purpose of making upon oath the discovery required.—*PERU REPUBLIC v. WEGUELIN, WEGUELIN v. PERU REPUBLIC* (1875), L. R. 20 Eq. 140; 44 L. J. Ch. 583; 32 L. T. 426; 23 W. R. 776.

Annotations:—*Consd.* *Costa Rica Republic v. Erlanger* (1875), 1 Ch. D. 171. *Mentd.* *Peru Republic v. Ruzo* (1875), 32 L. T. 598.

176. ———.]—*Stay of proceedings pending appointment.*—A deft. to a suit, instituted by a foreign state or corporate body, who institutes a cross-suit for the purpose of obtaining discovery from the original pltf., is entitled to have the proceedings in the original suit stayed until pltf. have appeared in the cross-suit. But he is not entitled to have those proceedings stayed until any

Nor Crown officers' reasons for refusal discussed.—When a govt. department objects to the production of documents on the ground that in their opinion the production would be prejudicial to the public service, the ct. will not consider the question, but will refuse to grant diligence on their recovery even in actions where a govt. department is pursuer.—*ADMIRALTY COMRS. v. ABERDEEN STEAM TRAWLING & FISHING CO.*, [1908] S. C. 335.—*SCOT.*

PART II. SECT. 4, SUB-SECT. 3.

b. General rule—Not enforceable

against infant party.—An infant party to a suit cannot be compelled, under Code of Civil Procedure, s. 129, to give discovery by affidavit & inspection of documents in his possession relating to the suit. To adopt the practice lately introduced in England would be objectionable mainly on three grounds: because it is not contemplated by the Code of Civil Procedure; because it is inconsistent with existing rules of practice; because there is no method of enforcing an order of discovery against an infant.—*DUNCAN v. BHOYRO PROSAD* (1895),

person whom he has himself selected to make discovery on oath on behalf of the original pltf. has appeared in the cross-suit. Pltf. in the original suit can be compelled, by means of a stay of proceedings in their suit, to make discovery; but they are entitled to point out who is the proper person to make discovery on oath on their behalf.—*COSTA RICA REPUBLIC v. ERLANGER* (1875), 1 Ch. D. 171; *sub nom.* *COSTA RICA REPUBLIC v. ERLANGER, ERLANGER v. COSTA RICA REPUBLIC*, 45 L. J. Ch. 145; 24 W. R. 151; 1 Char. Pr. Cas. 113, C. A.

Annotation:—*Apld.* *Willis v. Baddoley*, [1892] 2 Q. B. 324.

SUB-SECT. 3.—INFANTS.

See, now, R. S. C., Ord. 31, r. 29.

177. *Former law*—*Infant party*—*No discovery*—An infant party to an action cannot be compelled to make discovery of documents.—*CURTIS v. MUNDY*, [1892] 2 Q. B. 178; 40 W. R. 317; 8 T. L. R. 388; 36 Sol. Jo. 309, D. C.

178. ———.]—*No discovery by next friend.*—The next friend to an infant pltf. is not a “party to the action” within R. S. C. 1875, Ord. 31, r. 12, & therefore cannot be compelled to make discovery as to documents in his possession or power relating to the matters in question in the action.—*Re CORSELLIS, LAWTON v. ELWES* (1883), 52 L. J. Ch. 399; 48 L. T. 425; 31 W. R. 414.

Annotation:—*Consd.* *Ingram v. Little* (1883), 11 Q. B. D. 251.

179. ———.]—The ct. refused either to order the next friend of an infant pltf. to make an affidavit as to documents, or to stay the action till he made such affidavit.—*DYKE v. STEPHENS* (1885), 30 Ch. D. 189; 55 L. J. Ch. 41; 53 L. T. 561; 33 W. R. 932; 29 Sol. Jo. 682.

Annotations:—*Folld.* *Scott v. Consolidated Bank*, [1893] W. N. 56. *Apld.* *Pink v. Sharwood*, [1913] 2 Ch. 286. *Refd.* *Paspoti v. Paspoti*, [1914] P. 110.

180. ———.]—*SCOTT v. CONSOLIDATED BANK*, [1893] W. N. 56.

181. *Divorce proceedings*—*Application of Rules of Supreme Court.*—*REDFERN v. REDFERN*, No. 99, *ante*.

See, generally, INFANTS & CHILDREN.

SUB-SECT. 4.—LUNATICS AND PERSONS OF UNSOUND MIND.

A. Discovery.

182. *Whether next friend may make affidavit.*—Where a pltf. of unsound mind sues by a next friend, the deft. is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts.—*HIGGINSON v. HALL* (1879), 10 Ch. D. 235; 48 L. J. Ch. 250; 39 L. T. 603; 27 W. R. 469.

Annotations:—*Dbtd.* *Dyke v. Stephens* (1885), 30 Ch. D. 189. *N.F.* *Pink v. Sharwood*, [1913] 2 Ch. 286. *Refd.* *Scott v. Consolidated Bank*, [1893] W. N. 56; *Paspoti v. Paspoti*, [1914] P. 110.

—.]—The next friend of a person of

I. L. R. 22 Calc. 891.—*IND.*

c. *Circumstances justifying departure from rule.*—*NATHMULL NARSING-DAS v. MALHARRAO HOLKAR* (1894), I. L. R. 19 Bom. 350.—*IND.*

d. *Infant suing by next friend*—*Discovery against next friend.*—Where pltf. in a suit were infants suing by their next friend the ct. made an order directing the production of documents under Chancery Act, 1867 (c. 44), s. 73, on the oath of the next friend.—*CROWE v. BANK OF IRELAND (GOVERNOR & CO.)* (1871), 5 I. R. Eq. 578.—*IR.*

Sect. 4.—By and against what persons obtained:
Sub-sect. 4, A. & B. Sect. 5: Sub-sects. 1

unsound mind cannot be ordered to file an affidavit of documents under R. S. C., Ord. 31, r. 12.

In an action by a person of unsound mind by a next friend an order was made that the person of unsound mind by his next friend " & such next friend " should file an affidavit of documents, & the next friend filed an affidavit accordingly, & defts. then applied for a further & better affidavit:—*Held*: the order having been made without jurisdiction, the ct. could refuse the application without first setting aside the order.—*PINK v. SHARWOOD (J. A.) & Co., LTD.*, [1913] 2 Ch. 286; 82 L. J. Ch. 542; 108 L. T. 1017; 57 Sol. Jo. 663.
Annotation:—*Refd. Paspati v. Paspati*, [1914] P. 110.

184. Liability of guardian ad litem—Where lunatic not so found.—*PASPATI v. PASPATI*, No. 104, *ante*.

B. Production.

185. Against lunatic—Production by guardian.—*GAFON v. GARNIER* (1756), 1 Dick. 286; 21 E. R. 278.

186. By lunatic—Wrongful detention in asylum.—*RUCK v. STILLWELL*, *STILLWELL v. RUCK* (1859), 1 F. & F. 546.

187. — Not of medical report on his alleged lunacy.—An inquisition in lunacy being pending, the master in lunacy made an order under Lunacy Act, 1891 (c. 65), s. 26 (2), that the alleged lunatic should attend at a certain time & place for examination by a medical practitioner. The alleged lunatic attended under compulsion of the order, & saw the medical practitioner in private. He put the result of his examination into the form of a letter, & addressed it to petitioner's solrs. He made no communication on the subject to the alleged lunatic, & petitioner's solrs. declined to allow her to see the report, but stated that they intended to call the medical practitioner as a witness at the inquisition. The alleged lunatic then applied for an order that petitioner should file the report & supply her with a copy of it:—*Held*: the medical practitioner was not an officer of the ct., nor employed by the ct., but was simply directed to examine the alleged lunatic in order to qualify himself to give evidence on the inquisition as to her state of mind; he was not bound to make any report before the inquisition, & his report was practically the proof of the evidence which he proposed to give at the hearing; & the alleged lunatic was no more entitled to see it than the proofs of the other witnesses whom petitioner intended to call.—*Re B—*, [1892] 3 Ch. 194; 67 L. T. 62; *sub nom. Re BATHIE* (No. 2), 61 L. J. Ch. 487, C. A.

For use at inquiry as to alleged lunacy.—*Re CATHCART*, [1902] W. N. 80.

189. Where no committee appointed—Inspection by Official Solicitor.—Before a committee had been appointed of a lunatic's estate the ct. made an order for the Official Solr. to inspect the securities & other documents which the lunatic had deposited with a co. for safe custody.—*Re CAMPBELL* (1880), 13 Ch. D. 323; 42 L. T. 105; 28 W. R. 480, C. A.

190. Where documents relating to lunatic deposited in court—How obtained—When lunatic still living.—An order in lunacy is requisite for production & inspection of documents filed in office of the master in lunacy, where the lunatic is

living.—*Re SARTORIS' LUNACY, WYLDE v. ARNOLD* (1862), 1 New Rep. 4, L. JJ.

191. — At suits of claimants to lunatic's estate.—A party claiming to be heir to a lunatic was permitted, after the possession of the estates had been given up to the parties reported to be the heirs, to inspect deeds & documents remaining in the Master's office which, it seems, may be retained till a proper investigation has taken place.—*Re NORFOLK (DOWAGER DUCHESS), Ex p. CLARKE* (1822), Jac. 589; 37 E. R. 973, L. C.
Annotations:—*Refd. Re Ferrior, Carrow v. Ferrior, Dunn v. Ferrior* (1867), 3 Ch. App. 175. *Mentd. Re Butler* (1866), 1 Ch. App. 607; *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51.

192. — — — — ——*Re SILCOCK'S LUNACY, HUTTON v. HUTTON* (1862), 1 New Rep. 4, L. JJ.
Annotation:—*Refd. Re Strachan*, [1895] 1 Ch. 439.

193. — — — — ——Any party to a suit relating to the estate of a lunatic is entitled to inspection & production, at the hearing of the suit, of all documents relating to the lunacy in the custody of the master in lunacy.—*Re WOOD, BANNER v. ENGLAND* (1863), 4 De G. J. & Sm. 134; 3 New Rep. 272; 33 L. J. Ch. 334; 9 L. T. 698; 10 Jur. N. S. 60; 12 W. R. 293; 46 E. R. 867, L. JJ.
Annotations:—*Folld. Re Smyth* (1880), 15 Ch. D. 286. *Distd. Re Strachan*, [1895] 1 Ch. 439.

194. — — — — ——Where two rival claimants had filed bills praying for a receiver of the real estates pending the decision of their rights, & then presented petitions in lunacy for the appointment of a receiver, the ct. refused the application in lunacy, & also declined to exercise its original jurisdiction in Chancery for that purpose, upon an interlocutory application in the suits. But the ct. made an order in lunacy for the deeds to be retained in the master's office for inspection by claimants.—*Re FERRIOR, CARROW v. FERRIOR, DUNN v. FERRIOR* (1867), 3 Ch. App. 175; 37 L. J. Ch. 571, n.; 18 L. T. 65; 16 W. R. 298, L. J.
Annotations:—*Refd. Re Hinchcliffe* (1894), 64 L. J. Ch. 76; *Re Strachan*, [1895] 1 Ch. 439.

195. — — — — — Primâ facie title.—According to the practice in lunacy the ct. will order production of all documents in the custody of the master or registrar relating to the estate of a deceased lunatic on the application of a person claiming under him. But he must make out a *primâ facie* title to the estate.—*Re SMYTH* (1880), 15 Ch. D. 286; 50 L. J. Ch. 34; 43 L. T. 234; 28 W. R. 925, C. A.
Annotations:—*Folld. Re Smyth* (1881), 16 Ch. D. 673. *Distd. Re Strachan*, [1895] 1 Ch. 439.

196. — — — — ——A lunatic having died intestate, & an action having been commenced for recovery of his real estate:—*Held*: deft., who produced *primâ facie* evidence of his being heir-at-law of the lunatic, was entitled to an order to inspect the documents relating to the estate which were in the custody of the registrars in lunacy, although it was sworn on the other side, & not contradicted, that the lands had descended to the lunatic from his mother, & that deft. was no relation to the mother.—*Re SMYTH* (1881), 16 Ch. D. 673; 29 W. R. 585, C. A.
Annotation:—*Distd. Re Strachan*, [1895] 1 Ch. 439.

197. — — — — ——R., a lunatic, so found by an inquisition that had never been superseded, executed certain testamentary documents shortly before her death. After her decease, in an action to admit those documents to probate, certain of her next of kin opposed the grant, on the ground

that deceased at the time of the execution of the documents was not of sound mind, memory, & understanding. In the course of his examination the chairman of the Board of Chancery Visitors declined to produce certain reports as to the mental condition of deceased at the time of the execution of the documents in question, on the ground that he was prohibited by Lunacy Act, 1890 (c. 5), s. 186, from doing so:—*Held*: the patient being dead, the reports as to her condition must, by sect. 186, be treated as non-existent, & no order could be made for their production.—*ROE v. NIX*, [1893] P. 55; 62 L. J. P. 36; 68 L. T. 26; 9 T. L. R. 128; 1 R. 472.

Annotation:—*Mentd. Brown v. Penn* (1895), 12 T. L. R. 46.

198. — *Necessity for order permitting.*—No one is allowed to inspect documents in the custody of the Ct. in Lunacy without an order of one of the masters or of a judge in lunacy.—*Re STRACHAN*, [1895] 1 Ch. 439; 64 L. J. Ch. 321; 72 L. T. 175; 59 J. P. 102; 60 J. P. 36; 43 W. R. 369; 11 T. L. R. 215; 12 R. 148, C. A.

Annotation:—*Reid. Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47.

SECT. 5.—AT WHAT STAGE OF PROCEEDINGS GRANTED.

SUB-SECT. 1.—IN GENERAL.

199. *General rule—Discretion of court.*—The ct. has discretionary power to make an order for discovery & production of documents at any time after the writ is issued, although the issues have not been defined by the pleadings.

The statement of claim in an action was delivered on Mar. 1, & on Apr. 16 pltf. obtained an order for discovery & production of documents, no objection being taken on the part of deft. that the defence had not been delivered. The defence was delivered on May 2, & on May 4, deft. served notice of motion to discharge the order, the objection being that the order when made was irregular, the matter in question in the action not being then so defined as to show what documents were material:—*Held*: the order was within the jurisdiction of the ct., & ought not to be disturbed.—*MELLOR v. THOMPSON* (1883), 49 L. T. 222, C. A.

200. *Not till issue joined.*—No inspection of books, etc., will be granted till issue joined.—*HODGES v. ATKIS* (1773), 2 Wm. Bl. 877; 3 Wils. 398; 96 E. R. 516.

Annotation:—*Apld. Southampton Corpn. v. Graves* (1800), 8 Term Rep. 590.

201. *In motion for new trial.*—The ct. will not order a party to permit his opponent in the cause to inspect & take a copy of a deed of conveyance, with a view only to the discussion of a rule for a new trial.—*WOOD v. MOREWOOD* (1840), 9 Dowl. 44; 2 Scott, N. R. 204; 10 L. J. C. P. 53; *subsequent proceedings* (1841), 9 Dowl. 669.

202. — *Houghton v. Hemmett* (1848), 11 L. T. O. S. 69.

PART II. SECT. 5, SUB-SECT. 2.

2131. *Not till after statement of claim delivered—Exceptions—For preparation of statement of claim.*—Production of documents should not be ordered to be made by deft. for benefit of pltf. before he delivers his statement of claim, unless the judge is satisfied that the documents called for are essential to the statement of the claim.—*ARTHUR & Co., LTD. v. RUNIANS* (1898), 18 P. R. 205.—CAN.

1. — *Documents essential to preparation of claim—Loss by plaintiff of*

letter containing terms of contract.—An action was brought on an agreement, the terms of which were embodied in a letter written by defts. to pltf., & which letter pltf. had lost. Pltf., on an appearance being entered, applied to defts. for a copy of said letter, which defts. refused to give:—*Held*: pltf. was entitled to a general order for discovery, though the statement of claim had not yet been filed.—*STEWART v. RATNER SAFE CO.* (1907), 41 I. L. T. 74.—IR.

2. — *Amount to be fixed by partnership books.*—Where pltf.

203. *Not after evidence concluded.*—*Re WILLS' TRADE-MARKS*, No. 88, *ante*.

204. *Patent action—When petition comes into list.*—A petition for revocation ought not to be put into the witness list until it is effective for hearing. Inspection or discovery should be applied for when the petition comes into the petition list.—*Re SCOTT'S PATENT* (1902), 19 R. P. C. 273.

205. — *Not before issues defined.*—*THERMOS, LTD. v. ISOLA, LTD.*, No. 75, *ante*.

SUB-SECT. 2.—ON PLAINTIFF'S APPLICATION.

206. *Not till after statement of claim delivered.*—*CASHIN v. CRADDOCK*, No. 135, *ante*.

207. — *An application for discovery made before delivery of the statement of claim was ordered to be adjourned.*—*ANON.* (1876), 20 Sol. Jo. 282; 2 Char. Cham. Cas. 50; Bitt. Prac. Cas. 122.

208. — *Before discovery, the statement of claim must first be delivered, except under special circumstances.*—*ANON.* (1876), 20 Sol. Jo. 282; 2 Char. Cham. Cas. 49; Bitt. Prac. Cas. 116.

209. — *An application for discovery before delivery of the statement of claim was adjourned until a statement of claim should be delivered, notwithstanding it was stated the indorsement on the writ gave full particulars.*—*ANON.* (1876), 20 Sol. Jo. 282; 2 Char. Cham. Cas. 50; Bitt. Prac. Cas. 117.

210. — *Deft. in an action of ejectment will not be ordered to make an affidavit of documents unless the ct. is satisfied, upon the pleadings or upon affidavit, that pltf. has some tangible ground of action.*

Semble: such an order should never be made before the delivery of the statement of claim.—*PHILIPPS v. PHILIPPS* (1879), 40 L. T. 815; 27 W. R. 939.

211. — *Qu.*: Whether there is any general rule of practice that pltf. cannot obtain an order for production of documents before he has delivered his statement of claim.—*COSTA RICA REPUBLIC v. STROUSBERG* (1879), 11 Ch. D. 323; 40 L. T. 401; 27 W. R. 512, C. A.

Annotation:—*Reid. Whitwham v. Moss* (1895), 73 L. T. 57.

212. — *County court action—Transferred to Chancery Division.*—In an action for the recovery of land commenced by plaint in a county ct., & afterwards transferred to the Ch. Div. of the High Ct., the proceedings after transfer will be conducted according to the practice of the High Ct., so that pltf. is not entitled to discovery & production until he has delivered a statement of claim in the action.—*DAVIES v. WILLIAMS* (1879), 13 Ch. D. 550; 49 L. J. Ch. 352; 42 L. T. 469; 28 W. R. 223.

213. — *Exceptions—For preparation of statement of claim.*—Where it was alleged that discovery was necessary for the preparation of the statement of claim, an order was made accordingly

issued summons for an amount to be fixed after examination of the partnership books, & on appearance being entered, but before filing his declaration, obtained a discovery order, & deft. applied for a stay of discovery until pltf. filed his declaration, on the ground that the application was a fishing one & not made *bona fide*:—*Held*: as discovery at this stage was not prejudicial to justice or inexpedient & as the order was not obtained merely for the purpose of fishing for a declaration, in the absence of anything to the contrary of the rules, the order should stand & discovery proceed.—

Sect. 5.—At what stage of proceedings granted: Sub-sects. 2, 3 & 4.]

before delivery of the statement of claim.—*LEY v. MARSHALL* (1876), Bitt. Prac. Cas. 100; 2 Char. Cham. Cas. 59.

Annotation:—Distd. Cashin v. Craddock (1876), 2 Ch. D. 140.

214. ——— Special circumstances.]—ANON. (1876), No. 207, *ante*.

215. Not before defence delivered.]—Pltf., after delivering a statement of claim is not, as a general rule, entitled, under R. S. C., Ord. 31, r. 12, to an order for discovery of documents before a statement of defence is delivered, because, until that happens, it is impossible to say what the matters "in question in the action" are.—*HANCOCK v. GUERIN* (1878), 4 Ex. D. 3; 27 W. R. 112.

Annotations:—Consd. Philipps v. Philipps (1879), 40 L. T. 815; *Union Bank of London v. Manby* (1879), 13 Ch. D.

216. No absolute rule.]—The ct. has a discretion in ordering discovery, & there is no absolute rule that a deft. should not be ordered to make an affidavit of documents before the delivery of his statement of defence.—*EDELSTON v. RUSSELL* (1888), 57 L. T. 927.

Annotation:—Refd. Woolfe v. Automatic Picture Gallery (1902), 19 R. P. C. 161.

217. After issue joined.]—ANON. (1876), No. 128, *ante*.

SUB-SECT. 3.—ON DEFENDANT'S APPLICATION.

218. Not till after defence delivered.]—A motion by deft. to a bill for a partnership account for a production of the accounts before answer was refused.—*PICKERING v. RIBGY* (1812), 18 Ves. 484; 34 E. R. 400, L. C.

Annotations:—Expld. & Distd. Mickelthwait v. Moore (1817), 3 Mer. 292. *Refd. Brown v. Newall* (1837), 2 My. & Cr. 558; *Shopherd v. Morris* (1838), 1 Beav. 175.

219. ———.]—Where a pltf. set out in his bill a letter written by deft., & stated that it was pltf.'s intention to prove & put in evidence all letters which had passed between him & deft. on the subject of the transactions in question, if so advised:—*Held*: deft. was not entitled, before putting in his answer, to move for the production of pltf.'s documents.—*HALLIDAY v. TEMPLE* (1856), 8 De G. M. & G. 96; 44 E. R. 325, L. JJ.

Annotation:—Apld. Turner v. Burkinshaw (1863), 4 Giff. 399.

220. ———.]—A pltf. is not bound to produce accounts & documents for the inspection of a deft. before answer, even though they be referred to in the bill, where the objects of the suit relates to the accuracy of those accounts & documents.—*TURNER v. BURKINSHAW* (1863), 4 Giff. 399; 2 New Rep. 414; 8 L. T. 569; 9 Jur. N. S. 866; 11 W. R. 851; 66 E. R. 762.

221. ———.]—The ct. will not order pltf. to

produce documents until after deft. has put in his answer.—*FAIRBAIRN v. LAY, SMITH v. LAY* (1870), 22 L. T. 785; 18 W. R. 915.

222. ———.]—An application for discovery before delivery of the statement of defence was adjourned until after the defence should be delivered.—*MERCANTILE MUTUAL INSURANCE CO. v. SHOESMITH* (1876), Bitt. Prac. Cas. 131; 2 Char. Cham. Cas. 53.

223. ———.]—An application for discovery made before the defence had been delivered was adjourned until delivery of the defence.—*PLUM v. NORMANTON IRON & STEAM CO., LTD.* (1876), Bitt. Prac. Cas. 131; 2 Char. Cham. Cas. 53.

224. ———.]—An application for discovery was adjourned until after the statement of defence should be delivered.—*ANON.* (1876), 20 Sol. Jo. 282; 2 Char. Cham. Cas. 50; Bitt. Prac. Cas. 124.

225. ———.]—Defts., before putting in their statement of defence, moved for the production by pltf. of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals:—*Held*: the land having been conveyed to pltf. in fee simple, they were *prima facie* entitled to the land down to the centre of the earth, & unless defts. could show that they were not so entitled pltf. could not be compelled to produce their title deeds.—*EGREMONT BURIAL BOARD v. EGREMONT IRON ORE CO.* (1880), 14 Ch. D. 158; 49 L. J. Ch. 623; 42 L. T. 179; 28 W. R. 594.

226. ———.]—Pltf. cannot generally be com- pelled to produce to deft. a document relating to his own title only, though such document is referred to in his pleadings, until deft. has put in his defence.

Pltf. in his pleadings referred to a document on which his title depended & declined to produce it to deft. before statement of defence was put in:—*Held*: pltf. had "sufficient cause for not complying with the notice" to produce under R. S. C. (1875), Ord. 31, r. 14.—*WEBSTER v. WHEWALL* (1880), 15 Ch. D. 120; 49 L. J. Ch. 704; 42 L. T. 868; 28 W. R. 951.

Annotations:—Consd. Quilter v. Heatly (1883), 23 Ch. D. 42. *Refd. Re Hinchliffe* (1894), 12 R. 33. *Mentd. Roberts v. Oppenheim* (1884), 26 Ch. D. 724.

227. ———.]—The ct. will as a rule refuse discovery of documents before the statement of defence is delivered, notwithstanding the wide expressions contained in R. S. C., Ord. 31, r. 14.—*BRITISH & FOREIGN CONTRACT CO. v. WRIGHT* (1884), 32 W. R. 413, D. C.

228. ———.]—WOOLFE v. AUTOMATIC PICTURE GALLERY, LTD. (1901), 19 R. P. C. 161.

229. ——— Except in special circumstances.]—Pltf., unless he specifically offers to do so by the bill, or is required to do so by a cross-bill, is not bound to produce, previous to deft. being compelled to put in his answer, documents admitted to be in

GERALD (1878), 1 L. R. Ir. 492.—IR.

PART II. SECT. 5, SUB-SECT. 3.

k. Before defence delivered.]—The information deft. requires to enable him to plead or counterclaim can be obtained by means of an order requiring pltf. to make discovery of documents before deft. is required to plead, & the order will be granted.—*REID v. NELLES* (1910), 15 W. L. R. 578.—CAN.

deft. to wait until plea has been filed before making application for a discovery order. Where action had been instituted on an account annexed to the declaration & deft. before filing plea applied for a discovery order:—*Held*: as the action was founded on

TEPPERSON v. HOFFMAN (1910), 20 C. T. R. 88.—S. AF.

h. Before statement of claim de- livered—*Action by administratrix to eject defendant—In possession of intestate's premises & documents of title.]—*Where pltf. as administratrix of deceased, who had been in possession of certain premises up to the time of her death, brought an action against deft. to recover possession of those premises & for a declaration of title thereto, & where pltf. before delivering a statement of claim, applied for discovery of documents, alleging that the premises sought to be recovered were held by deceased under leases & other documents of title, which documents were in the premises at the time of deceased's death & remained

there until deft. entered into possession, & were, at the time of action brought, in his possession, power, or procurement:—*Held*: notwithstanding that a statement of claim had not been delivered, the circumstances were such as to entitle pltf. to discovery limited to the documents in the possession, power, or procurement of deft., showing the terms for which deceased held the premises.—*KINSELLA v. FLANAGAN* (1901), 35 I. L. T. 98.—IR.

215 i. Not before defence delivered.]—A pltf. is not entitled to obtain an order for discovery of documents, under Ord. 31, r. 11, until after the delivery of the defence, unless a special case is made by affidavit for granting such discovery at an earlier stage of the proceedings.—*CLEARY v. FITZ-*

his, pltf.'s, possession & alleged as proving his case.—*BATE v. BATE* (1844), 7 Beav. 528; 2 L. T. O. S. 475; 8 Jur. 232; 49 E. R. 1170.

Annotation:—*Refd.* *Turner v. Burkinshaw* (1863), 4 Giff. 399.

230. ———.]—Discovery will be allowed in special cases before the statement of defence is delivered.—*ANON.* (1875), 20 Sol. Jo. 81; Bitt. Prac. Cas. 32; 1 Char. Cham. Cas. 100.

231. ———.]—An application by a deft. for discovery before his defence had been delivered & without any special ground being put forward for the application, was adjourned until delivery of the defence.—*ANON.* (1876), Bitt. Prac. Cas. 118; 2 Char. Cham. Cas. 50.

232. Before defence delivered—Without special circumstances.—In an action for redemption against a mtgee. in possession, an order for production of documents made before the defence was delivered, & without any special case for production being made, was affirmed.—*UNION BANK OF LONDON v. MANBY* (1879), 13 Ch. D. 239; 49 L. J. Ch. 106; 41 L. T. 393; 28 W. R. 23, C. A.

233. ——— Unless reasons to contrary.]—Pltf. by his statement of claim referred to certain entries in his own books, to two letters written to himself, & to two letters written by himself. Deft., as soon as the statement of claim was delivered, applied for production of the books, of the letters written to pltf., & of copies of the letters written by pltf. Pltf.'s solrs. refused to produce any of them, as deft. had not delivered statement of defence. Deft. then applied to the ct. for production:—*Held*: production must be ordered at once of documents referred to in the pleadings unless some special reason against it could be shown, & pltf. must produce his books, with the usual liberty to seal up the parts other than the entries, & must also produce the letters written to himself, but he could not be ordered to produce copies of letters written by himself, there being no reference to such copies in the statement of claim.—*QUILTER v. HEATLY* (1883), 23 Ch. D. 42; 48 L. T. 373; 31 W. R. 331, C. A.

Annotations:—*Distd.* *Roberts v. Oppenheim* (1884), 26 Ch. D. 724. *Refd.* *Smith v. Harris* (1883), 48 L. T. 869.

Mentd. *Dashwood v. Magniac*, [1891] 3 Ch. 306.

234. ——— Only material for defence lying in discovery.]—Where a salvage action was brought against a derelict ship, defts. were allowed discovery before delivering a defence, with the object of obtaining the only possible material for a defence.—*THE LOCH MAREE* (1895), cited in *Roscoe's Admiralty Jurisdiction & Practice*, 4th ed., at p. 346.

235. Before appearance—Plaintiff able to sign judgment in default.—*ANON.* (1875), 20 Sol. Jo. 81; Bitt. Prac. Cas. 32; 1 Char. Cham. Cas. 43.

236. Before plaintiff's declaration.—Except under special circumstances, the ct. will not, where by the indorsement on the writ of summons it appears that the action is to recover principal & interest on a mtge. deed, order pltf. before declaration to allow deft. inspection of the deed; for *non*

constat that pltf. may declare upon the deed, & it may turn out that the application is premature. The fact that deft. executed the deed under the advice of pltf.'s attorney, without any copy of it, & is ignorant of its effect or contents, is not sufficient to justify the application at so early a stage in the cause.—*JONES v. HARGREAVES* (1860), 29 L. J. Ex. 368.

237. Where defendant himself in contempt for not making affidavit.—Although a deft. is in contempt, not for non-payment of costs, but for non-compliance with orders of the ct., he is entitled to take any step required for the purpose of his defence.

Deft. being in contempt for not having made an affidavit of documents, applied for an order that pltf. should make an affidavit of documents:—*Held*: he was entitled to the order, but the affidavit & production by pltf. were to be after an affidavit & production by deft.—*HALDANE v. ECKFORD* (1869), L. R. 7 Eq. 425; 38 L. J. Ch. 372; 20 L. T. 389; 17 W. R. 570.

Annotation:—*Mentd.* *Kennedy v. Wakefield* (1870), 39 L. J. Ch. 827.

SUB-SECT. 4.—BEFORE OR AFTER PARTICULARS.

238. General rule—Fraud.—There is no hard & fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars; but the ct. will, in the exercise of its discretion, look at all the circumstances in each case.

In an action in which pltf. alleged that they had lost business by reason of the fraudulent acts of defts., giving one specific instance of fraud in their statement of claim, which was admitted by defts., & alleging that "on divers other occasions" defts. had taken orders from "divers other persons" for coal from pltf.'s colliery, & fraudulently supplied coal not purchased from pltf.:—*Held*: as defts. had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which pltf. had not, defts. were not entitled to particulars before giving discovery.—*WAYNES MERTHYR CO. v. RADFORD & CO.*, [1896] 1 Ch. 29; 65 L. J. Ch. 140; 73 L. T. 624; 44 W. R. 103; 40 Sol. Jo. 85.

Annotations:—*Refd.* *Duke v. Wisden* (1897), 77 L. T. 67. *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151.

239. Before particulars—Fraud.—Pltf. employed defts. to purchase goods, as their agents, at the lowest possible prices. Pltf. sued for an account, & in their statement of claim alleged that defts. had purchased goods at prices higher than the current prices, & had secretly received from the vendors allowances or commissions. The charges against defts. were stated in general terms, no particulars being mentioned. Defts. denied the charges, & pleaded a settled account. Pltf. applied for production of documents:—*Held*: pltf. were not bound to give particulars of fraud

documents in pltf.'s possession, such order should be granted.—*EHLERS v. MALMESBURY BOARD OF EXECUTORS* (1909), 26 S. C. 406.—S. AF.

m. ——— To ascertain amount of damages—With view to payment into court with defence.]—A deft. may obtain discovery of documents, under Ord. 31, r. 11, before defence has been delivered, when such discovery is necessary for the purpose of ascertaining what damage pltf. has actually suffered, with a view to paying money into ct. with the defence.—*MEGAW v. M'DIARMID* (1882), 10 L. R. Ir. 376.—IR.

PART II. SECT. 5, SUB-SECT. 4.

n. General rule.—There is no hard & fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars, but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts & taking into account any special circumstances.—*TOWNSEND v. NORTHERN CROWN BANK* (1909), 14 O. W. R. 727; 1 O. W. N. 69; 19 O. L. R. 480.—CAN.

o. Before particulars—Allegation of fraud.—The ct. has discretion to order deft. to make an affidavit of

documents before delivery of defence for the purpose of enabling pltf. to give particulars of charges of fraud made in the statement of claim.—*BEAUCHAMP v. MUIRHEAD* (1898), 6 B. C. R. 418.—CAN.

an action for damages for false representations made by defts. whereby pltf. were induced to supply them with goods & money, & to enter into agreements with them, to pltf.'s loss:—*Held*: it was enough for pltf. to aver in their statement of claim that the goods & money were supplied on the faith of statements, falsely & fraudulently made; & this

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Sect. 5.—At what stage of proceedings granted: Sub-4 & 5. Sect. 6.]

under R. S. C., Ord. 19, r. 6, before obtaining discovery of documents.

R. S. C., Ord. 31, r. 20, does not do more than give the judge a discretion in such matters. In some cases it may be perfectly right that when there is a plea which would prevent the necessity of the discovery, which would be a bar to the right of discovery, that should be settled first (COTTON, L.J.).

The ordinary order for production ought to be made, except that such of the books as are in Japan must be produced in that country (BACON, V.-C.).—WHYTE v. AHRENS (1884), 26 Ch. D. 717; 54 L. J. Ch. 145; 50 L. T. 344; 32 W. R. 649, C. A.

Annotations:—Distd. Leitch v. Abbott (1886), 31 Ch. D. 374. Apld. Sachs v. Spellman (1887), 37 Ch. D. 295.

240. — Defendant knowing facts in dispute—Ignorance of plaintiff.]—Where deft. has means of knowing the facts in dispute, & pltf. has not, deft. is not entitled to particulars until after he has given discovery.

Pltfs., who were exors. of a married woman, sued her husband to establish that a quantity of the furniture & other chattels comprised in an inventory which had been taken of the goods in deft.'s house, belonged to the separate estate of the wife. The husband applied for particulars of demand showing which chattels they claimed:—*Held*: the application ought to stand over till the husband had made an affidavit which of the articles belonged to the wife.—MILLAR v. HARPER (1888), 38 Ch. D. 110; 57 L. J. Ch. 1091; 58 L. T. 698; 36 W. R. 454, C. A.

Annotations:—Distd. Woolfe v. Automatic Picture Gallery (1902), 19 R. P. C. 161. Refd. Waynes Merthyr Co. v. Radford (1895), 65 L. J. Ch. 140.

241. — Inquiring into damages.] —Judgment having been obtained by pltfs. for breach of defts.' covenant, restricting him as to the trade formerly carried on by him, & now carried on by pltfs., with an enquiry as to damages, deft. was ordered to make an affidavit of the documents relating to the matters in question in the enquiry. Before complying with the order, deft. applied that pltfs. might first be ordered to give particulars of damage:—*Held*: he was entitled to a statement of the heads of claim under which pltfs. sought damages before completing his affidavit of documents. On appeal:—*Held*: the order ought to be discharged, inasmuch as pltfs. would not be able to make any statement which would limit the scope of the enquiry until after deft. had made discovery.—MAXIM NORDENFELT GUNS & AMMUNITION CO. v. NORDENFELT, [1893] 3 Ch. 122; 62 L. J. Ch. 749; 69 L. T. 471; 42 W. R. 38; 37 Sol. Jo. 600; 2 R. 538, C. A.

Annotation:—Refd. Waynes Merthyr Co. v. Radford (1895), 65 L. J. Ch. 140.

242. After particulars — Libel — Justification pleaded.]—In an action of libel, although the libel consists of a charge of misconduct, general in its nature, a deft. who pleads justification must in his particulars state with sufficient precision the specific instances of misconduct on which he intends to rely. It is no excuse that deft. will thereby be obliged to disclose the names of the

they could do without the production of defts.' balance sheets, books of account, etc. If particulars were afterwards claimed, it would then be time enough to apply for discovery.—ARTHUR & CO., LTD. v. RUNIANS (1898), 18 P. R. 205.—CAN.

240 i. — Defendant knowing facts in dispute—Ignorance of plaintiff.]—Where deft. knows the facts, & pltf.

does not, deft. should give discovery before pltf. delivers particulars, & this principle applies not only where there is a fiduciary relation between the parties & fraud is alleged.—HICKSON v. SCALES (1900), 19 N. Z. L. R. 202.—N.Z.

PART II. SECT. 5, SUB-SECT. 5.

*q. Pending rehearing.]—*After a

witnesses he proposes to call upon the trial of the action. In the absence of some relation between the parties, as that of principal or agent, or of special circumstances, deft. is not entitled to have discovery before he delivers the particulars.—ZIERENBERG v. LABOUCHERE, [1893] 2 Q. B. 183; 63 L. J. Q. B. 89; 69 L. T. 172; 57 J. P. 711; 41 W. R. 675; 9 T. L. R. 487; 4 R. 464, C. A.

Annotations:—Distd. Yorkshire Provident Life Assce. v. Gilbert & Rivington, [1895] 2 Q. B. 148. Consd. Waynes Merthyr Co. v. Radford, [1896] 1 Ch. 29; Wootton v. Slevier, [1913] 3 K. B. 499. Refd. Arnold & Butler v. Bottomley, [1908] 2 K. B. 151. Gaston v. United Newspapers (1915), 32 T. L. R. 143.

243. — Allegation of undue influence.]—Upon a complaint that deft. railway co. were unduly preferring certain trade competitors of appcts., by carrying their goods at lower rates than those charged to appcts., an order was made by the registrar that appcts. should be precluded at the hearing from giving evidence of specific consignments by themselves & their competitors, unless six weeks before the hearing they delivered to defts. particulars identifying such specific consignments. Before any such particulars were delivered a second order was made by the registrar that the railway co. should file an affidavit stating what documents were or had been in their possession as from a certain date relating to the consignment of the competitors' traffic to certain places mentioned in the application:—*Held*: the application for discovery by appcts. was premature, & they first ought to make their case by alleging specific instances in respect of which they claimed relief, in support of which they then could have discovery.—GENERAL ELECTRIC CO., LTD. v. GREAT WESTERN RY. CO. (1912), 15 Ry. & Can. Tr. Cas. 53, C. A.

Annotation:—Folld. Clayton & Shuttleworth v. G. C. Ry. (1912), 29 T. L. R. 111.

SUB-SECT. 5.—AFTER JUDGMENT OR DECREE.

244. General rule.]—Defts. & pltf. had business relations together, & pltf. commenced an action alleging a partnership & claiming a receiver of the assets of the firm & an account. Upon a motion for a receiver, a consent order was made for the taking of the account between the parties by a special referee. The account was taken before the referee, who ordered discovery. Pltf. then alleged that defts. were acting improperly in getting in the debts owing to the firm, & gave notice of motion for the appointment of a receiver, which motion was ordered to be heard with witnesses. Pltf. then applied to the ct. for an order for further discovery & inspection of documents for the purposes of the motion:—*Held*: (1) if the order of the special referee for discovery were insufficient, application should have been made to the referee for a further order; (2) if the matters to which the discovery claimed related arose out of the judgment, a sufficient order could be made by the special referee; (3) if such matters did not arise out of the judgment, they should be the subject of a new action.

After decree a party may apply for discovery in so far as it is necessary to work out the decree, but here discovery is sought to enable deft. to

hearing & a decree, a pltf. may file a bill for discovery in aid of a rehearing, without leave of the ct.—JUDKIN v. HICKIE (1767), 2 How. E. E. 807.—IR.

*r. For taking account — Directed under decree.]—*If a party refuses to produce documents in his possession, to be used before the master in taking an account under the decree, he will be

show that he cannot get under the decree what he says he is entitled to. If that is so he must start a new action (BUCKLEY, L.J.).—KORKIS v. WEIR (ANDREW) & Co. (1914), 110 L. T. 794, C. A.

245. **Former practice.**—Deft. in an action at law alleged that pltf. had a letter from him which would have discharged the claim, but which pltf. refused to produce. After verdict, he filed his bill in equity:—*Semble*: his remedy was by discovery before verdict; *aliter*, if the matter had been after the trial.—ANON. (1664), 3 Rep. Ch. 17; 21 E. R. 715.

246. —.—]—BARBONE v. BRENT (1683), 1 Vern. 176; 23 E. R. 397.

247. —.—]—On showing cause against a rule, certain documents were verified by exhibits not annexed, & filed:—*Held*: after the rule was disposed of, deft. had no right to inspect & take copies of the exhibits.—DAVENPORT v. JONES (1840), 4 Jur. 720.

248. —.—]—A cause having been heard on further directions, a decree made, & accounts taken, the next friend moved in his own name for production of a special document for a special purpose, & there was a variation between the summons in chambers & the order. Upon motion to discharge that order:—*Held*: the summons must follow the notice of motion; pltf. had no right after decree to move for production, & there being no admission in the answer, the order would be discharged with costs.—RIPPIN v. DOLMAN (1854), 2 W. R. 432.

249. —.— On taking an account.]—After verdict for pltf. in an action for the infringement of a patent, a rule for an account & payment under 15 & 16 Vict., c. 38, s. 42, is absolute in the first instance. Under the same circumstances, however, an order for inspection of defts.' books will not be made in the absence of special grounds.—HOLLAND v. Fox (1854), Bail. Ct. Cas. 221; 23 L. J. Q. B. 211; 22 L. T. O. S. 228; 1 Jur. N. S. 13; 2 W. R. 166; *subsequent proceedings*, 3 E. & B. 977.

250. —.— As between co-defendants.]—In an administration suit, after a decree for taking the accounts, one deft. may obtain from a co-deft. a production & inspection of documents, etc., which relate to the matters in question in the suit.—HART v. MONTEFIORE (1861), 30 Beav. 280; 31 L. J. Ch. 333; 5 L. T. 441; 8 Jur. N. S. 350; 10 W. R. 97; 54 E. R. 897.

251. **Future discovery.**—Pltf., after decree,

spection, if the master will certify that their production is necessary.—COOKE v. HUGHES (1825), 1 Hog. 276.—IR.

s. —.—]—Order for discovery granted to pltf., who had obtained a judgment for an injunction against deft. & an account of profits, discovery being necessary for the proper ascertainment thereof.—HENNESSY v. LAVERY, [1903] 1 L. R. 87.—IR.

t. *Of a lease—Of lands ordered to be sold.*—A conditional order to make discovery of a lease may be made against a lessee of lands ordered to be sold in an action.—WEBB v. WEBB (1891), 27 L. R. Ir. 42.—IR.

a. *After execution levied.*—The ct. will order copies of a bond, & warrant of attorney for confession judgment thereon, to be furnished, although it appear, from appct.'s affidavit, that execution has been had thereon, & there is no longer a cause in ct. It is no ground for refusing such an application, that the party applying does not clearly show the previous written notice of demand for the copy sought

Houston (1855), 7 Ir. Jur. 362.—IR.

is entitled, as a matter of course, to an order requiring deft. to make the common affidavit as to documents, though deft. has answered an interrogatory as to documents, & the answer has not been excepted to.—HANSLIP v. KITTON (1863), 1 De G. J. & Sm. 440; 2 New Rep. 145; 32 L. J. Ch. 662; 8 L. T. 376; 9 Jur. N. S. 482; 11 W. R. 762; 46 E. R. 175, L. JJ.

252. **Appeal pending.**—Pltfs. obtained a verdict in an action for the infringement of a patent: a rule to enter the verdict for defts. was discharged; & defts. appealed. An order was afterwards made for an account of profits, which was not appealed against, but on the parties appearing before the master for the purpose of taking the account, defts. refused to produce their books. The ct. made absolute a rule for production & inspection of defts.' books, & for interrogatories to defts., notwithstanding the pendency of the appeal.—SAXBY v. EASTERBROOK (1872), L. R. 7 Exch. 207; 41 L. J. Ex. 113; 26 L. T. 439; 20 W. R. 751.

253. **Matters relating to damages.**—In an action for breach of promise judgment for pltf. had gone by default, & the question of damages had been referred to the master. Pltf. claimed the right to inspect & take copies of her letters to deft. as being material to the question of damages:—*Held*: the matter was one for the discretionary jurisdiction of the ct. or judge, & not of right.—LADDS v. WALTHER (1884), 32 W. R. 1000, D. C.

254. —.—]—MAXIM NORDENFELT GUNS & AMMUNITION Co. v. NORDENFELT, No. 241, ante.

SECT. 6.—POSTPONEMENT PENDING TRIAL OF ISSUE OR QUESTIONS—CONSEQUENTIAL DISCOVERY.

See R. S. C., Ord. 31, r. 20.

255. **No discovery till question determined—Materiality depending on question at issue.**—RANDAL v. HEAD (1659), Hard. 188; 145 E. R. 444.

Annotation:—Reid. Shaw v. Ching (1805), 11 Ves. 303.

256. —.— **Alleged partnership.**—Deft. need not set forth an account of the transactions of a trade, in which pltf. pretends to have been a partner, if there is a clear denial of the

PART II. SECT. 6.

255 i. **No discovery till question determined—Materiality depending on question at issue.**—Whenever discovery is sought in aid of an issue which must be determined at the hearing, pltf. is entitled to it to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, he is not entitled as of right thereto, but it is subject to the discretion of the ct. until pltf. has established his fundamental right at the hearing. Where pltf. claimed a declaration of the right of himself & all other persons insured in the temperance section of deft. co. to the profits earned by that section, payment, & an account & apportionment, thereof:—*Held*: upon the mere statement of pltf. in pleading that he was the holder of a policy entitling him to share in certain profits of the co., & without any proof of the statement, the ct., in its discretion, should not require the co. to produce & lay open to him all their books of account & the papers relating to them; but it was a proper case in which to

permit defts. to apply for an order for a preliminary trial of pltf.'s right to require an account, & to postpone discovery of the books until after such trial.—GRAHAM v. TEMPERANCE & GENERAL LIFE ASSURANCE Co. OF N. AMERICA (1895), 16 P. R. 536.—CAN.

255 ii. —.—]—Where there is a clear preliminary issue to be determined, discovery ought not to be allowed of matters which only become material if the issue is found in the pltf.'s favour, if the granting of such discovery at an early stage can be deemed to be oppressive. When the discovery, even though it may be regarded as consequential, is not oppressive the discretion given by this rule ought not to be used to withhold the information sought.—PATTERSON v. NEILL (1912), 20 O. W. R. 887.—CAN.

b. —.— **Alleged alteration of will after execution.**—In an action against defts., as exors. & residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, & for

DISCOVERY, INSPECTION, AND INTERROGATORIES.

Sect. 6.—Postponement pending trial of issue or questions—Consequential discovery.]

partnership.—*JACOBS v. GOODMAN* (1791), 2 Cox, Eq. Cas. 282 ; 3 Bro. C. C. 489, n. ; 30 E. R. 130.

Annotations:—Reid. Agar v. Regent's Canal Co. (1815), Coop. G. 212 ; *Elmer v. Creasy* (1873), 9 Ch. App. 69.

257. ——— Taking accounts.]—A bill was filed to rectify a deed of settlement of partnership accounts, & as consequential relief, to have the accounts taken. The deed, & certain correspondence relating to the contract between the parties, & the partnership accounts, were admitted by the answer to be in the possession of defts. Pltf. obtained an order, upon motion, for leave to inspect the deed ; but *semble*, he was not entitled, before he obtained a decree to rectify the deed, to the production of the partnership accounts.—*WIMBURN v. LLOYD* (1842), 12 L. J. Ch. 92.

258. ——— ———.]—Deft. answering must answer fully, & he cannot, by denying pltf.'s title, refuse a discovery of the accounts which are consequential on a decree being made against him.

A railway co., under the advice of the chairman & directors, bought up another line in which the chairman was principally interested, & the chairman was furnished with a number of paid-up shares to effect the object. In answer to a bill by the co. impeaching the transaction, on the ground of suppression & misrepresentation, & of ignorance, on the part of the co., of the chairman's interest, he insisted on the validity of the transaction on various grounds, & declined to set forth how he had dealt with the shares:—*Held*: the answer was insufficient.—*GREAT LUXEMBOURG RY. CO. v. MAGNAY* (1857), 23 Beav. 646 ; 53 E. R. 251.

259. ——— ———.]—A. filed a bill against B. alleging an agreement by B. to pay him a sixth of the profits of B.'s business, & praying for an account of such profits, & for payment of such share. B., by his answer, admitted an agreement to pay to A. a twelfth of the profits, but alleged an agreement by A. to accept B.'s statement of the profits, & not to investigate B.'s books & accounts:—*Held*: upon these pleadings A. was not entitled to the production of B.'s books & accounts before the hearing.—*TURNER v. BAYLEY* (1864), 4 De G. J. & Sm. 332 ; 3 New Rep. 695 ; 33 L. J. Ch. 499 ; 10 L. T. 115 ; 12 W. R. 633 ; 46 E. R. 947, L. JJ.

260. ——— ———.]—Deft. was agent to pltf. for the sale of goods according to the terms of a certain agreement. Pltf. believed that deft. had violated the terms of the agreement, & filed a bill against him for an account. Deft., by his answer, submitted that the inquiries made by the interrogatories as to the names of the persons to whom he had sold the goods, & as to the quantities & particulars of such sales were wholly immaterial to the questions at issue. Pltf. took out a summons for the production of documents, & deft., by his affidavit, admitted the possession & relevancy of the documents, & agreed to produce the documents mentioned in the first part of the

administration & partition:—*Held*: until pltf. established the alteration charged, they were not entitled to discovery of instruments affecting the estate of testator.—*HURST v. BARBER* (1888), 12 P. R. 467.—CAN.

263 i. ——— Infringement of patent.]—In an action to restrain defts. from selling a certain drug in violation of the rights of pltf. under a patent, & of the terms upon which the drug

was sold to defts., & for damages for selling in violation of such rights & terms, & for damages for a trade libel, defts. admitted that they bought the drug, but not from pltf., & that they were selling it by their agents, but in their pleading they denied pltf.'s patent right:—*Held*: there being a *bona fide* contest as to that right, defts. should not, before the trial, be compelled to afford discovery of the details & particulars of such buying

first schedule to his affidavit as relating exclusively to these transactions with pltf., but declined to produce certain other documents mentioned in the second part of the first schedule, on the ground that in them were contained the whole of his business transactions, except those contained in the documents he had agreed to produce. Pltf. accordingly took out a further summons to produce the documents contained in the second part of the first schedule, upon which the chief clerk made an order to produce the documents required:—*Held*: deft. must be allowed to seal up the names & addresses of his customers, & was only bound to produce the entries showing the quantities of goods sold, & the prices.

A discovery which is useless to pltf. for any purposes of the hearing, but which may be very injurious to deft. in case pltf. fails at the hearing, is not a discovery that ought to be made.—*HEUGH v. GARRETT* (1875), 44 L. J. Ch. 305 ; 32 L. T. 45, L. JJ.

261. ——— ———.]—A.-G. *v. THOMPSON*, No. 1081, *post*.

262. ——— Allegation of existence & breach of custom.]—The bill set up a custom, that all corn grown & flour sold in a particular district, in which deft. occupied a farm, should be ground at pltf.'s ancient mill ; & alleged that deft. had infringed that custom, by selling corn & flour grown upon his farm which had been ground at other mills. Deft., a corn merchant & flour dealer, by his answer, denied the custom, & admitted the possession of trade books containing entries of the corn & flour grown & sold by him in the course of his business ; & by his affidavit stated, that the quantity of corn & flour grown & sold by him within the district did not exceed one-eightieth part of the corn & flour mentioned in such entries. An order was made, upon motion by pltf., for the production of the books, the deft. having liberty to file affidavits to enable him to seal up such entries as did not relate to corn & flour grown & sold within the district.—*ORD v. FAWCETT* (1850), 19 L. J. Ch. 487 ; 14 L. T. O. S. 464 ; 14 Jur. 456.

263. ——— Infringement of patent.]—When pltf.'s right to relief at the hearing is clear, assuming the title stated by his bill, deft., by his answer denying that title, is in certain cases, protected from discovery.

In a suit to restrain an alleged infringement of a patent, deft., by his answer denying the fact of infringement, is protected from making any discovery immaterial to that question, & which when that question is decided would be given under the decree.—*DE LA RUE v. DICKINSON* (1857), 3 K. & J. 388 ; 69 E. R. 1159.

Annotations:—Distd. Swaby v. Sutton (1863), 9 L. T. 711 ; *Ashworth v. Roberts* (1890), 45 Ch. D. 623. *Reid. Crossley v. Stewart* (1863), 1 New Rep. 426 ; *Foxwell v. Webster* (1863), 3 New Rep. 103 ; *Beavan v. Cook* (1869), 17 W. R. 872 ; *Elmer v. Creasy* (1873), 9 Ch. App. 69 ; *Lea v. Saxby* (1875), 32 L. T. 731 ; *Cooke v. Smith* (1891), 39 W. R. 273.

264. ——— ———.]—Where the bill prays alternative relief, & pltf. would only be entitled to the discovery asked for under one of the alternatives

& selling, so as to disclose their & their customers' private business transactions. Such discovery should be deferred until after pltf. should have established their right, even if a subsequent separate trial of the question of infringement should be necessary.—*DICKERSON v. RADCLIFFE* (1897), 17 P. R. 586.—CAN.

c. ——— Alleged erroneous statement of profits.]—In an action to

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which is not the one principally relied on by the bill, & the information desired could not be material for the purpose of determining to which of such alternatives pltf. is entitled, such discovery will not be compelled before the hearing.—*LETT v. PARRY* (1861), 1 Hem. & M. 517; 71 E. R. 226.

265. ———.]—If in an administration suit by a legatee, whose legacy is charged on real estate, the exors. admit assets, the legatee is not entitled to the production of documents relating to testator's real estate.—*FORBES v. TANNER* (1863), 1 New Rep. 464; 9 Jur. N. S. 455; 11 W. R. 414.

266. ———.]—Pltf. filed his bill to establish his title by descent to lands of which A. died seised in fee. The bill stated that A. acquired part of the lands by descent from her maternal grandmother, S.; that the last purchaser of these estates was an ancestor of S., & that pltf. was heir-at-law of such ancestor, & also of A. *ex parte materna*, & that A. had died intestate, & that pltf. was lineally descended from the great-grandfather of A. & was her heir-in-law. Defts. pleaded a denial of pltf.'s heirship in bar to all the relief, & to all the discovery except to so much of the bill as sought discovery whether pltf. was lineally descended from A.'s great-grandfather. Issues were directed as to pltf.'s heirship. After this, pltf. having applied for production of documents, defts. by their affidavit admitted the possession of a pedigree, which they had covered up, except so much of it as showed the direct line from S. to A.; & defts. stated by their affidavit that the covered part evidenced or related to their own title only, & did not evidence or tend to make out the title claimed by pltf., or any link therein:—*Held*: (1) a pedigree was not to be looked upon as one indivisible document of which pltf. was entitled to see the whole, & the parts covered were sufficiently protected by the affidavit. Defts. objected to produce other documents on the ground that persons not parties to the suit were interested in them:—*Held*: (2) this was no ground for resisting production. Defts. objected to produce other documents on the ground that they did not relate to any issue or matter to be tried at the hearing, but were documents to the production of which pltf. would be entitled by way of consequential relief if he succeeded on the trial of any of the issues, but not in any other event:—*Held*: (3) these documents were protected.—*KETTLEWELL v. BARSTOW* (1872), 7

recover a share of the profits of a business under an alleged agreement to share profits, pltf. sought discovery of the books of the deft.:—*Held*: the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law & not upon an interlocutory motion, whether the agreement alleged by pltf. was within Master & Servant Act, 1897, ss. 3, 4, & if it was, whether the statement of profits declared by deft. could be impeached for fraud, error, mistake, or other like cause.—*ENGELAND v. MITCHELL* (1907), 9 O. W. R. 31; 13 O. L. R. 184.—CAN.

d. ——— *Alleged receipt of property as trustee.*]—The statement of claim alleged that deft. B. as trustee of a syndicate received various moneys & shares which he wrongfully used for purposes other than those of the syndicate. Pltf. claimed an accounting. The fiduciary relationship was denied in defence:—*Held*: discovery as to the disposition of the property alleged to be the subject matter of the breach should be postponed until the main issue, namely the breach of the fiduciary relationship, had been established.—*SHIRK v. BATE*

Ch. App. 686; 41 L. J. Ch. 718; 27 L. T. 258; 20 W. R. 917, L. JJ.

Annotation:—As to (1) *Reid. Minet v. Morgan* (1873), 28 L. T. 573.

267. ——— *Disputed handwriting.*]—Pltf., in support of an alleged gift to her by a testator, relied on a writing in her possession purporting to have been signed by him. Deft., however, disputed the genuineness of the document, & charged pltf. with forgery. Deft. having made the usual affidavit of documents, pltf. obtained an order in chambers that deft. should make a further affidavit setting forth all cheques in his possession drawn by testator during a period of nine years, covering the date of the alleged gift. Deft. then by his further affidavit of documents set forth & consented to produce certain cheques bearing testator's undoubted signature, but declined to set forth or produce others, which he alleged were forged. Upon a further summons to compel deft. to set forth & produce the latter cheques:—*Held*: pltf.'s general right to the production of all documents relating to the matters in question in the suit ought not to be extended to the production of all documents signed by testator, however numerous. & consequently, on technical grounds, the application must be refused, the ct. at the same time intimating its opinion that, having regard to the charges against the pltf., deft. ought, in fairness, to have acceded to the application.

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the C. L. P. Act, 1854, s. 27, disputed writings may be compared only with writings proved to the satisfaction of the judge to be genuine, & this proof can only be furnished at the hearing.—*WILSON v. THORNBURY* (1874), L. R. 17 Eq. 517; 43 L. J. Ch. 356; 22 W. R. 509.

268. *Liability & damages severable—Discovery relating to damages only—Not granted till liability determined.*]—Upon an application for inspection of documents in an action for work & labour, it appeared that the questions in the cause were whether deft. was liable to pay commission to pltf., & if so to what amount. The documents of which inspection was sought related to the second question only. Deft. had offered, in the event of the first question being decided against

(1914), 30 W. L. R. 165; 7 W. W. R. 925.—CAN.

e. ——— *Alleged agreement by partner—Not to share certain profits.*]—Where deft., in an action between partners for an accounting & discovery of partnership assets, asserts that the profits from a certain transaction had been expressly excepted from the partnership & refuses to disclose the amount of the profits in question, the ct. will exercise a judicial discretion as to compelling him to give discovery of the profits of that transaction before the main issue of pltf.'s right to share therein has been determined. This discretion arises under K. B. Rule 436 (Man.), by virtue of which the ct. has power to postpone consequential discovery until the main issue has been decided. The rule, however, is not absolute, & where it does not appear to the ct. that it would be unfair or unreasonable that the discovery should be made, deft. may be ordered to answer the questions before a special examiner at his own expense.—*MCDONALD v. SANDERSON*, [1923] 3 W. W. R. 237; 33 Man. L. R. 289.—CAN.

268 i. *Liability & damages severable*

—*Discovery relating to damages only—Not granted till liability determined.*]—Pltf. alleged that he had been manager of deft.'s business under a verbal agreement by which he was to be paid a salary & also a half share of the nett profits. In an action for wrongful dismissal, & to recover the said share of profits earned during a period of two years, he applied for discovery & inspection of deft.'s books & accounts in the said business on the grounds that it would enable him to prove the damages to which he was entitled; & that the method in which the books had been kept would assist him in proving the alleged contract for a share of the profits. Deft. swore that no such agreement existed, that pltf. had since dismissal started a similar business, & that discovery & inspection would seriously prejudice him. Pltf. filed no affidavit asserting the existence of the alleged agreement, nor made any definite statement as to how the books would assist to prove it:—*Held*: as it appeared that the contents of the books would only affect the question of damages if a contract in the form alleged by pltf. was proved, the proper course was to postpone discovery & inspection until, at the

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him at the trial, to refer the question of damages, granting an inspection of the documents at the reference:—*Held*: as the question of liability was severable from that of the amount of damages, & the discovery sought related to the latter question only, inspection ought not to be granted.—*ELKIN v. CLARKE* (1873), 21 W. R. 447.

Annotation:—Folld. Schreiber v. Heymann (1894), 63 L. J. Q. B. 749.

269. ———.—*FENNESSY v. CLARK*, No. 83, *ante*.

270. ———.—*Where it is possible to deal separately with the questions of the liability of deft. & of the amount of damages the ct. will not order the production of documents which will assist pltf. in establishing the amount of damages only, & which do not bear upon the question of deft.'s liability, until the question of liability has been determined.—SCHREIBER v. HEYMAN* (1894), 63 L. J. Q. B. 749, D. C.

271. *Under R. S. C., Ord. 31, r. 20.*—Where the materiality of discovery depends upon the determination of a question in dispute, & the discovery sought is calculated to cause considerable trouble, or to prove oppressive & vexatious to the party from whom it is sought, the ct. will act upon the above rule & postpone the discovery until the question has been determined.—*WOOD v. ANGLO ITALIAN BANK, LTD.* (1876), 34 L. T. 255; 3 Char. Pr. Cas. 238, D. C.

Annotation:—Reid. Re Mulcaster, Dalston v. Nanson (1878), 26 W. R. 434.

272. ———.—*Disputed question of law or fact.*—Where, in an action against a principal & sureties for breaches of contract, the sureties claimed to be discharged by reason of an alteration of the terms of the contract:—*Held*: (1) this was not a case in which an order should be made under R. S. C., Ord. 36, r. 6, for the trial of the question of the sureties' liability before the other questions in the actions, since, in the event of the principal's liability not being established, it would become unnecessary to try that of the sureties; (2) R. S. C., Ord. 36, r. 6, was not confined to questions of fact, but applied also to mixed questions of law & fact.

The principals' liability should be determined first. Ord. 31, r. 20, applies to mixed questions of law & fact (*LINDLEY, J.*).—*TASMANIAN MAIN LINE RY. CO. v. CLARK, PUNCHARD, ETC.* (1879), 27 W. R. 677.

273. ———.—*Disputed agency.*—In an action claiming an account of profits made by defts. as agents of pltf., where defts. denied agency, the ct. declined to order production of invoices of goods sold by third persons to defts. & re-sold by them to pltf. until after trial of the question of agency.

The case is exactly within the above rule (*JESSELL, M.R.*).—*VERMINCK v. EDWARDS* (1880), 29 W. R. 189.

274. ———.—*Gives court discretion.*—*WHYTE v. AHRENS*, No. 239, *ante*.

275. ———.—*Pltf. alleged that he had*

trial, pltf. had established a case on the main issue, when, in the discretion of the judge, he might be allowed inspection before the completion of his case.—*COHEN v. BRAND* (1920), 20 S. R. N. S. W. 481.—*AUS.*

1. *Discovery ordered—Before validity of patent claim established—Though prejudicing trade rival—Scottish practice.*—*B.*, a patentee, raised an action of interdict against E. for infringement, concluding also for

damages or alternatively for profits. B. asked for a diligence to recover documents in terms of a specification calling *inter alia* for E.'s business books:—*Held*: the interlocutor allowing proof could not be altered; & the inquiry into profits or damages was not to be postponed until infringement had been proved.—*BROWN v. EVKREP & CO.* (1904), 21 R. P. C. 501.—*SCOT.*

2. *Power of court—To raise pre-*

employed deft. as a stockbroker, but that deft. had in many of the transactions dealt with himself as principal, & had also charged pltf. with moneys not paid. Pltf. delivered interrogatories asking for the particulars of the dealings on behalf of pltf. & the names of the persons with whom deft. had dealt & the amounts paid. Deft. refused to answer on the ground that pltf. was not entitled to this information until after decree:—*Held*: though there were no particulars of the frauds alleged, pltf. was entitled to discovery in order to enable him to give details of the frauds alleged.

It often happens that one party to an action makes an allegation of some fact, such as the existence of a partnership or an agency, which is disputed by the other party. If the allegation is true, the right to discovery would follow; if it is not true, there would be no right to discovery. Therefore the above rule enables the judge to sever the trial of the issue of facts from the trial of the right to discovery (*BOWEN, L.J.*).—*LEITCH v. ABBOTT* (1886), 31 Ch. D. 374; 55 L. J. Ch. 460; 54 L. T. 258; 50 J. P. 441; 34 W. R. 506, C. A.

Annotations:—Consd. Sachs v. Spielman (1887), 37 Ch. D. 295; *Woolfe v. Automatic Picture Gallery* (1902), 19 R. P. C. 161. *Reid. Lierenberg v. Labouchere*, [1893] 2 Q. B. 183; *Re A Debtor* (No. 7 of 1910), *Ex p. Petitioning Creditors* (1910), 79 L. J. K. B. 1065.

276. ———.—*Infringement of patent.*—The patentee of a chemical process brought an action for infringement. In their affidavit of documents, defts. disclosed certain books, which they objected to produce (1) as containing particulars of the materials operated upon by them, & the results produced by the manufacture alleged to be an infringement, & they objected to give such particulars until pltf. had established his legal rights, which defts. denied; (2) such documents contained names of customers & details of prices, & other information which, they submitted, pltf. was not entitled to know at that stage of the action. Pltf. took out a summons for production of the books in June, 1889. This was refused by the judge in chambers. Pltf. subsequently moved for inspection of defts.' works & of the books. Inspection of the works was offered at once by defts. Pltf. in April, 1890, brought on his motion for inspection of the books:—*Held*: this was an attempt to review the refusal of production in June, which was not appealable, & the motion was refused. Pltf. took out a fresh summons for inspection of such of the books as contained analyses of the materials operated on in defts.' processes:—*Held*: pltf. had not made out that he was entitled, at this stage of the action, to see the documents, as the question of infringement might never be tried if pltf. failed to establish the validity of the patent, & the application was refused without prejudice to any application by pltf. during the trial.

The above rule is an enabling rule & not intended to enumerate exhaustively all the cases in which the ct. is to hold its hand.—*RAWES v. CHANCE* (1890), 7 R. P. C. 275, C. A.

277. ———.—*BENNO JAFFE & DARMSTAEDTER LANOLIN FABRIK v. RICHARDSON & CO.*, No. 1698, *post*.

liminary issue.—The intention of Civil Procedure Code, 1877, s. 135, is to give the ct. the power of raising & determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, & therefore, from the nature of the case, before the hearing of the cause. It should be a rule of practice that when an order is under that sect. by the judge in chambers, the suit should be set down

278. Extent of rule.]—A common order for discovery was made against defts., who made an affidavit of documents, of which there were a large number, & then applied by summons that inspection might be postponed until certain questions of law mentioned in the summons had been determined. These questions of law were not raised by the pleadings:—*Held*: the statement of defence should be amended so as to raise the points of law which defts. desired to have determined, & the ct. then had jurisdiction under R. S. C., Ord. 25, r. 2, to order the points of law to be set down for hearing, & to postpone the inspection until they had been disposed of.

Semble: R. S. C., Ord. 31, r. 20, is not to be construed so narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the ct. has no jurisdiction after such an order to make a subsequent order for questions of law to be determined before inspection.—*LEVER v. LAND SECURITIES CO., LTD., DE CARTERET v. LAND SECURITIES CO., LTD.* (1893), 70 L. T. 323; 42 W. R. 104; 38 Sol. Jo. 38; 7 R. 16, C. A.

SECT. 7.—GROUNDS FOR RESISTING.

See Sect. 3, sub-sect. 2, *ante*.

SECT. 8.—THE APPLICATION.

SUB-SECT. 1.—IN GENERAL.

279. How made.]—A summons must be taken

for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same judge.—*AHMEDBOY HUBIBBOY v. VULLEEBHOY CASSUMBHOY* (1882), 1 L. R. 6 Bom. 572.—*IND*.

PART II. SECT. 8, SUB-SECT. 1.

h. How made—By summons.]—An application in the K. B. Div. for a short order for discovery of documents must be made by summons, & not *ex parte*.—*CAMPBELL v. CASTLEBLAYNEY, KEADY & ARMAGH RY. CO.* (1907), 41 L. L. T. 134.—*IR*.

k. — Or motion.]—Applications under Ord. 31, r. 11, ought to be made by summons or by motion before a judge.—*HEALY v. SMITH* (1878), 4 L. R. Ir. 72.—*IR*.

l. — Whether ex parte.]—The application for an order requiring a party in a cause to make discovery as to a specific document identified in the affidavit supporting the application may be made *ex parte*.—*O'MALLEY v. WALSH* (1903), 37 L. L. T. 75.—*IR*.

m. — The application, under Ord. 31, r. 20 (3), for an order requiring a party to state by affidavit whether certain specific documents are, or have at any time been, in his possession, or power, may be made ex parte, notwithstanding that privilege is claimed for such documents.—*KEATING v. DUBLIN UNITED TRAMWAY CO.* (1907), 41 L. L. T. 165.—*IR*.

n. Affidavit in support—Whether documents required must be specified.]—To support a motion that the opposite party in an action be compelled to answer upon oath as to what documents such party has in his possession or power relating to the matters in dispute, appct. must point out on oath some one document, & show it to be in the possession or power of the opposite party, & he will then be entitled to a discovery of all documents in the possession or power of the opposite party relating to the subject-matter in

dispute.—*KANE v. ATHENRY & ENNIS JUNCTION RY. CO.* (1870), 18 W. R. 435.—*IR*.

o. — In order to obtain an order for a discovery of documents under Ord. 31, r. 20 (3), it is essential that appct. should, in his affidavit, name & specify, so that they can be identified, the particular documents of which he seeks discovery. An order under the rules leaves wholly untouched the privilege claimed by the other side.—*ROBERTS v. DUBLIN UNITED TRAMWAYS CO.* (1909), 43 L. L. T. 203.—*IR*.

p. Whether granted—Concurrently with order for interrogatories.]—One of two joint defts. in an action for libel wrote a number of libels concerning pltf., who was resident in Ireland, & employed other deft., a bill-poster, also resident in Ireland, to post, publish & circulate them in the vicinity of pltf.'s residence. In an action for damages for the libels an application was made for an order for discovery of documents &, at the same time, for an order giving leave to administer interrogatories:—*Held*: in a special case the ct. will grant both orders at the same time.—*COONEY v. WILSON & HENDERSON* (1913), 47 L. L. T. 294.—*IR*.

q. What evidence sufficient to support.]—In order to succeed in an application for discovery made by pltf. before filing his declaration it must be shown that the document in respect of which discovery is sought exists, & that it is necessary for pltf. to have discovery of it for the purpose of properly framing his declaration. In addition, evidence must be given of facts, from which it can reasonably be inferred that the document in question is in the possession or power of deft.—*HERMAN v. DOUGLAS* (1922), 22 S. R. N. S. W.

r. — A party in an action is not entitled as of right to an order

out at chambers under R. S. C., Ord. 31, r. ANON. (1875), 1 Char. Cham. Cas. 108; Bitt. Prac. Cas. 1.

280. Whether documents required must be specified.]—The order for an affidavit of documents will be granted without any statement as to their nature being required.—ANON. (1875), 1 Char. Cham. Cas. 110; Bitt. Prac. Cas. 44.

281. —.]—It is no bar to discovery of documents that appct. names no documents in his opponent's possession.—ANON., [1876] W. N. 24; 2 Char. Cham. Cas. 59; Bitt. Prac. Cas. 104.

282. Affidavit in support.]—ANON. (1875), No. 280, *ante*.

283. —.]—Upon an application for discovery under R. S. C., Ord. 31, r. 12, the judge has power to demand an affidavit by the party applying of his belief that the party from whom discovery is sought has documents in his possession to the discovery of which he is entitled, & it is entirely within the judge's discretion whether such an affidavit shall be made or not.—*JOHNSON v. SMITH* (1877), 36 L. T. 741; 25 W. R. 539.

284. —.]—*DOWNING v. FALMOUTH UNITED SEWERAGE BOARD*, No. 286, *post*.

285. The order—Chancery Procedure Act, 1852 (c. 86).]—(1) No affidavit is necessary to support an application for production on oath of documents under sect. 20 of the above Act. The ct. has settled an order under that Act, requiring pltf. to make an affidavit of the documents in his possession, & to produce such as he does not thereby object to produce. (2) Deft. is entitled of right to such an order for production, & a delay in making the application does not deprive him

for discovery of documents by the opposite party, but must show to the ct. *prima facie*, that there are documents to be discovered, & that they are material to the issue.—*ELSON v. CANADIAN PACIFIC RY. CO.* (1897), 6 B. C. R. 71.—*CAN*.

s. —.]—In an action to recover for services alleged to have been rendered in finding a purchaser for deft. co.'s property, etc., application was made in chambers for an order that defts. answer on affidavit "stating what documents relating to any matter in question in this action are or have been in the possession of the defts., etc." The application was dismissed with costs. It appeared that one of defts. was a corpn., & must have had under its control all records, proceedings & correspondence, if any existed, relating to communications with other deft., & the ct., having regard to all the circumstances, being unable to say that discovery was not necessary, or might not be helpful on the trial:—*Held*: the order should have been granted, & the appeal should be allowed with costs, the costs in chambers to be costs in the cause.—*WOOD v. DOMINION LUMBER CO., LTD.* (1904), 37 N. S. R. 250.—*CAN*.

t. —.]—To support a motion that the opposite party in an action be compelled to answer on oath as to what documents such party has in his power or possession relating to the matters in dispute, it is sufficient that the party applying should pledge his belief as to the existence of some particular document. The order will not be granted if the document referred to is clearly privileged.—*IRISH SOCIETY v. CROMMELIN* (1868), 1 R. 2 C. L. 501.—*IR*.

a. —.]—Where, under Ord. 31, r. 11, an order for discovery of documents is applied for, reasonable grounds for believing that the party against whom the order is sought has or has had in his possession documents

DISCOVERY, INSPECTION, AND INTERROGATORIES.

Sect. 8.—The application: Sub-sects. 1 & 2.]

of it.—*ROCHDALE CANAL CO. v. KING* (1852), 15 Beav. 11; 51 E. R. 439.

Annotation:—As to (1) *Reid. Wing v. Harvey* (1853), 1 Sm. & G. App. 10.

As steps in arbitration proceedings—Effect of.]—
See *ARBITRATION*, Vol. II., p. 376, No. 399.

SUB-SECT. 2.—DISCRETION OF COURT TO GRANT OR REFUSE.

286. General rule.]—R. S. C., Ord. 31, r. 12, was not intended entirely to alter the principles as to production of documents, but to give the ct. a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents evidence ought not to be entered into; the ct. will form its conclusion from the pleadings, but any other proceedings in the action, as, *e.g.*, evidence used on a former occasion, may be looked at.

In an action to restrain a nuisance from sewerage works, *ptf.*s., after notice of trial, applied for an affidavit as to documents in the possession of *defts.* relating to the matters in question in the action. The application was refused on the ground that it was not to be presumed that *defts.* had documents in their possession which would be material on the question whether there was a nuisance or not. *Ptfs.* appealed, & gave notice to read the affidavits filed on an application for an *interim* injunction, which were about thirty in number. From three of these affidavits it appeared that there had been resolutions passed by *defts.* bearing on the question of nuisance, & a correspondence between them & the Local Government Board on their proposing an alteration in their system of sewerage:—*Held*: the refusal of the general order asked for was right, but these affidavits could be looked at on the question whether there was sufficient reason to suppose that there were no documents the production of which would be of any use, & an order was made for an affidavit limited to resolutions of *defts.* & correspondence between them & the Local Government Board.—*DOWNING v. FALMOUTH UNITED SEWERAGE BOARD* (1887), 37 Ch. D. 234; 57 L. J. Ch. 234; 58 L. T. 296; 36 W. R. 437; 4 T. L. R. 190, C. A.

287. —.]—There is nothing in modern times which requires greater care than making orders for discovery & inspection of documents. The old practice of the Ct. of Ch. was limited to cases with which the chancery *cts.* were familiar, such as breaches of trust. Where all the documents were in the possession of a trustee & the *cestui que trust* knew nothing about the matter; & in that class of case the practice of the Ct. of Ch. was admirable & without it it would have been impossible to administer justice. But the tendency to extend the power of the ct. to order discovery in

relating to some matter in controversy in the action must be disclosed, & the ct. may & will require an affidavit to show such reasonable grounds, if they do not appear on the pleadings.—*HEALY v. SMITH* (1878), 4 L. R. Ir. 72.—IR.

PART II. SECT. 8, SUB-SECT. 2.

286 i. General rule.]—The right of extraordinary discovery must be jealously guarded, lest it be abused, & it should be conceded only when it is clearly proved to be necessary for the furtherance of justice.—*BOULTON v. BLAKE* (1885), 11 P. R. 196.—CAN.

286 ii. —.]—Although a party's whole averments had been admitted to proof, it does not follow that the same width & extent of investigation are to be allowed in respect of every statement on record, & the Lord Ordinary in granting a diligence for recovery of documents, is entitled to discriminate between averments which are, & those which are not, crucial, & to exercise his discretion as to the length to which investigation should go.—*MACQUEEN v. MACKIE & CO. DISTILLERS, LTD.*, [1920] S. C. 544; 57 Sc. L. R. 486.—SCOT.

286 iii. —.]—Apart from the pro-

tection afforded by the principle that the ct. may refuse to order production of documents if of opinion that their production is not necessary for disposing fairly of the matter, or for saving costs, there are four grounds upon which discovery may be resisted as of right, viz.: (1) that the documents are criminatory or penal; (2) that they are within the doctrine of professional privilege; (3) that their production would be disclosing the parties' evidence; (4) that production would be injurious to the public interest.—*ADAMS v. MOFFAT, HUTCHINS & CO.* (1906), 23 S. C. 343.—S. AF.

cases of a totally different character ought to be very carefully checked & certainly not encouraged. An undue extension of an old & just principle has given rise to enormous expense & great oppression (*LINDLEY, L.J.*).—*Re WILLS' TRADE-MARKS*, No. 88, *ante*.
288. —.]—In an action for libel brought by a co. in respect of an article published in a newspaper, in pursuance of an order for discovery of documents, *ptfs.* made an affidavit in which they scheduled as relevant certain reports made by the directors to the shareholders in *ptf. co.*, & balance-sheets of the co. thereto, containing statements which on the face of them must have been derived from books of account belonging to the co., which were not included in the affidavit:—*Held*: it being admitted by *ptfs.* affidavit of documents that the before-mentioned reports & balance-sheets were relevant on the issues raised by the defence, & the balance-sheets not being intelligible without those portions of *ptf. co.*'s books upon which they were founded, *ptfs.* should upon the principles laid down in *Jones v. Monte Video Gas Co.*, No. 380, *post*, be ordered to make a further affidavit of documents.

The matter with which in this case we have to deal is one for the discretion of the judge before whom the case comes at chambers. No one is entitled *de jure* to an order for discovery still less to an order for further discovery. The judge at chambers grants or refuses such orders as in his discretion he may think right (*VAUGHAN WILLIAMS, L.J.*).—*KENT COAL CONCESSIONS, LTD. v. DUGUID*, [1910] 1 K. B. 904; 79 L. J. K. B. 423; 102 L. T. 225; 26 T. L. R. 345, C. A.; *affd.*, [1910] A. C. 452, H. L.

Annotation:—*Folld. British Asscn. of Glass Bottle Manufacturers v. Nettlefold*, [1912] 1 K. B. 369.

289. No necessity shown.]—Where all the parties, including *ptf.*, interested under the will & in the partnership of a deceased relation, finally settled their respective claims by a deed of arrangement, & more than 24 years afterwards, *ptf.*, as next of kin to one of the parties, & upon the ground of his mental incapacity at the time of the execution of the deed, filed a bill for a discovery of all the partnership accounts antecedent to the arrangement, & for a declaration that the deed was not binding as against such party, upon exceptions to answer:—*Held*: *ptf.* was not entitled to the discovery sought.

Generally speaking *ptf.* is entitled to discovery if it appears material to the relief prayed & *deft.* has submitted to answer; but the question of materiality is one which the ct. must look at with reference to the constitution of the suit & the character of the proceedings (*STUART, V.C.*).—*KAY v. HARGREAVES* (1866), 14 L. T. 281.

Annotation:—*Reid. Lockett v. Lockett* (1868), 17 W. R. 96.

290. —.]—In an application under Railway & Canal Traffic Act, 1894 (c. 54), complaining of an increase of rates, *deft. railway cos.* raised a

PART II.—DISCOVERY OF DOCUMENTS.

formal defence under Railway & Canal Traffic Act, 1913 (c. 29), contending that the increase was justified on the ground that there had been a rise in the cost of working the railway resulting from improvements in the conditions of employment of their labour staff. Appcts. took out a summons asking for an order that deft. cos. should make an affidavit of documents stating what books & other documents were or had been in their possession or power relating to the matters in question in the application & showing the amounts incurred or expended by them in each of the years 1911 & 1913, & any allocations of such wages & salaries between departments, services & branches or classes of traffic. The registrar having refused this application, appcts. appealed &, on the hearing of the appeal, it was agreed that deft. cos. should deliver their tables of figures to appcts., who were to have full power of inspecting all relevant books, with liberty to apply for an affidavit of documents & interrogatories. Defts. subsequently also agreed to furnish a list of those documents which they considered to be relevant. The M. co. delivered two lists of the documents in their possession, & twelve months later appcts. again applied for an affidavit of documents, contending that books, such as the extra wages book & the permanent way book, had inadvertently not been disclosed in the lists delivered by the railway cos. :—*Held* : having in view the proviso to R. S. C., Ord. 31, r. 12, that “discovery shall not be ordered when & so far as the ct. or judge shall be of opinion that it is not necessary for disposing fairly of the cause or matter, or for saving costs,” the order for an affidavit of documents ought not to be made in the present case, & an application

for an affidavit of documents must be considered on the special facts & history of each particular case.—*BUTTERLEY CO., LTD. v. MIDLAND RY. CO., LONDON & NORTH WESTERN RY. CO., & LANCASHIRE & YORKSHIRE RY. CO.* (1917), 16 Ry. & Can. Tr. Cas. 225.

291. *No primâ facie case made out.*]—In a suit by an alleged next of kin to an intestate, against the Solr. to the Treasury to whom administration had been granted :—*Held* : deft. was not bound to make an affidavit of documents until a *primâ facie* case had been made by pltf.

The order for production of documents is discretionary.—*LANE v. GRAY* (1873), L. R. 16 Eq. 552 ; 43 L. J. Ch. 187.

292. —.]—*PHILIPPS v. PHILIPPS*, No. 210, ante.

293. *Application partly granted, partly refused.*]—Appcts. alleged an undue preference by defts. of the town of G. Defts. denied that there was any undue preference. They said that if the rates from G. were lower, it was owing to the existence of water competition at G. & they further said that the rates charged were necessary in the interests of the public. On an application by appcts. for particulars & discovery, & for leave to administer interrogatories inquiring whether traders in G. had not from time to time before the application sent goods over defts.’ lines, & whether the rates charged to them were not the rates now complained of :—*Held* : an order should be made for particulars of public interest & the discovery of communications & complaints in regard to the rates, but an order for interrogatories should not be made until appcts. gave specific instances of the undue preference of which they

291 i. *No primâ facie case made out.*]—Where pltf. claimed a declaration of the right of himself & all other persons insured in the temperance section of deft. co. to the profits earned by that section, payment thereof, & an account & apportionment thereof :—*Held* : upon the mere statement of pltf. in pleading that he was the holder of a policy entitling him to share in certain profits of the co., & without any proof of the statement, the ct., in its discretion, should not require the co. to produce & lay open to him all their books of account & the papers relating to them.—*GRAHAM v. TEMPERANCE & GENERAL LIFE ASSURANCE CO. OF N. AMERICA* (1895), 16 P. R. 536.—CAN.

b. *Where primâ facie case made out—From nature of property claimed—Whether affidavit in support necessary.*]—In an action for trespass to a several fishery in portion of the non-tidal waters of the River S., where pltf. was not a riparian proprietor, & did not claim the soil & bed of the *locus in quo*, defts. in their defence, upon which issue was joined, traversed pltf.’s alleged title to a several fishery in the river ; & an affidavit was made by them stating that various riparian proprietors, whom they named, had always allowed them & the public generally to fish in the river, & had always denied the existence of a several fishery therein, & that, in fact, the right of fishing in the part of the river in question had been enjoyed by the public from time immemorial. Defts. applied for discovery of documents by pltf. under Ord. 31, r. 11. There was no affidavit in support of the application showing that there were documents in pltf.’s possession relating to the questions in issue in the action :—*Held* : the nature of the property claimed raised a presumption that there were documents in existence, & in the possession of pltf., relating to matters in question in the action ;

& the motion should be granted.—*POWELL v. HOFFERNAN* (1879), 4 L. R. 1r. 703.—IR.

c. *Exercise of—Circumstances by which influenced.*]—In an action to recover for services alleged to have been rendered in finding a purchaser for deft. co.’s property, etc., application was made at chambers for an order that defts. answer on affidavit “stating what documents relating to any matter in question in this action are or have been in the possession of the defts., etc.” The application was dismissed with costs. It appeared that one of defts. was a corpn., & must have under its control, all records, proceedings & correspondence, if any existed, relating to communications with other deft., & the ct., having regard to all the circumstances, being unable to say that discovery was not necessary, or might not be helpful on the trial :—*Held* : the order should have been granted, & the appeal should be allowed with costs.—*WOOD v. DOMINION LUMBER CO., LTD.* (1904), 37 N. S. R. 250.—CAN.

d. —.]—*Where result would be disclosure of trade secret not yet patented.*]—In an action on a promissory note given by deft. to pltf. in payment of a quantity of pads made by pltf., & said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud & that the pads purchased were useless & possessed no healing properties. Dft. demanded production & discovery of the formula or recipe from which the pads were made, in order to show that they were valueless, which pltf. refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, & that discovery would injure them in their business :—*Held* : deft. was not entitled to the discovery.—*STAR KIDNEY PAD CO. v. GREENWOOD* (1883), 3 O. R. 280.—CAN.

e. —.]—A protection is afforded by the principle that the ct. may refuse to order discovery of documents if of opinion that their production is not necessary for disposing fairly of the matter, or for saving costs.—*ADAMS v. MOFFAT, HUTCHINS & CO.* (1906), 23 S. C. 343.—S. AF.

f. —.]—*When production resisted on grounds of public policy.*]—The ct. has power, in the exercise of its discretion, to order production of documents in the custody of a public department even though that department plead public interest as an objection to their production—but in the circumstances of the present case, it was unnecessary to order production of the documents in question.—*HENDERSON v. M’GOWN*, [1916] S. C. 821.—SCOT.

g. —.]—*Before defence delivered.*]—An order was made by a judge in chambers requiring a number of officials of pltf. bank to make discovery on oath of certain documents, correspondence, etc. At the time the order was granted no defence to the action had been delivered :—*Held* : under Ord. 31, s. 1, the judge had a discretionary power to make such order before the delivery of the defence ; & the objection to the order on the ground that it ordered discovery & inspection, as well as the delivery of interrogatories, could not be sustained.—*COMMERCIAL BANK OF WINDSOR v. BECKWITH* (1887), 7 R. & G. 527 ; 8 C. L. T. 60.—CAN.

h. *No power to exercise—If resulting in breach of statutory regulations—Special circumstances.*]—Where justification is pleaded as a defence to a defamation action deft. must state specifically the facts upon which he relies to support the plea.

Pltf., proprietress of a nursing home licensed under Hospitals & Charitable Institutions Act, 1909, brought an action for defamation against deft.,

Sect. 8.—The application: Sub-sect. 2. Sect. 9: Sub-sect. 1, A., B. & C.; sub-sect. 2.]

complained.—CLAYTON & SHUTTLEWORTH, LTD. v. GREAT CENTRAL RY. CO. (1912), 29 T. L. R. 111.

294. *Exercise of—Appeal lies against.*—The rules of 1883 give the judge a discretion with regard to discovery which he had not previously. But it is a judicial discretion, & an appeal lies from its exercise (COTTON, L.J.).—WILLIAMS v. BIRD (1890), 1 Sol. Jo. 347, C. A.

295. — *Too wide & oppressive.*—CROZAT v. BROGDEN (1895), 98 L. T. Jo. 474, C. A.

SECT. 9.—THE AFFIDAVIT.

SUB-SECT. 1.—FORM OF.

A. In General.

See R. S. C., Ord. 31, r. 13, App. B., No. 8.

296. *Statutory form—Necessity for.*—Where a deft.'s affidavit of documents made no mention of books & was not in the statutory form, a better affidavit was ordered, the statutory form being the correct form.—ANON. (1876), Bitt. Prac. Cas. 112; 2 Char. Cham. Cas. 71.

297. — *Former possession of documents.*—The omission of the words "& never have had" from an affidavit of documents is in itself a sufficient reason for ordering a further & better affidavit.—WAGSTAFFE v. ANDERSON, MOSS & MICHELL (1878), 39 L. T. 332, D. C.

298. *Not on oath—Declaration by peeress.*—A peeress ordered to produce deed; confessed in her answer on honour only, not on oath.—HAMILTON (DUKE) v. GERRARD (LADY) (1699), Prec. Ch. 92; 24 E. R. 44.

299. *Possession of documents—Sufficiency of denial.*—A charge in the bill that papers & documents are in the possession or power of deft. or his solr., is not answered by a denial that they are in the possession or power of deft.—BOND v. NORTHOVER (1835), 1 Y. & C. Ex. 221; 160 E. R. 90.

300. *Stating names of parties to documents—In addition to other description.*—An exception for impertinence must be supported *in toto*, or will fail altogether.

Where, by the bill, a deft. is called upon to set forth, in the ordinary form, & without any limita-

a medical practitioner who had formerly attended professionally on patients in pltf.'s institution. The defamatory statements consisted of alleged slanders reflecting on pltf.'s management & conduct of the home. Deft. pleaded justification, & pltf. issued a summons for an order requiring further particulars respecting his allegations that he had repeatedly complained to pltf. about the way the home was being run & as to her treatment of specific patients & the refusal of some patients to go back to the home because of the treatment received there. Deft. alleged he could not supply the particulars unless he was allowed to examine the registers of patients kept in the house, & he therefore issued a summons for an order for discovery:—*Held*: the order should be refused as pltf. could not be ordered by the ct. to commit a breach of the regulations relating to licensed nursing homes under the Act.—PASCOE v. BERTRAM (1914), 33 N. Z. L. R. 646.—N.Z.

PART II. SECT. 9, SUB-SECT. 1.—A.

k. *General rule.*—It is essential to a proper affidavit of discovery to set out not only that there are no docu-

ments, other than those disclosed, in the possession, custody or power of the litigant himself, but also that there are none in the possession, custody or power of his attorney or agent. Inasmuch as a person seeking discovery is bound by the affidavit of his opponent, it is not sufficient to state merely that documents are privileged. There must be a full statement on oath of the facts relied upon as founding the privilege, & a party is not bound to be satisfied with statements in a letter written to supplement an affidavit of discovery. It is not sufficient to give a general description such as "correspondence" to documents for which privilege is claimed. The documents must be identified in such a way that if the ct. orders production it can see that the documents referred to are produced. What is sufficient identification depends on the circumstances of each particular case; but a description as "letter from A. to B." giving their number & the dates between which they were written & setting forth the grounds upon which privilege is claimed, should generally be sufficient.—WALLIS & WALLIS v. LONDON ASSURANCE CO. (1917), W. L. D. 116.—S. AF.

l. —.—.—*BURDEN v. HOWARD* (No.

tion being suggested by pltf., a schedule of deeds in his possession, it is not impertinent to state the names of the parties to the deeds, in addition to the dates & description of the estates to which they relate.—TENCH v. CHEESE (1839), 1 Beav. 571; 3 Jur. 768; 48 E. R. 1063.

301. *"I am informed"—Effect of.*—Where, in the affidavit made by a deft., on an order for production of documents, the ordinary words "or in possession, custody or power of my solr. or agent" are omitted the ct. will not hold such affidavit insufficient, if a satisfactory reason is given for such omission & will hold that it is a satisfactory reason that an exception involving documents in the hands of deft.'s solr., has been overruled; the documents, such as books, diaries, etc., in the hands of a solr., not being documents of the client, although they may be liable to be produced.

The words "I am informed," where there is no personal knowledge, are the same as "I believe," & where an affidavit is sworn at different places, by different defts., one date is sufficient.—WOODHATCH v. FREELAND (1863), 11 W. R. 398.

Annotation:—*Refd. O'Shea v. Wood*, [1891] P. 237.

B. Joint Affidavit.

302. *One date sufficient—Where sworn at different places.*—WOODHATCH v. FREELAND, No. 301, *ante*.

303. *Must answer as to possession of either.*—A husband & wife sued as co-pltfs. in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, & sued without a next friend. An order was made that pltfs. should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them" any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents which they scheduled & going on to say "We have not now & never had, in our possession, custody or power or in the possession, custody or power of any other person or persons on our behalf, any deed, etc., other than & except the documents set forth in the said schedule":—*Held*: pltfs. must be ordered to file a further & better affidavit for that an affidavit relating only to documents in the joint custody of the husband & wife

2) (1902), 23 C. L. T. 266.—CAN.

m. *Must deny possession by agent—Description must admit of ready identification.*—An affidavit as to documents should in terms negative possession by an agent, & should refer to the documents in deponent's possession with sufficient clearness to enable them to be identified.—LEWIDGE v. MAYNE (1877), 11 I. R. Eq. 463.—IR.

n. —.—.—*It is essential to a proper affidavit of discovery to set out not only that there are no documents, other than those disclosed, in the possession, custody or power of the litigant himself, but also that there are none in the possession, custody or power of his attorney or agent. A party is not bound to be satisfied with statements in a letter written to supplement an affidavit of discovery. It is not sufficient to give a general description such as "correspondence" to documents for which privilege is claimed. The documents must be identified in such a way that if the ct. orders production it can see that the documents referred to are produced.—WALLIS & WALLIS v. LONDON ASSURANCE CORPN. (1917), W. L. D. 116.—S. AF.*

did not comply with the order, & the order was right in requiring them to answer as to documents in the possession of either of them.—*FENDALL v. O'CONNELL* (1885), 29 Ch. D. 899; 54 L. J. Ch. 756; 52 L. T. 553; 33 W. R. 619, C. A.
Annotation:—*Mentd.* *Scott v. Consolidated Bank*, [1893] W. N. 56.

C. Prolixity.

304. Affidavit taken off file—Many irrelevant items.]—*TAYLOR v. KEILY*, [1876] W. N. 139.

305. ——— No proper identification—Documents set out separately—Should be referred to in bundles.]—An affidavit as to documents setting out a very large number of letters instead of referring to them in bundles properly identified, was ordered to be taken off the file, the costs to be paid by defts.—*WALKER v. POOLE* (1882), 21 Ch. D. 835; 51 L. J. Ch. 840.

306. ———.]—*BOLTON v. NATAL LAND & COLONIZATION CO.*, [1887] W. N. 178, C. A.

See, further, Sub-sect. 4, *post*.

307. ——— No provision for removal in rules—Files not to be instruments of oppression.]—Although there is no provision in the Rules for taking a document off the file for prolixity, yet it is the duty of the ct. to see that its files are not made the instruments of oppression, & the ct. has full power to order oppressive documents to be taken off the file, even though such a course may result in their being destroyed.—*HILL v. HART-DAVIS* (1884), 26 Ch. D. 470; 53 L. J. Ch. 1012; 51 L. T. 279, C. A.

Annotation:—*Mentd.* *Cooke v. Smith*, [1891] 1 Ch. 509.

SUB-SECT. 2.—BY WHOM MADE.

308. Party himself—Documents in possession of solicitor.]—*DINORBEN'S (LORD) CASE* (undated), cited 1 Jur. N. S. 466.

Annotation:—*Refd.* *Manser v. Dix* (1855), 1 Jur. N. S. 466.

309. Party abroad—Affidavit of wife & attorney admitted.]—The affidavit of the wife & the attorney of pltf. for discovery admitted, under special circumstances [he being in Australia], in lieu of that of the party himself.—*BARNETT v. HOOPER* (1858), 1 F. & F. 412.

310. Company or corporation—Clerk—Principal members.]—*ANON.* (1682), 1 Vern. 117; 23 E. R. 355.

Annotations:—*Consd.* *Prioleau v. United States & Johnson* (1866), L. R. 2 Eq. 659. *Refd.* *Dummer v. Chippenham Corp.* (1807), 14 Ves. 245.

311. ——— City company.]—The clerk to a city co. or other corporate body will be compelled to disclose on oath the particulars of the

deeds, documents & papers admitted by the answer of such co. to be in their possession for the usual purposes of the suit.—*A.-G. v. MERCERS' Co.* (1860), 3 L. T. 438; 9 W. R. 83.

312. ——— Officers.]—A corp. were sole defts. to a suit, no officer of the co. being party for the purpose of discovery. On a motion by pltf. that defts. might file an affidavit, as directed by 15 & 16 Vict. c. 86, s. 18, as to the documents in their possession, it was ordered that the co. should, before a day named, file an affidavit, made by one or more of its officers, as to such documents, unless they should in the meantime satisfy the ct. that they could not procure such officer to make the affidavit.—*RANGER v. GREAT WESTERN RY. CO.* (1859), 4 De G. & J. 74; 28 L. J. Ch. 741; 33 L. T. O. S. 129; 5 Jur. N. S. 1191; 7 W. R. 426; 45 E. R. 29, L. JJ.

Annotations:—*Fold.* *Liberia Republic v. Imperial Bank* (1873), L. R. 16 Eq. 179. *Refd.* *Redfern v. Redfern* (1890), 39 W. R. 212.

313. ——— Directors.]—In answer to an order against a co., its directors, managing director & secretary, for the production of documents, the directors filed affidavits stating that they had not in their possession or power any documents other than those which might be in the possession of the co. They afterwards made further affidavits, in which they stated that they had no documents whatever in their possession or power:—*Held*: the affidavits were insufficient; & defts. were bound to give upon oath all the information in their power, as to the documents in possession of their co.—*ULINCH v. FINANCIAL CORPN.* (1866), L. R. 2 Eq. 271; 12 Jur. N. S. 484; 14 W. R. 685.

314. ———.]—*ALCOCK v. GILL*, No. 408, *post*.

315. ———.]—*COOKE v. OCEANIC STEAM CO.*, [1875] W. N. 220; Bitt. Prac. Cas. 33.

316. ——— Not solicitor.]—The attorney of a body corporate is not an officer thereof within C. L. P. Act, 1854 (c. 125), s. 50, & therefore cannot be compelled to make a discovery of documents in an action to which the body corporate is a party.—*BROWN v. THAMES & MERSEY MARINE INSURANCE CO.* (1874), 43 L. J. C. P. 112.

317. ——— Corporation may appoint proper officer.]—*COSTA RICA REPUBLIC v. ERLANGER*, No. 176, *ante*.

318. ——— Liquidator.]—In a proceeding by an alleged contributory under the winding up of a co. to obtain relief from liability, the official liquidator is in the same position as if a bill had been filed against the co., & he had been made a deft. for the purpose of discovery. He is therefore bound by the same rules as to answering questions & producing documents, & is entitled to the same

PART II. SECT. 9, SUB-SECT. 2.

o. Party a firm—Whether order must specify individual.]—Where individuals sue, or are sued, under the name of a firm, & an order for discovery of documents is made against them, it is not necessary that the order should specify the name of the individual to make discovery.—*HERSKIND & Co. v. HALL & Co.*, [1908] 2 I. R. 222.

p. ——— Carrying on business abroad—Agent within jurisdiction.]—In an action brought by a firm carrying on business abroad to recover the price of goods ordered through their agents in the United Kingdom, defts. moved for discovery of documents:—*Held*: the order should be made against pltf. with liberty to their agent in the United Kingdom to make discovery on their behalf.—*DONOVAN & Co. v. TODD, BURNS & Co.*, [1908]

2 I. R. 100; 42 I. L. T. 87.—IR.

q. Party a foreign corporation—Clerk advertised as manager—Though not such in fact.]—The registered agent in British Columbia of deft., a foreign corp., advertised his clerk B., & B. also advertised himself, as local manager of the co. Pltf. made an application for an affidavit of documents by B., which the corp. resisted upon the grounds that it had never authorised B. to act as its local manager, & that in fact his duties were merely those of clerk to the local manager:—*Held*: for the purposes of the application, B. must be treated as local manager of the corp.—*RICHARDS v. BRITISH COLUMBIA GOLDFIELDS CO.* (1897), 5 B. C. R. 483.—CAN.

r. Party incapacitated—Must procure other person as representative.]—Where a party is incapacitated from making discovery on oath, an order

may be made, not directly against a person not a party, but against the party, that some other person shall give discovery on his behalf; & in this case, where one of defts. was incapacitated through illness from making the usual affidavit of documents, an order refusing to strike out his defence for default of such an affidavit was affirmed, with leave to apply for an order for discovery from some other person on that deft.'s behalf.—*COLONIAL INVESTMENT CO. v. SMITH* (1914), 28 W. L. R. 419.—CAN.

s. Several parties on same side—Some abroad—All must join.]—Where there are several pltf., all of them must join in making the affidavit of documents unless some specific reasons to the contrary are shown. The fact that some of pltf. reside in England is no reason why they should be excused

Sect. 9.—The affidavit: Sub-sects. 2 & 3, A. &

privilege, as such a debt. would be.—*Re BARNED'S BANKING Co., Ex p. CONTRACT CORPN.* (1867), 2 Ch. App. 350; 36 L. J. Ch. 262; 16 L. T. 249; 15 W. R. 524, L. JJ.

Annotation:—Consd. Re Contract Corpn., Gooch's Case (1872), 7 Ch. App. 207.

319. ———.]—The official liquidator of a co. is in the position of a receiver or manager of partnership assets appointed by the ct. Where he represents the co. in a suit against strangers, or in a proceeding in the winding up against an alleged contributory, the adverse party has a right to the same discovery from him as an ordinary litigant. But where the question is whether a past shareholder is to be placed on list B. &, if so, what is the extent of his liability, that being a question which does not concern the co., the official liquidator is only bound to afford equal facilities to the shareholder & the creditors, but not to make discovery at the instance of either party.—*Re CONTRACT CORPN., GOOCH'S CASE* (1872), 7 Ch. App. 207; 41 L. J. Ch. 338; 26 L. T. 177; 20 W. R. 345, L. JJ.

Annotations:—Refd. Re Sir John Moore Gold Mining Co. (1877), 37 L. T. 242. *Mentd. Re Leslie, R. v. Curzon* (1882), 46 L. T. 159.

320. ———.]—(1) The official liquidator of a co. applied, under Cos. Act, 1862 (c. 89), s. 165, to make a number of gentlemen, some of whom were, & others had been, directors, responsible for acts of misfeasance. The alleged acts were 107 in number. E. had been a director only during the period in which the first eleven of these acts were done, & it was not sought to make him liable in respect of any others. The liquidator filed an affidavit of 1,150 folios, including all the cases. E., who appeared alone, applied for an order that the liquidator might state what paragraphs he intended to read against E. It appeared that E.'s solr. had borrowed the affidavit, & was, on his own showing, able to make out what parts of the affidavit affected E.:—*Held*: E.'s application must be refused, for although the ct. would interfere if the cases against different parties were mixed up together in a way which was oppressive, a debt. must, as a general rule, ascertain for himself what part of pltf.'s evidence affects him, & there were no circumstances in the present case to take it out of the general rule.

(2) E. applied that the official liquidator might be ordered to make the usual affidavit as to documents in his possession:—*Held*: such an order ought not to be made, for the official liquidator, being an officer of the ct., is not, even in proceedings under the above sect., in the position of an ordinary

from making such affidavit.—*RYRIE v. SHIVSHANKAR GOPALJI* (1890), 1 L. R. 15 Bom. 7.—IND.

t. Party an infant — By next friend.]—Motion by defts. that the next friend of infant pltf. might be ordered to make an affidavit in reference to documents in his possession relating to matters in the suit, was granted.—*CROWE v. BANK OF IRELAND (GOVERNOR & Co.)* (1871), 19 W. R. 910.—IR.

a. Party abroad — Affidavit of attorney admitted.]—Where pltf., heir-at-law of deceased, resided in America, & knew nothing of the case, the ct. allowed his solr. to make & file an affidavit of scripts.—*MURRAY v. MULLIGAN* (1860), 2 L. T. 812.—IR.

b. Party a company — By defendant not personally cognisant — On information supplied by official.]—Where a co. or partnership, carrying on complicated business transactions & having

litigant, & will not, in the absence of special circumstances, be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the document which the latter requires to see.—*Re MUTUAL SOCIETY* (1883), 22 Ch. D. 714; 52 L. J. Ch. 621; 48 L. T. 651; 31 W. R. 872, C. A.

—— *Joinder of offices for purpose of discovery.* —See Nos. 32–37, *ante*.

—— *Production & inspection by.*]—See Part III., Sect. 4, sub-sect. 2, *post*.

SUB-SECT. 3.—WHAT DOCUMENTS MUST BE INCLUDED.

A. All Relevant Documents.

See R. S. C., Ord. 31, r. 12.

321. What are relevant documents — *General rule.*]—An affidavit of documents is insufficient & a further affidavit will be ordered where it appears from the affidavit of documents itself, or from the documents therein referred to, or from any admission in the pleadings of the party who makes the affidavit, that there are or have been in his possession or power other documents "relating to any matter in question in the action" within the meaning of Ord. 31, r. 12; & a document "relating to any matter in question in the action" is one which it is not unreasonable to suppose contains information which may, directly or indirectly, enable the party who claims the further affidavit either to advance his own case or to damage that of his adversary.

The rule is not confined to documents which would be evidence for or against a party in the action. Any document must be properly held to relate to matters in question in the action which not only would be evidence, but which it is not unreasonable to suppose does contain information which may, either directly or indirectly, enable a party who claims a further affidavit either to advance his own case or to damage the case of his adversary (*BRETT, L.J.*).—*COMPAGNIE FINANCIERE DU PACIFIQUE v. PERUVIAN GUANO Co.* (1882), 11 Q. B. D. 55; 52 L. J. Q. B. 181; 48 L. T. 22; 31 W. R. 395, C. A.

Annotations:—Folld. Dinn v. Brandon (1885), 1 T. L. R. 598. *Distd. Emmerson v. Ind Coope* (1886), 33 Ch. D. 323. *Appl. The Consul Corfitzon*, [1917] A. C. 550. *Refd. Hall v. Truman, Hanbury* (1885), 52 L. T. 82; *Kent Coal Concessions v. Duguid*, [1910] 1 K. B. 904.

322. ——— *Order too extensive—Modification.*]—*M'INTOSH v. GREAT WESTERN RY. Co.* (1852), 1 Sm. & G. 4; 22 L. J. Ch. 72; 20 L. T. O. S. 77;

a large number of documents, is sued, the information for the affidavit of discovery should be compiled by the official of the co. or partnership cognisant of the matter in dispute, while the affidavit of discovery may actually be made in form by a debt. who relies to a very large extent on information supplied to him.—*STRASBURGE v. COMBRINCK & Co.* (1913), C. P. D. 776.—S. AF.

PART II. SECT. 9, SUB-SECT. 3.—A.

321 i. What are relevant documents—*General rule.*]—In an action to recover for services alleged to have been rendered in finding a purchaser for debt. co.'s property, etc., application was made at chambers for an order that defts. answer on affidavit "stating what documents relating to any matter in question in this action are or have been in the possession of the defts., etc.," which was dismissed with costs. It appearing that one of defts. was a

corpn., & must have under its control all records, proceedings & correspondence, if any existed, relating to communications with the other debt., & the ct., having regard to all the circumstances, being unable to say that discovery was not necessary, or might not be helpful on the trial:—*Held*: the order should have been granted, & the appeal should be allowed with costs, the costs in chambers to be costs in the cause.—*WOOD v. DOMINION LUMBER Co., LTD.* (1904), 37 N. S. R. 250.—CAN.

321 ii. ———.]—Every document relates to any matter in question, under rule 51, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.—*ROBINSON v. FARRAR* (1907), T. S. 740.—S. AF.

16 Jur. 989; 1 W. R. 19; 65 E. R. 2; *order varied*, 22 L. J. Ch. 182, L. JJ.

323. — **Action of ejectment.**—ANON. (1876), Bitt. Prac. Cas. 84.

324. — **Action for libel—Plea of justification.**—In an action for libel, if deft. puts in a plea of justification & delivers particulars in support of his plea; the issues to be tried under that plea are limited to the matters referred to in the particulars; & deft. can only obtain discovery of documents relating to those matters.—YORKSHIRE PROVIDENT LIFE ASSURANCE CO. v. GILBERT & RIVINGTON, [1895] 2 Q. B. 148; 64 L. J. Q. B. 578; 72 L. T. 445; 14 R. 411, C. A.

Annotation:—Folld. Arnold & Butler v. Bottomley, [1908] 2 K. B. 151.

325. — **Newspaper competition—Successful coupon.**—Pltf. was a competitor in a prize competition which was advertised in a newspaper belonging to defts. & which consisted in constructing the most clever, apt & original sentences in accordance with certain rules. The prizes were to be awarded after careful consideration by competent judges & the editor's decision was to be final. Pltf., not having been awarded a prize, brought an action against defts. for breach of contract & applied for discovery of the coupons in respect of which prizes had been awarded:—*Held*: as these documents were not relevant to any question in issue, pltf. was not entitled to discovery of them.

The rule is quite well founded according to which pltf. was entitled to show by reference to the pleadings & in other ways that deft. must have in his possession other documents relating to the matter in issue (BUCKLEY, L.J.).—ANGELL v. JOHN BULL, LTD. (1915), 31 T. L. R. 175; 59 Sol. Jo. 286, C. A.

326. — **Seizure of goods as prize.**—An application on behalf of the Crown for an order for discovery of claimants' books & documents relating to the sales of leather & boots from the year prior to the outbreak of war down to the date of seizure was resisted (*inter alia*) on the ground that if the leather was going to be made into boots the doctrine of continuous voyage did not apply, & therefore, whatever the ultimate destination of the boots, the leather could not be seized as prize:—*Held*: an order could be made directing claimants to make discovery of the books & documents relating to their sale of boots as well as of leather from Aug. 1913, down to the date of seizure.—THE BALTO, [1917] P. 79; 86 L. J. P. 83; 116 L. T. 319; 33 T. L. R. 244; 61 Sol. Jo. 399; 14 Asp. M. L. C. 28.

Annotation:—Mentd. The Baron Stjernblad, [1918] A. C. 173.

327. — **Admiralty certificate—Diversion of voyage.**—Pltfs. chartered a steamship from defts. in 1914, to make certain voyages between America & Europe. In July, 1914, she was delivered under the charterparty & she started

from America for Rotterdam. Having arrived in the English Channel in Aug. 1914, she was diverted to Falmouth because of advice given by the Admty., & the rest of the voyage to Rotterdam was abandoned. The Admty. gave a certificate that the advice was given with the object of preventing transactions which might be contrary to the national interests. In an action for breach of the charterparty defts. pleaded the certificate & produced it at the trial, but they had not disclosed it:—*Held*: as defts. had acted in accordance with the advice of the Admty. & their breach of contract was due to their having done so, the certificate was a good defence to the action, & it ought to have been disclosed.

When one party in an action has obtained an official certificate it ought to be disclosed to the other. It is desirable especially in the Commercial Ct. that the contents of such a document should be communicated at the earliest possible moment (ATKIN, J.).—GANS S.S. LINE v. CELTIC SHIPPING CO., LTD. (1918), 34 T. L. R. 282.

B. Documents in Possession or Power.

See R. S. C., Ord. 31, r. 12.

328. **Must be set forth—Whether privileged from production or not.**—FORSHAW v. LEWIS, No. 367, *post*.

329. — **Joint possession.**—TAYLOR v. RUNDELL, No. 338, *post*.

330. — **Joint possession.**—An order was made on a deft. in the common form to "make & file a full & sufficient affidavit, stating whether he has, or has had, in his possession or power any, & if any what, documents relating to the matters in question in the suit, & accounting for the same." Deft. filed an affidavit, saying that he had not in his actual custody any documents relating to the matters in question, "except such entries as might be contained in account books of a firm, which he objected to produce, on the ground that they were not in his exclusive possession, but only in his possession jointly with another, who was not a party to the suit." He did not, however, set forth the number or particulars of the books. Motion, that deft. be ordered to make an affidavit in conformity with the terms of the order, setting forth the number & particulars of the documents which he acknowledged to be in his joint possession, but claimed to be privileged, granted, but without costs.—LAZARUS v. MOZLEY (1859), 1 L. T. 3; 5 Jur. N. S. 1119.

331. — **Joint possession.**—The exors. of a deceased partner, two of whom were also members of the firm, employed part of their testator's assets in the business of the firm in which there were also other members. A bill was filed against the exors. for the administration of testator's estate, & for an account & payment of that portion of it which was employed in the partnership business.

PART II. SECT. 9, SUB-SECT. 3.—B.

328 i. **Must be set forth—Whether privileged from production or not.**—Pltf. in an action for damages for injuries sustained in a railway accident, sought to compel defts. to produce a certain report of an investigation held by defts. immediately after the accident, & the notes of evidence taken at the investigation. These documents, according to the evidence of H. an officer of defts., who was examined for discovery in the action, were not obtained for the solr. of defts., nor for the purpose of being laid before him for advice, nor in view of an impending or threatened litigation nor after litigation commenced; but,

for the purpose of the management of the line. In answer to the question whether defts.' solr. was present at the investigation H. said, "No, it would be entirely between the officers of the co." The affidavit of the solr. stated that the information was obtained that he might advise defts. as to their liability for damages arising from the accident, & that it had been used for that purpose & no other. Defts.' affidavit of documents did not claim privilege for these documents but denied the possession of any documents relating to the matters in question, but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts & that these documents were in

the possession of defts.:—*Held*: the Ct. need not under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out & privilege claimed for them, & upon the statements of H. & the solr. the documents were not privileged & should be produced.—BETTS v. GRAND TRUNK RY. CO. (1888), 12 P. R. 86, 634.—CAN.

c. — **& include every relevant document.**—In an action to recover for services alleged to have been rendered in finding a purchaser for deft. co.'s property, etc., application was made at chambers for an order

Sect. 9.—The affidavit: Sub-sect. 3, B. & C.; sub-sect. 4.]

Defts., in their affidavit of documents, refused to produce certain documents on the grounds that they were in the joint possession of the firm. Pltf. excepted to the sufficiency of this affidavit:—**Held**: defts. must set out in their affidavit a list of all the documents in the joint possession of the firm.—*VYSE v. FOSTER* (1872), L. R. 13 Eq. 602; 26 L. T. 282.

332. ——— ———.]—SWANSTON v. LISHMAN, No. 54, ante.

333. ——— ———.]—When a deft. sets out documents in his affidavit of documents as being in his possession or power jointly with his partners, & objects to produce the documents on that ground, the ct. has power to allow an interrogatory to be administered by pltf. asking deft. what are the contents of the documents he so objects to produce & requiring copies of them to be exhibited to the answer.—*RATTENBERRY v. MONRO* (1910), 103 L. T. 560; 55 Sol. Jo. 76.

334. ——— Legal professional privilege.]—A deft. admitted that he had in his possession documents relating to the matters in the bill; but refused to set forth a list of them because they had been procured by his solr. since the institution of the suit & for the purpose of his defence to it; & the same were, as he was advised & insisted, confidential communications:—**Held**: the allegation relative to the documents did not justify deft.'s refusal to set forth a list of them; & therefore, his answer was insufficient.—*BALGUY v. BROADHURST* (1850), 1 Sim. N. S. 111; 16 L. T. O. S. 385; 14 Jur. 1105; 61 E. R. 43.

Annotations:—*Reid. Kennedy v. Lyell* (1883), 23 Ch. D. 387; *Lyell v. Kennedy* (1884), 27 Ch. D. 1; *Ainsworth v. Wilding*, [1900] 2 Ch. 315.

335. ——— ———.]—Copies of letters written by the solr. of a party, in answer to communications from other persons relating to the subject-matter of an action, must be disclosed in an affidavit of documents.—*WEAL v. GARNES* (1884), 28 Sol. Jo. 513.

336. Documents belonging to co-defendant—Possession of party as depositary only.]—Deft. stated by his answer, that he had in his possession as depositary, certain boxes belonging to another deft., containing documents, etc., which might relate to the matters in question in the suit, but he was not acquainted with the purport of any of them, & he did not set out any schedule of those documents:—**Held**: exceptions to the answer for insufficiency could not be sustained.—*FORMAN v. NEVILL* (1844), 14 L. J. Ch. 33; 4 L. T. O. S. 209; 9 Jur. 158.

337. ——— Company documents—Affidavit by directors.]—CLINCH v. FINANCIAL CORPN., No. 313, ante.

that defts. answer on affidavit "stating what documents relating to any matter in question in this action are or have been in the possession of the defts., etc.," which was dismissed with costs. It appeared that one of defts. was a corpn., & must have under its control all records, proceedings & correspondence, if any existed, relating to communications with other deft., & the ct., having regard to all the circumstances, being unable to say that discovery was not necessary, or might not be helpful on the trial:—**Held**: the order should have been granted.—*WOOD v. DOMINION LUMBER CO., LTD.* (1904), 37 N. S. R. 250.—**CAN.**

an administration suit, where certain creditors produced promissory notes as vouchers for nearly all their claim, the master,

as of course, ordered production of the books & accounts:—**Held**: the exors. were entitled to an affidavit identifying the books & accounts as being all in the possession of the creditors relating to the claim.—*Re ROSS' ESTATE* (1880), 5 A. R. 82.—**CAN.**

—It is the duty of a party who is ordered to make discovery to make a full & proper discovery of all documents in his possession or which have been in his possession. It is not necessary for the other party to point out to the defaulting party a manifest failure to comply with a discovery order before applying to the ct. for an order for further discovery.—*COLLISON, LTD. v. DICKMAN* (1916), C. P. D. 117.—**S.**

1. ——— Where possession not proved—But presumed from nature of

338. Possession of solicitor or agent—Party must make inquiries.]—A lease of mines was made to four persons, nominally as individuals, but really as trustees for a mining co., reserving to the lessor a certain proportion of the net profits of working the mines. A bill having been filed by the exors. of the lessor against the three surviving lessees, who were also shareholders & directors of the co., for an account, defts., in their answer to that part of the bill which sought a discovery of the mines that had been opened & worked under the lease, of the moneys expended & received in working them, & of the documents in the possession of defts. or their agents relating to the matters in question, after stating what they personally knew of the matters inquired after, & setting forth a list of all the documents in the possession of themselves or their agents, proceeded to state that there were other documents in the custody of the agents of the assocn. but who were not their agents personally, containing all the information that could be obtained about the matters in question, but that defts. had no power to use those documents except when sitting at the board of directors, or by an order of the board, & that they believed the directors declined to allow them to use the same, or to afford them any information which would assist pltf. in prosecuting the suit until all the other shareholders should have been made parties:—**Held**: this answer was insufficient, by reason of its not stating that defts. had applied to the board of directors for leave to procure & give the information required, & that they had been refused.—*TAYLOR v. RUNDELL* (1841), Cr. & Ph. 104; 41 E. R. 429, L. C.

Annotations:—*Folld. Bute v. Stuart* (1842), 12 L. J. Ch. 140. *Consd. Lopez v. Deacon* (1843), 6 Beav. 254. *Distd. Ellwand v. M'Donnell* (1844), 8 Beav. 14. *Apld. Reid v. Langlois* (1849), 2 H. & Tw. 59. *Consd. Glyn v. Caulfield* (1851), 3 Mac. & G. 463. *Folld. Clinch v. Financial Corpn.* (1866), L. R. 2 Eq. 271. *Reid. Kearsley v. Philips* (1882), 10 Q. B. D. 36.

339. ——— Solicitor no longer acting.]—In answer to a bill seeking to impeach a security & requiring deft. to set forth what communications passed between his solr. & agents in the transaction & pltf.; & what letters were written & received, & entries made on the subject by such solrs., it is not sufficient for deft. to say that the solrs. had ceased for several years since the transaction to be his solrs. or agents, & that he does not know what communications or entries they had or made: deft., if he had not personal knowledge of the facts, must at least show that he has endeavoured to acquire the information from his agents in the transaction in question.—*GLENGALL (EARL) v. FRAZER* (1842), 2 Hare, 99; 12 L. J. Ch. 128; 6 Jur. 1081; 67 E. R. 41.

Annotations:—*Reid. M'Intosh v. G. W. Ry.* (1851), 4 De G. & Sm. 502; *Bolckow, Vaughan v. Fisher* (1882), 52 L. J. Q. B. 12.

claim.]—In an action for trespass to a several fishery in portion of the non-tidal waters of the River S., where pltf. was not a riparian proprietor, & did not claim the soil & bed of the *locus in quo*, defts. in their defence, upon which issue was joined, traversed pltf.'s alleged title to a several fishery in the river; & an affidavit was made by them stating that various riparian proprietors, whom they named, had always allowed them & the public generally to fish in the river, & had always denied the existence of a several fishery therein, & that, in fact, the right of fishing in the part of the river in question had been enjoyed by the public from time immemorial. Defts. applied for discovery of documents by pltf. There was no affidavit in support of the application, shewing that there were documents in pltf.'s

Agent abroad.]—In a bill for account pltf. charged fraud & wilful neglect against deft., who interrogated him as to invoices & documents in his, pltf.'s, possession. Pltf.'s answer alleged that they were at New Orleans, & that he was unable to communicate with his clerks there, or to proceed thither to fetch them. Def. excepted to this answer:—*Held*: pltf. was bound to show that he had attempted to obtain the documents & failed in that attempt, a mere allegation that they were in a country where war was raging not being sufficient.—*MERTENS v. LAIGH* (1863), 3 De G. J. & Sm. 528; 2 New Rep. 254; 8 L. T. 561; 11 W. R. 792; 46 E. R. 41, L. J.J.; *affg.* (1860), John. 735.

Annotations:—*Distd. Kearsley v. Phillips* (1882), 10 Q. B. D. 36. *Refd. Bonnardet v. Taylor* (1861), 1 John. & H. 383.

341. — Solicitor employed to collect rents—Entries of receipts in solicitor's book—Need not be set out.]—The books of a solr. employed by a trustee to receive the rents of his trust estate are not documents which the trustee has in his custody, possession or power, or in the custody, possession or power of his solr. or agent, & need not be mentioned in an affidavit of documents in compliance with the usual order, although they contain accounts of rents received for the trustee.—*EGLINTON (EARL) v. LAMB* (1865), 35 L. J. Ch. 113; 13 L. T. 698; 12 Jur. N. S. 45; 14 W. R. 170.

Annotation:—*Consd. O'Shea v. Wood*, [1891] P. 237.

342. Partnership documents—Partner resident in England—Principal place of business abroad.]—A partner, resident in England, of a house carrying on business abroad, is not bound to set forth a schedule of books, etc., relating to & in the custody of the foreign house.—*MARTINEAU v. COX* (1837), 2 Y. & O. Ex. 638; 7 L. J. Ex. Eq. 18; 1 Jur. 818; 160 E. R. 551.

C. Documents which have been but are not now in Possession or Power.

See R. S. O., Ord. 31, r. 12.

343. What has become of documents—Must be stated.]—*STANHOPE v. NOTT* (1674), 2 Swan. 221, n.; 36 E. R. 599.

344. — — —.]—In an action against a joint-stock co., an order was obtained by pltf. against C., a director of the co., that he give inspection of certain documents to pltf.; inspection not having been given, a rule *nisi* for an attachment was moved for; on cause being shown, C. made an affidavit, stating that "he had not at the time the order was made, nor had he any time since, in his possession, custody or power any of the documents mentioned in the order":—*Held*: the affidavit was insufficient, as it did not state any facts showing that C. had no knowledge in whose custody or control the documents were.—*LACHARME v. QUARTZ ROCK MINING Co.* (1862), 1

possession relating to the questions in issue in the action:—*Held*: the nature of the property claimed raised a presumption that there were documents in existence, & in the possession of pltf., relating to matters in question in the action; the motion should be granted; & the right of defts. to the inspection or production was a matter to be determined, not upon an application under Ord. 31, r. 11, but upon an application to compel production or inspection after the affidavit as to documents had been made.—*POWELL v. HEFFERNAN* (1879), 4 L. R. IRr. 703.—IR.

PART II. SECT. 9, SUB-SECT. 3.—O.

g. Incomplete — Unless included — Consequences of failure to include.]

It is the duty of a party who is ordered to make discovery to make a full & proper discovery of all documents which have been in his possession. It is not necessary for the other party to point out to the defaulting party a manifest failure to comply with a discovery order before applying to the ct. for an order for further discovery. Where it was clear that a discovery affidavit was incomplete the ct. made an order for further discovery & mulcted resp. in costs.—*COLLISON, LTD. v. DICKMAN* (1916), C. P. D. 117.—S. AF.

PART II. SECT. 9, SUB-SECT. 4.

349 i. General rule.]—The party making the affidavit on production must specify either by reference to

H. & C. 134; 31 L. J. Ex. 508; 6 L. T. 502; 10 W. R. 799; 158 E. R. 832.

Annotation:—*Refd. Dickson v. Neath & Brecon Ry.* (1869), L. R. 4 Exch. 87.

345. — Inquiries as to.]—Where an incorporated co., in answer to an interrogatory in a bill as to documents where ever were in the power of agents formerly & not now in their employment, stated ignorance as to the fact, but did not state that they had made any particular inquiries of such former agents:—*Held*: the answer was sufficient, there being no special circumstances alleged applicable to any particular document or any particular person.—*M'INTOSH v. GREAT WESTERN RY. Co.* (1851), 4 De G. & Sm. 502; 64 E. R. 931.

346. Documents lost or mislaid — By party's solicitor.]—A deft., in his first answer, stated, that certain papers in another suit referred to in the bill, were in the possession of his solr., & being asked by the amended bill to set forth a schedule thereof, he stated, that his solrs. had made diligent search for them, but that they could not be found, having been misplaced or mislaid in the solr.'s office; & that, therefore, he could not set forth a schedule of them:—*Held*: the answer was sufficient.—*ELLWAND v. M'DONNELL* (1844), 8 Beav. 14; 3 L. T. O. S. 319; 50 E. R. 6.

347. What documents parted with — Must be specified—Books of bankrupt.]—Where deft., a bkpt., swore that he had no documents in his possession, he was required to state what documents passed from him to the trustee.—*ANON.* (1876), 20 Sol. Jo. 261; 2 Char. Cham. Cas. 60; Bitt. Prac. Cas. 107.

348. "Never have had"—Essential.]—*WAGSTAFFE v. ANDERSON, MOSS & MICHELL*, No. 297, ante.

SUB-SECT. 4.—HOW DOCUMENTS MUST BE DESCRIBED OR IDENTIFIED.

349. General rule.]—Where an affidavit of documents is made under a common order for discovery of documents, it is not enough to tie the documents in bundles & number each bundle. Each document must be identified by being specifically marked, & if they are tied up in bundles a description must be given of the character of the documents in each bundle.—*COOKE v. SMITH*, [1891] 1 Ch. 509; 60 L. J. Ch. 573; 64 L. T. 484; 39 W. R. 273, C. A.

350. Documents need not be set out seriatim.]—Where the documents of which a deft. is required to set forth a list are numerous, it is not necessary for him to specify each of them; but it is sufficient for him to describe them, so as to enable pltf. to move for them; as, for instance, to say that they are contained in bundles or hogsheads, sealed up,

existing page numbers or to identification marks placed thereon especially for that purpose, the particular pages whereon entries may be found relevant to the matters in issue.—*ROYAL BANK OF CANADA v. WALLIS* (1918), 2 W. W. R. 620; 13 Alta. L. R. 416; 41 D. L. R. 383.—CAN.

h. — When privilege claimed.]—Pltf. took out a summons under Ord. 31, rr. 8 & 9, of S. A. Supreme Ct. Act, 1878, calling upon deft. to state whether he "has or has had in his possession, custody, or power a report made by one B., an officer of Customs, of his inspection of certain books of pltf., & if the same is now in his possession, custody or power, whether he objects to produce the same, & the ground of such objection, if any," &

& marked A, B, etc.—**CHRISTIAN v. TAYLOR** (1841), 11 Sim. 401; 10 L. J. Ch. 145; 59 E. R. 928.

Annotation :—**Mentd. Davis v. Cripps** (1843), 2 Y. & C. Ch. Cas. 430.

351. Insufficient — “Bundle of papers marked G.”—The ct. will not make an order for the production of papers described in deft.’s answer as a “bundle of papers marked G,” on the ground that they are not sufficiently identified.—**PHELPS v. OLIVE** (1835), 4 Beav. 549, n.; 4 L. J. Ch. 167; 49 E. R. 452.

Annotation :—**Refd. Taylor v. Batten** (1878), 4 Q. B. D. 85.

352. — “Divers books of account.”—A deft. by his answer admitted that he had in his possession “divers books of account” :—**Held** : the particulars were not sufficiently specified to enable the ct. to make an order for their production.—**INMAN v. WHITLEY** (1842), 4 Beav. 548; 49 E. R. 451.

353. — Number & particulars not given—**Account books of firm.**—**LAZARUS v. MOZLEY**, No. 330, *ante*.

354. — “Bundles of letters.”—(1) A. & B. were co-defts. in a suit. Their London solr. employed B., who was also a solr., to collect evidence, & a correspondence then ensued between A. & B. relating to the subject-matter of the suit :—**Held** : the correspondence was privileged, & therefore pltf. could not compel its production.

(2) “Bundles of letters” is not a sufficient description of correspondence in an affidavit of documents.—**HAMILTON v. NOTT** (1873), L. R. 16 Eq. 112; 42 L. J. Ch. 512.

355. **Bundle of deeds & papers.**—Deft. was in possession of real estate to which pltf. claimed to be entitled as heir-at-law of his mother. Pltf. filed his bill for discovery & production of documents in support of deft.’s title. Deft., by her answer stated her belief that a deed had been executed, of which she set out the dates, parties, & effect, whereby her father became seised absolutely of the property. She was the universal devisee of her father. She also filed an affidavit in support of her title, to which she appended a list of documents, & among them was “a bundle of deeds & papers relating exclusively to the title of me the above-named deft. to the premises mentioned & referred to in pltf.’s bill.” Pltf. took out a summons for a further affidavit of documents :—**Held** : pltf. was entitled to know whether the above-mentioned deed was in deft.’s possession, & to a further affidavit containing a list of each of the documents relating to her title.—**FORTESCUE v.**

also for an order that deft. make discovery on oath of the documents which are or have been in his possession or power relating to the question of fact set out in the defence.

The summons was dismissed. On appeal :—**Held** : the documents for which privilege is claimed must be enumerated, described & scheduled for purposes of identification.

Semble : the cases appear to be conflicting as to whether in all cases the names of the writers of documents should be mentioned, but they should.—**CLUTTERBUCK BROTHERS v. WOLLASTON**, [1908] S. A. L. R. 159.—**AUS.**

j. —.]—An affidavit as to documents should in terms negative possession by an agent, & should refer to the documents in deponent’s possession with sufficient clearness to enable them to be identified.—**LEDWIDGE v. MAYNE** (1877), 11 L. R. Eq. 463.—**IR.**

k. *Need not be specified numeri-*

j.—It is not necessary, though it is a convenient course, to specify by number books, documents, etc., set forth in the schedules to an affidavit of discovery. Where a schedule to an affidavit of discovery mentioned certain ledgers & books of account, but did not specify them :—**Held** : the other party to the action could not insist on their being numbered in the schedule.—**STRASBURGE v. COMBRINCK & Co.** (1913), C. P. D. 776.—**S. AF.**

1. Sufficiency — *When raised* — *Motion to compel production.*—Whatever discovery deft. would have been bound to give by answer with respect to documents in his possession, must now be furnished by the affidavit in answer to a motion to compel production under Ord 31 of May, 1850; & the ground upon which he relies to excuse production must be stated with the same particularity. When, therefore, a party filed a bill claiming title as heir-at-law of an intestate & called upon deft. to produce deeds, etc., & in

FORTESCUE (1876), 34 L. T. 847; 24 W. R. 945; 3 Char. Pr. Cas. 470.

Annotation :—**Consd. Taylor v. Batten** (1878), 4 Q. B. D. 85.

356. — “Companies general letter books &—“Volumes of copies of letters.”—**BOLTON v. NATAL LAND & COLONIZATION Co.**, [1887] W. N. 178, C. A.

357. — Documents number one to twenty-one — **Bundle marked “A.”**—Deft. may be ordered to give particulars of documents referred to in his pleading, even though he has in an affidavit of documents effectually claimed for those documents privilege from production. The right to particulars & the right to production are distinct & independent rights.

Pltf. claimed a declaration that she was entitled, subject to incumbrances, in fee simple to an estate of which deft. was in possession, & her title to which he denied.

In his affidavit of documents deft. claimed privilege from production for “documents numbered 1 to 21 in a bundle marked A,” as relating solely to his own case & not to the case of pltf. Documents relating to the alleged sale to him & the re-mortgage were comprised in the bundle. Pltf. asked that deft. should be ordered to make a further & better affidavit of documents, & to deliver particulars of the alleged sale & conveyance, stating when the same were executed & what was the valuable consideration for the same, & of the alleged re-mortgage, stating when the same was executed & for how much; & for inspection of the documents :—**Held** : deft. must give particulars of the alleged purchase & re-mortgage; but pltf. was not entitled to inspection of the documents.—**MILBANK v. MILBANK**, [1900] 1 Ch. 376; 69 L. J. Ch. 287; 82 L. T. 63; 48 W. R. 339; 44 Sol. Jo. 259, C. A.

Annotation :—**Mentd. Re Morgan** (1915), 59 Sol. Jo. 289.

358. Sufficiency—**When may be raised**—**Motion to set aside order discharging contempt.**—Deft. being in default for not making an affidavit of documents, pltf. obtained an order for his attachment. Deft. then filed an affidavit, & thereupon obtained *ex p.* an order of course discharging his contempt. Pltf. now moved to set aside the order of course, on the ground that the affidavit was insufficient, & that therefore the order of course had been obtained on a misrepresentation :—**Held** : the question of sufficiency could be raised on this motion, & the affidavit being insufficient, the order of course must be discharged, so as to revive the original order for attachment.—**PRICE v. PRICE** (1879), 48 L. J. Ch. 215.

answer to a motion to compel production, deft. put in an affidavit stating that the deeds in his possession did not prove pltf.’s title, without furnishing any description so as to enable the ct. to judge of the effect proper to be given to this general allegation :—**Held** : such affidavit was not sufficient, & production of the documents should be ordered.—**NICHOLL v. ELLIOTT** (1852), 3 Gr. 536.—**CAN.**

m. Insufficient — “Correspondence file marked ‘A.’”—“Containing copies of letters between defendant & X.”—Deft. co. in an affidavit of documents objected on the ground of professional privilege to produce certain documents therein referred to as “File of correspondence marked ‘A.’” containing copies letters deft. to X., & copies letters X. to deft. :—**Held** : the documents were insufficiently described & an order made that they be further described by affidavit identifying them by numbers.—**LION NOTTING MILLS PROPRIETARY, LTD.** v. **THE**

9.—*The affidavit: Sub-sects. 4 & 5.*

make use of an affidavit in contradiction of deft.'s affidavit of documents:—*Held*: the affidavit of documents was sufficient, & need not allege that the documents did not impeach the defence; a contentious affidavit was not admissible to contradict deft.'s affidavit of documents, & plffs. were not entitled to a further answer.—*MORRIS v. EDWARDS* (1890), 15 App. Cas. 309; 60 L. J. Q. B. 292; 63 L. T. 26, H. L.

Annotations:—*Apld.* *Budden v. Wilkinson*, [1893] 2 Q. B. 432; *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1899] 2 Q. B. 478. *Consd.* *Johnson v. Whitaker* (1904), 90 L. T. 535. *Mentd.* *McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Milbank v. Milbank*, [1900] 1 Ch. 376.

364. — Title deeds—Numbers & dates—Names of parties to deeds not required.—An affidavit of documents had been filed setting out the numbers & the dates, but not the parties to title deeds, & a summons was taken out to have the names of the parties added:—*Held*: as the deeds were privileged, the ct. would not order the names of the parties to the deeds to be set out.—*TAYLOR v. OLIVER* (1876), 45 L. J. Ch. 774; 34 L. T. 902.

365. Documents for which privilege claimed—Must be identified.—Deft. by his answer, admitted that he had in his possession certain documents relating to the matters in question, but he stated that several of them were privileged. Pltf. having moved for the production of all the documents, the ct. admitted an affidavit to be read on the part of deft., specifying which of them were privileged.—*PARSONS v. ROBERTSON* (1837), 2 Keen. 605; 7 L. J. Ch. 1; 1 Jur. 770; 48 E. R. 761.

Annotation:—*Reid.* *Llewellyn v. Badeley* (1842), 1 Hare,

366. — — — — ——Reports & minutes of committees of a corpn. with reference to actual or contemplated litigation are privileged communications.

Cases submitted to counsel after a dispute has arisen, & counsel's opinions thereon, are similarly privileged; & this is so although the party claiming production is a ratepayer & the opinions were paid out of the rates—at all events, if the action is not one with direct reference to the rates.

For privilege to be successfully claimed for any of such documents they must be sufficiently identified for production to be ensured, if ordered.

was in contemplation for the purpose of enabling its solr. to prepare a defence to the contemplated action, was upheld as sufficient.—*VICKERY v. CANADIAN PACIFIC RY Co.*, [1921] 2 W. W. R. 517.—CAN.

365 i. Documents for which privilege claimed—Must be identified.—A party called on to produce documents must state distinctly in his affidavit on production what are the documents he seeks to protect, & the grounds on which he claims privilege.—*WRIGHT v. WESTERN INSURANCE Co.* (1869), 2 Ch. Ch. 403.—CAN.

365 ii. — — — — ——Where in an affidavit of documents privilege is claimed for a correspondence on the ground that it contains instructions & confidential communications from the client (pltf.) to his solr., it must appear not merely that the correspondence generally contains instructions, etc., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit.—*ORIENTAL BANK CORPN. v. BROWN & Co.* (1885), 1 L. L. R. 12 Calc. 265.—IND.

365 iii. — — — — ——Pltf. at the close of his case called for all the corre-

spondence between deft., his agents, & third parties. Deft. claimed that the letters were privileged:—*Held*: deft. should within 24 hours file a further affidavit of discovery in which he should state specifically which letters were written with a view to impending litigation.—*MESSINA BROTHERS v. KIRSTEIN* (1912), C. P. D. 126.—S. AF.

PART II. SECT. 9, SUB-SECT. 5.

i. Must be set forth in affidavit.—As regards the discovery of documents, the rule is that where pltf.'s case rests wholly upon the proof of matters which might be the subject of criminal proceedings discovery cannot be compelled in any form; but that where the case is based upon matters which do not involve criminal charges, but privilege is incidentally claimed upon the ground that production of the documents might criminate the party, the order for discovery of documents must be made, & the privilege must be claimed in the affidavit of documents. Order refused where it was plain that an affidavit of documents to be of any service, must assist in proving a criminal offence on the part of defts.—*ROSKRUG v. RYAN* (1896),

When the effect of a privileged opinion of is stated in the pleadings of the party in possession it is, he can only refuse to produce it upon condition of making no use of it at the trial of the action.—*BRISTOL CORPN.* (1884) 26 Ch. D. 678; 53 L. J. Ch. 1144; T. 719; 33 W. R. 255.

Annotations:—*Reid.* *Gouraud v. Gower Bell Telephone Co. of Europe* (1888), 57 L. J. Ch. 498. *Mentd.* *Woodhouse v. Woodhouse* (1914), 30 T. L. R.

Affidavit bad for prolixity.—See Sect. 9, sub-sect. 1, C., *ante*.

SUB-SECT. 5.—CLAIM OF PRIVILEGE.

367. May be set forth in affidavit.—It is no answer to an application under C. L. P. Act, 1854 (c. 125), s. 50, that the documents are such as the party is privileged from producing; if that be so the fact may be shown in the affidavit to be made in obedience to the rule.—*FORSHAW v. LEWIS* (1855), 10 Exch. 712; 1 Jur. N. S. 263; 156 E. R. 626. *Annotation*:—*Reid.* *Thompson v. Robson* (1857), 26 L. J. Ex. 367.

368. — Further affidavit—Claiming protection more strictly.—A petition for revocation of a patent alleged certain prior users & particulars thereof were delivered. The prior user alleged was of steel constructed by petitioners in the manner described in the specification. Resps. applied for further & better particulars as to the alleged prior user & also for a further affidavit of documents, there being a claim of privilege on the ground that certain documents related to the case of petitioners & not to the case of resps. & that they did not tend to support resp.'s case or impeach petitioner's case & related to the prior user:—*Held*: a further affidavit claiming the protection more strictly was necessary, but, subject to that, the protection was properly claimed.—*Re STAHLWERK BECKER AKT.'S PATENT* (1917), 34 R. P. O. 332.

369. Grounds for claim—Must be stated.—Deft. declined answering certain matters, stating, that he was present at the time they occurred as the solr. of the other defts., & that he had acquired his information solely & only from the fact of his being present at the time in his capacity of solr.:—*Held*: deft., not having also shown that the circumstances were such as to make the communica-

15 N. Z. L. R. 246.—N.Z.

369 i. Grounds for claim—Must be stated.—Pltf.'s case, for the purpose of discovery, consists of everything necessary to obtain a decree, including what may be required to answer the defence set up. An affidavit on production, made by deft., in which he objected to produce certain books of account, was held insufficient to protect them from discovery, because it did not state that the books did not contain evidence substantiating pltf.'s case or that they only related to deft.'s case.—*WESTERN OF CANADA OIL Co. v. WALKER* (1874), 6 P. R. 191.—CAN.

369 ii. — — — — ——Letters written by one of deft.'s servants to another for the purpose of obtaining information with a view to possible future litigation are not privileged, even though they might, under the circumstances, be required for the use of the deft.'s solr. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solr.—*BIRMO DOSS DEY v. SECRETARY OF STATE FOR INDIA* (1885), 1 L. L. R. 11 Calc. 655.—IND.

369 iii.

—Where privilege

tion privileged, was bound to answer more fully.—**DESBOROUGH v. RAWLINS** (1838), 3 My. & Cr. 515; 7 L. J. Ch. 171; 2 Jur. 125; 40 E. R. 1025, L. C.

Annotations:—**Consd. Mackenzie v. Yeo** (1842), 1 Notes of Cases, 516. **Refd. Kennedy v. Lyell** (1883), 23 Ch. D. 387. **Mentd. Birch v. Barker** (1841), 5 Jur. 430; **Herring v. Olobery** (1842), 1 Ph. 91; **Walsingham v. Goodricke** (1843), 3 Hare, 122; **Re Mullens** (1849), 14 L. T. O. S. 137; **Ford v. Tennant** (No. 2) (1863), 32 Beav. 162.

370. Sufficiency of claim.—An objection to the production of documents must be properly raised by deft.'s answer, where the bill seeks their production.

Pending exceptions to an answer for insufficiency, pltf. may move for the production of documents admitted by that answer to be in deft.'s possession.—**HUNTER v. CAPRON** (1842), 5 Beav. 93; 49 E. R. 512; *revid.* on other grounds, 12 L. J. Ch. 142, L. C.

Annotation:—**Mentd. Dalton v. Hayter** (1844), 4 L. T. O. S. 211.

371. — Joint ownership.—Where a party to a suit is required to make an affidavit as to documents in his possession & alleges in his affidavit as a reason for not producing them that they are in the possession of himself & a third person as joint owners, he is bound to state the nature of the joint ownership.—**BOVILL v. COWAN** (1870), 5 Ch. App. 495; 39 L. J. Ch. 768; 22 L. T. 503; 18 W. R. 533, L. J.

Annotation:—**Refd. Kearsley v. Phillips** (1882), 10 Q. B. D.

372. Public policy.—In an action against the secretary of the Board of Trade for acts done by the board's servants, an order having been obtained for discovery of documents, deft. made an affidavit stating that he had, as secretary to

the board, certain official documents in his official custody & control, & that he objected to state anything further with respect to them on the ground of public policy:—**Held**: this was insufficient to establish the privilege claimed.

Semle: it is not enough to state, in a mere formal affidavit, that discovery is objected to on the ground of public policy; but it should appear that the mind of a responsible person has been brought to bear on the question of the expediency to the public interest of giving or refusing the information asked for. In such an action, deft. not having denied his responsibility for the acts of the servants of the board, possession of documents by the board, which are under his official control, is possession by himself.—**KAIN v. FARRER** (1877), 37 L. T. 469, D. C.

Annotations:—**Consd. Hennessy v. Wright** (1888), 21 Q. B. D. 509; **Re Hargreaves**, [1900] 1 Ch. 347. **Expld. & Distd. Re Soc. les Affréteurs Réunis & Shipping Controller**, [1921] 3 K. B. 1.

373. — Facts to be stated & verified.—An affidavit as to documents by a party who objects to produce them is insufficient, if it merely states "that the documents are privileged;" it ought to state & verify the facts upon which the objection is grounded.

An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. The person seeking discovery is bound by the affidavit made by his opponent & therefore it ought to be full (**COTTON, L.J.**).—**GARDNER v. IRVIN** (1878), 4 Ex. D. 49; 48 L. J. Q. B. 223; 40 L. T. 357; 27 W. R. 442, C. A.

Annotations:—**Mentd. O'Shea v. Wood**, [1891] P. 286; **R. v. Bullivant**, [1900] 2 Q. B. 163.

is claimed in an affidavit of discovery, the ground of privilege should be set forth, & it is not sufficient for the ground of privilege to appear from the description of the documents in the schedule to the affidavits.—**STRASBURGE v. COMBRINCK & Co.** (1913), C. P. D. 776.—S. AF.

369 iv. ——It is essential to a proper affidavit of discovery to set out not only that there are no documents, other than those disclosed, in the possession, custody or power of the litigant himself, but also that there are none in the possession, custody or power of his attorney or agent. Inasmuch as a person seeking discovery is bound by the affidavit of his opponent, it is not sufficient to state merely that documents are privileged. There must be a full statement on oath of the facts relied upon as founding the privilege. A party is not bound to be satisfied with statements in a letter written to supplement an affidavit of discovery. In an action on a fire policy, deft. disclosed an assessor's report & claimed privilege for it on the ground that it was "framed & secured for the purpose of being submitted to the deft. in order to resist the claim which it was contemplated would be made by pltf's."—**Held**: this was a sufficient statement of the grounds on which privilege was claimed & the report was rightly withheld from pltf's.—**WALLIS & WALLIS v. LONDON ASSURANCE CORPN.** (1917), W. L. D. 118.—S. AF.

On further affidavit where necessary.—On a motion for production of documents disclosed in the affidavit of documents, & for which the party has insufficiently claimed protection, he is as a rule allowed to file further affidavits for the purpose of showing that they ought to be protected. To entitle a party to the privilege of non-production of documents the ct. must see from the circumstances of the case & the nature

of the documents that there is reasonable ground to apprehend danger to the party from his being compelled to produce them. A party claiming privilege from producing documents under an order for production, must swear that their production would criminate him. It is sufficient if he swear that production "might" criminate him.—**A.-G. FOR MANITOBA v. KELLY** (1915), 33 W. L. R. 233, 963; 9 W. W. R. 863; 10 W. W. R. 131.—CAN.

a. ——The tendency of the ct. is to widen all avenues to discovery. The affidavit of documents filed by defts. stated that they objected to produce documents numbered 3 to 55, on the ground that they related solely to deft's case & not to pltf's, nor did they tend to support the case of pltf. nor did they, to the best of deponent's knowledge, contain anything impeaching the case of defts. & that they were privileged from production:—**Held**: as the documents for which privilege was claimed did not appear on the face of the affidavit to be in fact privileged, defts. should file a better affidavit.—**HENDERSON v. MERCANTILE TRUST CO.** (1922), 52 O. L. R. 198.—CAN.

b. — Whether confined to those set out—Further affidavit in support.—Where an affidavit of documents stated, with regard to certain documents of which pltf's asked for inspection, that defts. objected to produce them for inspection "because such documents were obtained after dispute arose, & for purposes of litigation that might arise between them & the pltf's."—**Held**: the affidavit was not sufficient to support deft's claim to privilege; the party claiming privilege is entitled to put in & use a further affidavit in support of the claim of privilege & is not confined to the grounds made in the affidavit in which the claim is first set up. *Qu.*: however, where the party comes into ct. relying on the

original affidavit as sufficient to support his claim of privilege but asks the ct. if it should think otherwise, for leave to put in a further affidavit in support of his claim, whether he should be allowed to do so.—**UMBICA CHURAN SEN v. BENGAL SPINNING & WEAVING CO.** (1894), I. L. R. 22 Calo. 105.—IND.

370 i. Sufficiency of claim.—**IMRIE v. WILSON** (1912), 21 O. W. R. 513; 3 O. W. N. 929; 2 D. L. R. 886.—CAN.

370 ii. ——In an action against a banking co. for breach of contract in disclosing pltf's banking account, defts. in making discovery tied in a bundle with red tape certain documents described as reports, queries, answers & communications passing between defts.' manager & the directors of the co. & claimed privilege for them, on the ground that they were made in *bona fide* belief that litigation might ensue:—**Held**: further discovery of documents should be granted.—**FLYNN v. NORTHERN BANKING CO.** (1898), 32 I. L. T. 67.—IR.

372 i. — Public policy.—Actions against the Comptroller & Collector of Customs of the Commonwealth, under Customs Act, are not actions against the Crown. In such actions, therefore, the common order for discovery should be made as between subject & subject. In affidavits, in compliance with such orders, it is competent for deft. to claim privilege on grounds usual between subjects, & also on the ground that the discovery is not expedient in the opinion of Ministers on grounds of public policy. The documents for which privilege is claimed must be enumerated, described & scheduled for purposes of identification. *Semle*: the cases appear to be conflicting as to whether in all cases the names of the writers of the documents should be mentioned, but they should.—**CLUTTERBUCK BROTHERS v. WOLLASTON**, [1908] S. A. L. R. 159.—AUS.

9.—*The affidavit: Sub-sects. 5, 6 & 7. Sect. 10.]*

374. — Document alleged to be incriminating.]—A party cannot protect himself from producing a document on the ground that its production would tend to criminate him unless he pledges his oath that, to the best of his belief, its production would tend to criminate him.

Qu.: whether a party can protect himself from producing a document on the ground that its production would tend to criminate him.

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shown; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party.—*WEBB v. EAST* (1880), 5 Ex. D. 108; 49 L. J. Q. B. 250; 41 L. T. 715; 44 J. P. 200; 28 W. R. 336, C. A.

Annotations:—*Reid. McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

375. — Declaration on oath.]—In an action on a policy of marine insurance upon a cargo of cotton, the defence was that the ship had been fraudulently destroyed by fire, & the cotton had never in fact been shipped, but that bales of rubbish had been shipped in its place. On an application to inspect documents in deft.'s possession which were admittedly relevant to the case, deft. claimed privileges & pointed out on oath the nature of the dispute & the character of the documents sufficiently to enable the ct. to test substantially the grounds of the claim of privilege:—*Held*: the claim was satisfactorily established.—*EBSWORTH v. ALLIANCE INSURANCE CO.* (1873), cited in 7 Q. B. D. at p. 405.

Annotation:—*Consd. Bewicke v. Graham* (1881), 7 Q. B. D. 400.

376. — Partly valid, partly invalid—Whole claim not thereby invalidated.]—Pltf. made an affidavit of documents claiming privilege as to all documents in the schedule thereto, on the ground

374 i. — Document alleged to be incriminating.]—To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated. A statement that according to pltf.'s contention a document contains a libel, & therefore exposes deft. to a criminal charge, is not sufficient to protect the document; deft. must go further & express his belief that the production of the document will expose him to a criminal charge.—*BROMLEY v. GRAHAM* (1886), 11 P. R. 451.—CAN.

c. — Documents relating solely to party's case.]—In the affidavit of the defts.' manager, on production of documents, he stated that defts. had in their possession "The books of the said Bank, consisting of deposit ledgers & liability ledgers, manager's register of collateral securities, & letter books"; & also letters that had passed between the managers at B. & W., which he objected to produce on the ground that they were privileged communications relating solely to defts.' case & defence, & did not concern pltf.'s case:—*Held*: sufficient had been stated to excuse production of the letters between the managers.—*HECTOR v. CANADIAN BANK OF COMMERCE* (1896), 11 Man. L. R. 320.—CAN.

d. — Facts to be stated—Authorship of document.]—Where privilege was claimed in an affidavit on production for certain reports the master ordered that the date & author of such reports should in each case be given,

even though in so doing the names of witnesses are disclosed. The order was reversed on the ground that it was not necessary in that case.—*ST. CLAIR v. STAIR* (1913), 24 O. W. R. 981; 4 O. W. N. 1580; 12 D. L. R. 840.—CAN.

e. — Documents prepared for litigation purposes—Necessity for accurate statement.]—In an action on a policy on the life of pltf.'s husband, defts. filed an affidavit on production, but objected to produce certain letters between a local & the head office, on the ground "that they are privileged, being of a confidential nature & disclosing certain legal points in connection with the defence of this action." On a motion to compel production, defts.' manager in an affidavit stated that "it is my custom, in the course of business, frequently to write to the head office on matters involving points of law; the head office confer with their general solrs., receive legal advice from them, & then communicate with me. The letters (in question) are of the same nature as those between solr. & client, & are, as I am advised & believe, privileged for that reason":—*Held*: not sufficient, & the affidavit should state that the letters "came into existence for the purpose of being communicated to the solr., with the object of obtaining his advice or enabling him to defend an action."—*THOMSON v. MARYLAND CASUALTY CO.* (1906), 11 O. L. R. 44; 7 O. W. R. 15.—CAN.

f. — —.]—Where an affidavit on production sets up facts

that they supported pltf.'s title, & did not support the title of deft. Deft. took out a summons for production, notwithstanding the privilege claimed, when the judge in chambers ordered production of one of the documents, & adjourned the hearing of the rest of the summons into ct.:—*Held*: the inaccuracy of the affidavit as to one document did not of itself destroy pltf.'s privilege as to the rest of the scheduled documents.—*LESLIE v. CAVE* (1887), 56 L. T. 332; 35 W. R. 515; *previous proceedings*, [1886] W. N. 162.

377. — — —.]—Professional privilege as a ground for resisting production of documents by trustees is not displaced by the fact that the solr. consulted is himself a trustee & is acting as professional adviser to himself & his co-trustees.

Professional privilege does not attach to communications made by or to a solr. for the purpose of carrying out a fraud; but, in order to displace the privilege on this ground, a mere allegation of fraud in a pleading is not sufficient; a *prima facie* case of fraud must be made out in fact.

Privilege claimed by a party on the ground that the documents relate exclusively to his own case is not limited to documents admissible in evidence in support of his case.

The fact that a party claiming privilege for a mass of documents is shown to have misapprehended the effect of one of the documents is not of itself a sufficient reason for refusing protection to all the other documents included in the same head of claim on the footing that the affidavit of documents is untrustworthy.

A pltf. suing as the representative of the heir-at-law & next of kin of a testator, & claiming that the exors. are trustees for those whom he represents of part of testator's estate on the footing of an intestacy, is not entitled to the production of the trust documents as *cestui que trust* on the ground of proprietary right, if the questions whether there was an intestacy is the issue to be tried in the action.—*O'ROURKE v. DARBISHIRE*, [1920] A. C. 581; 89 L. J. Ch. 162; 123 L. T. 68; 36 T. L. R. 350; 64 Sol. Jo. 322, H. L.; *affg.* S. C. *sub nom.*

which upon their face disclose complete privilege, that should be accepted as conclusive until the opposite party can show some grounds for going behind it & examining the documents themselves; the ct. should not adopt the course, provided for by R. 273 (2), of inspecting documents claimed to be privileged unless there is something in the affidavit itself or in the material supplied by the party seeking production to show that the party making production has misconceived the privileged character of the documents which he has withheld or is seeking to shelter documents which ought to be produced under a form of words which would apparently justify their retention. A description of documents in a schedule to an affidavit on production as "a bundle of documents marked with the letter 'A' & numbered 1 to 51 & each initialed by deponent," & a claim of privilege for such documents on the ground that they were communications passing between officers of deft. co. after the litigation was in contemplation for the purpose of enabling its solr. to prepare a defence to the contemplated action, were upheld as sufficient.—*VICKERY* .., [1921]

g. — —.]—In an action for negligence against a railway co. the co., in its affidavit of documents, claimed privilege for certain reports made by porters & station-masters on the ground that the same consisted of "reports & notes of evidence procured

Re WHITWORTH, O'ROURKE *v.* DARBISHIRE, [1919] 1 Ch. 320, C. A.

In particular instances.]—See Part III., Sect. 9, *post*.

SUB-SECT. 6.—CLAIM TO SEAL UP.

See Part III., Sect. 13, sub-sect. 3, *post*.

SUB-SECT. 7.—DOCUMENTS DISCOVERED AFTER AFFIDAVIT FILED.

378. Duty to disclose.—It is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit, the proper course, or at least by notice.—MITCHELL *v.* DARLEY MAIN COLLIERY Co. (1884), 1 Cab. & El. 215; *reversd.* on other grounds, 14 Q. B. D. 125, C. A.; *sub nom.* DARLEY MAIN COLLIERY Co. *v.* MITCHELL (1886), 11 App. Cas. 127, H. L.

Annotations :—*Mentd.* Brunson *v.* Humphrey (1884), 14 Q. B. D. 141; *Serrao v. Nool* (1885), 15 Q. B. D. 549; *Crumble v. Wallsend L. B.*, [1891] 1 Q. B. 503; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.* (1898), 87 L. J. Ch. 666; *Hall v. Norfolk*, [1900] 2 Ch. 493; *Markey v. Tolworth Joint Hospital District Board* (1900), 69 L. J. Q. B. 738; *Carey v. Bermondsey B. Co.* (1903), 2 L. G. R. 219; *Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; *West Leigh Colliery Co. v. Tunnicliffe & Hampson*, [1908] A. C. 27; *Manley v. Burn*, [1916] 2 K. B. 121; *Nash v. Rochford R. Co.*, [1917] 1 K. B. 384; *Boynston v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213; *Kennard v. Cory*, [1922] 1 Ch. 265.

SECT. 10.—HOW FAR AFFIDAVIT CONCLUSIVE.

379. Is conclusive—Possession of documents.—Deft., by his answer, denied the possession of certain documents. The answer was admitted to be sufficient. Pltf. alleging by affidavit that the denial of possession was untrue, & that the particular documents were wilfully suppressed, moved for their production:—*Held*: assuming fraud, falsehood & misrepresentation to be proved, pltf. was not entitled to move for production, but must file a bill.—REYNELL *v.* SPRYE (1851), 1 De G. M. & G. 656; 21 L. J. Ch. 13; 18 L. T. O. S. 104; 15 Jur. 1046; 42 E. R. 708, L. JJ.; *subsequent proceedings*, *sub nom.* SPRYE *v.* REYNELL (1852), 1 De G. M. & G. 712, L. JJ.

Annotations :—*Reid.* Adams *v.* Lloyd (1858), 3 H. & N. 351. *Mentd.* Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1.

380. ———.]—(1) An affidavit of documents made pursuant to R. S. C., Ord. 31, r. 12, is conclusive against the party seeking discovery,

by the defts., solely to submit to their legal professional advisers, & communications passing between the officials of defts. with a view to procuring evidence for the purpose of their defence in this action, solely to be submitted to their legal professional advisers & procured after the alleged cause of action herein had taken place, in view of anticipated litigation, but the affidavit did not state in whose view the litigation was anticipated:—*Held*: the affidavit was sufficient.—M'MAHON *v.* GREAT NORTHERN RY. Co. (1906), 40 I. L. T. 172.—IR.

PART II. SECT. 9, SUB-SECT. 7.

h. Necessity for further affidavit.

unless it can be shown either from the affidavit itself, or from the documents therein referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents exist in his possession or power which are material & relevant to the action. In any of these instances, but not otherwise, a further affidavit may be ordered.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see* No. 6, *ante*).—JONES *v.* MONTE VIDEO GAS Co. (1880), 5 Q. B. D. 556; 49 L. J. Q. B. 627; 42 L. T. 639; 28 W. R. 758, C. A.

Annotations :—*As to* (1) *Expld. & Apld.* Bowicke *v.* Graham (1881), 7 Q. B. D. 400. *Expld. & Distd.* Compagnie Financière du Pacifique *v.* Peruvian Guano Co. (1882), 11 Q. B. D. 55. *Folld.* Norton *v.* Lamport, Holt (1886), 2 T. L. R. 630. *Consd.* Morris *v.* Edwards (1889), 23 Q. B. D. 287. *Apprvd.* Kent Coal Concessions *v.* Duguid, [1910] A. C. 452. *Consd.* British Assocn. of Glass Bottle Manufacturers *v.* Nettleford, [1912] 1 K. B. 369. *Reid.* Hall *v.* Truman, Hanbury (1885), 29 Ch. D. 307; *Nicholl v. Wheeler* (1886), 17 Q. B. D. 101; *Morris v. Edwards* (1890), 63 L. T. 26; *Yorkshire Provident Life Assce. v. Gilbert & Rivington*, [1895] 2 Q. B. 148; *Graves v. Heinemann & Armstrong* (1901), 18 T. L. R. 115; *White v. Spafford*, [1901] 2 K. B. 241; *Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry.*, [1913] 3 K. B. 850. *Generally, Mentd.* Proctor *v.* Smiles (1886), 2 T. L. R. 845.

381. ———.]—Pltfs. sued defts. for wrongful dismissal as their agents, defts. alleging that they were justified by pltfs.' conduct towards themselves & their other agents, including H. & Co. Defts. scheduled in their affidavit of documents letters to them from H. & Co., but not their letters or any copies to them sent in reply, & in the affidavit swore that they had disclosed all documents in their possession relevant to the action:—*Held*: they ought not to be ordered to make a further & better affidavit, as it had not been shown that they had any copies of their letters to H. & Co., & they had sworn that they had disclosed all material documents.—NORTON & Co. *v.* LAMPORT, HOLT & Co. (1886), 2 T. L. R. 630, D. C.

382. ———.]—Although as a general rule an affidavit of documents is conclusive against the party seeking discovery, in the absence of any admission in that or some other document by the party making the affidavit that he has in his possession or power other documents material & relevant to the issue, yet where the affidavit is based upon a misconception of his case by the party making the affidavit, & the ct. is practically certain that he has in his possession or power other relevant documents which ought to have been disclosed & which he would have disclosed, if he had rightly conceived his case, the ct. will order a further & better affidavit.—BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. *v.* NETTLEFOLD, [1912] A. C. 709; 81 L. J. K. B. 1125; 107 L. T. 529; 56 Sol. Jo. 702, H. L.

383. ———.]—GARDNER *v.* IRVIN, No. 373, *ante*.

384. ———.]—(1) Where in an answer to interrogatories the party interrogated declines to

—Deft.'s solr. admitted that several material documents, not mentioned in his client's affidavit on production, had been discovered after the affidavit was made:—*Held*: deft. must make a further affidavit.—CAMPBELL *v.* MCARTHER (1876), 7 P. R. 46.—CAN.

PART II. SECT. 10.

k. General rule.—The general rule is, that an affidavit on production is conclusive & must be accepted as true by the opposite party, respecting not only the documents that are said to have been in the possession of the party making discovery & their relevancy, but also as to the grounds stated in support of a claim for privilege

from production. But Ord. 31, r. 19A, (2), of the English Supreme Court Rules, is in force in Alberta, & gives power to the ct. or judge to determine at once, by inspection, whether the objection is well founded.—STAPLEY *v.* CANADIAN PACIFIC RY. Co. (1912), 22 W. L. R. 85; 6 D. L. R. 97; 2 W. W. R. 1010; 5 Alta. L. R. 341.—CAN.

1. ——— *Circumstances under which contradiction allowed.*—Ordinarily the affidavit is conclusive, but if, from the affidavit itself or from the documents therein referred to, or from admissions in the pleadings of the party from whom discovery is sought, or from an examination upon it, it appears that the

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give certain information on the ground of professional privilege, & the privilege is properly claimed in law, the ct. will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated.

(2) The mere existence of a reasonable suspicion which is sufficient to justify the ct. in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified.

(3) The duty of the ct. with reference to answers to interrogatories is now regulated by R. S. O., Ord. 31, rr. 10, 11, & limited to considering the sufficiency or insufficiency of the answer, i.e., whether the party interrogated has answered that which he has no excuse for not answering—& only in the case of insufficiency can it require a further answer; *Scmble*: an embarrassing answer to interrogatories may be dealt with as insufficient.

(4) A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to interrogatories, & is not restricted to the passages dealing with any particular interrogatory, & all embarrassment to the interrogating party is now obviated by the provisions of r. 24 of the above Order; but he must not endeavour to import into an admission matter which has no connection with the matter admitted.

(5) A waiver of privilege in respect of some out of a larger number of documents for all of which privilege was originally claimed, does not preclude the party from still asserting his claim of privilege for the rest.

(6) Although *prima facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, & is the result of the professional knowledge, research, & skill of those advisers.

(7) Deft. K. in his answer to interrogatories objected to disclose certain information asked for by pltf. L. on the ground of professional privilege, which the ct. held properly claimed in law. L. sought by reference to certain admissions in the answer itself, & from documents referred to in the interrogatories & answer, as well as from documents scheduled to K.'s affidavit of documents, to show that the information sought was obtained under circumstances which negatived the claim of privilege, & sought a further answer:—*Held*: no further answer should be required, as the admissions in the answer & in the documents referred to therein only raised a case of suspicion at the most, which might be capable of explanation if K. were at liberty to make an affidavit.

The ct. declined to decide how far, under the present practice, reference could be made, as against the interrogated party, to any document in

possession not referred to in his answer, but only scheduled to his affidavit of documents.

(8) K.'s solrs. had for the purposes of an action in defence in the action procured copies of & extracts from certain entries in public registers, & also photographs of certain tombstones & taken for which K. in

of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, & research of his solrs., must be privileged—any disclosure of the copies & photographs might afford a clue to the view entertained by the solrs. of their client's case.

(9) No judge would allow a deft. when he had made an admission to read with it a passage which was not connected in sense or substance with that admission, even if he had put in a statement submitting that he was entitled to do so & claiming to do so. Of course, when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for deft., & he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted (COTTON, L.J.).

(10) With regard to these affidavits of documents the question arose really under the new practice, & it was held that the party making the affidavit could not be cross-examined, the party requiring it could not file affidavits to show that it was false, & it was held to be conclusive. But if from any documents produced, or any statements in the pleadings, it appears that the party making the affidavit has in his possession documents other than those which are mentioned in his affidavit, the ct. requires him to make a further affidavit. The production was only ordered of those documents which he admitted to be in his possession. If there was a probable ground for supposing that he had more, then he was required to make a further affidavit, but that proceeded upon the footing that the oath of the deponent was conclusive as against the party requiring the production. But as the ct. was not restricted to requiring the deponent to make one affidavit only, it might require him to make another at any time if there was reasonable probability of there being other documents not mentioned in his former affidavit (COTTON, L.J.).

I think there has been an attempt to embarrass, & if that were an attempt which could have succeeded, I think we should have ordered a further answer (BOWEN, L.J.).

(11) If pltf. can satisfy the judge in chambers that there is reason for thinking that his adversary has answered hastily or loosely, or untruthfully, he can interrogate him specifically over & over again by getting leave to put further interrogatories (BOWEN, L.J.).—*LYELL v. KENNEDY* (No. 3) (1884), 27 Ch. D. 1; 53 L. J. Ch. 937; 50 L. T. 730, C. A.

Annotations:—As to (4) *Expld.* *Lyell v. Kennedy* (1884), 33 W. R. 44. As to (6) *Consd.* *Pearce v. Foster* (1885), 15 Q. B. D. 114. As to (8) *Distd.* *Lambert v. Home*, [1914] 3 K. B. 86. *Generally*, *Mentd.* *Bidder v. Bridges* (1885), 54 L. J. Ch. 798.

385. — Relevancy of documents.]—Where there has been a positive statement in an affidavit

affidavit cannot be trusted, then production may be ordered.—*SAVAGE v. CANADIAN PACIFIC RY. CO.* (1906), 3 W. L. R. 124; 15 Man. L. R. 401.—CAN.

m. ———.]—Where an affidavit on production sets up facts which upon their face disclose complete privilege, that should be accepted as conclusive until the opposite party can show some grounds for going

behind it & examining the documents themselves; the ct. should not adopt the course, provided for by R. 273 (2), of inspecting documents claimed to be privileged unless there is something in the affidavit itself or in the material supplied by the party seeking production to show that the party making production has misconceived the privileged character of the documents which he has withheld or is seeking

to shelter documents which ought to be produced under a form of words which would apparently justify their retention. — *VICKERY v. CANADIAN PACIFIC RY. CO.*, [1921] 2 W. W. R. 517.—CAN.

385 i. Is conclusive—Relevancy of documents.]—A party to an action is not entitled to discovery of the

of documents that certain scheduled documents were not relevant to the matter in dispute in the action, the ct. refused an order for production & inspection, though one member of the ct. believed they were relevant.—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co., SKINNER & Co., JENKINS & Co., PENINSULAR & ORIENTAL STEAM NAVIGATION Co., OCEAN S.S. Co., THOMPSON (WILLIAM) & Co. (1886), 2 T. L. R. 752, D. C.*

386. ———.]—*STEELE v. SAVORY (1891), 36 Sol. Jo. 12, C. A.*

387. ———.]—*KENT COAL CONCESSIONS, LTD. v. DUGUID, No. 288, ante.*

388. ——— *Claim of privilege.*]—*BEWICKE v. GRAHAM, No. 362, ante.*

389. ——— Unless court entertain doubts.]—(1) Although a deft. to an action swears that certain documents which are in his possession & are material to the matter in issue, form & support his own title, & do not contain anything which could form or support pltf.'s case, or impeach the defence, the ct. will not act on such oath, but will order such documents to be produced, if from the whole of deft.'s answer or from the description of the documents given by deft., the ct. is reasonably certain that deft. has erroneously represented or misconceived the nature of such documents.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see No. 9, ante*).—*A.-G. v. EMERSON (1882), 10 Q. B. D. 191; 52 L. J. Q. B. 67; 48 L. T. 18; 31 W. R. 191, C. A.*

Annotations:—As to (1) Distd. Bulman & Dixon v. Young, Ehlers & Commercial S.S. Co. (1883), 49 L. T. 736; Roberts v. Oppenheim (1884), 26 Ch. D. 724. Apld. A.-G. v. Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 384; Frankenstein v. Gavin's Cycle Cleaning & Insee., [1897] 2 Q. B. 62. Consd. British Assocn. of Glass Bottle Manufacturers v. Nettlefold, [1912] A. C. 709. Reft. Morris v. Edwards (1890), 15 App. Cas. 309; Budden v. Wilkinson, [1893] 2 Q. B. 432; Yorkshire Provident Life Assce. v. Gilbert & Rivington (1895), 14 R. 411; A.-G. v. Newcastle-upon-Tyne Corpn., [1899] 2 Q. B. 478; Milbank v. Milbank, [1900] 1 Ch. 376. As to (2) Consd. Roberts v. Oppenheim (1884), 26 Ch. D. 724.

390. ———.]—(1) Where a party claims privilege against the production of documents on the ground that they supported his own title & do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the ct. can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents. The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see No. 14, ante*).—*ROBERTS v. OPPENHEIM (1884), 26 Ch. D. 724; 53 L. J. Ch. 1148; 50 L. T. 729; 32 W. R. 654, C. A.*

Annotation:—As to (1) Reft. O'Rourke v. Darbishire, [1920] A. C. 581.

opposite party which exclusively relate to the case of the latter, & the truth of a statement to that effect respecting any particular document, made in the affidavit on production of documents sworn to by one party, cannot be questioned on an application by the opposite party to compel production of that document.—*VON FERBER v. ENRIGHT (1909), 19 Man. L. R. 383.—CAN.*

385 ii. ———.]—Pltf. sued to eject deft. from certain pieces of land belonging to him, being portions of a passage upon which deft. was encroaching. In his written statement deft. denied pltf.'s title, & stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce deeds for pltf.'s inspection on the

ground that they related solely to his own title to the land in dispute, & did not in any way tend to prove or support the title of pltf. thereto.—*Held: deft. was entitled to refuse production of the deeds. The ct. could not go behind deft.'s affidavit of documents.*—*VINAYAKRAO DHUNDIRAJ v. NAROTAM ANANDJI (1893), 1 L. R. 17 Bom. 581.—IND.*

385 iii. ———.]—Where resp., against whom an order for discovery had been made, refused to disclose his bank pass-book & cheque counterfoils under the *bona fide* belief that they were not relevant.—*Held: on an application for his attachment for contempt, the appct. was bound by resp.'s statement on oath as to the relevancy of the documents, & had adopted a wrong procedure in applying for an order for*

391. ———.]—In an action for an alleged misrepresentation in the prospectus of a co. the statement complained of was that 12,500 persons had enrolled themselves as annual subscribers to the co. In an affidavit of documents defts. stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the co., but that they objected to produce them on the ground that they were part of the evidence supporting defts.' case, & did not support or tend to support pltf.'s case, & contained nothing impeaching the case of defts.:—*Held: pltf. was not entitled to inspection of the applications.*

The general rule with regard to discovery is that the person who seeks it is bound by the oath of the person from whom it is sought (*CHITTY, L.J.*).—*FRANKENSTEIN v. GAVIN'S CYCLE CLEANING & INSURANCE Co., [1897] 2 Q. B. 62; 66 L. J. Q. B. 668; 76 L. T. 747; 45 W. R. 547, C. A.*

——— *Partly valid, partly invalid.*]—*See Nos. 376, 377, ante.*

392. *Contradictory evidence not permissible.*]—*GARDNER v. IRVIN, No. 373, ante.*

393. ———.]—*MORRIS v. EDWARDS, No. 363, ante.*

394. ———.]—In an affidavit of documents on behalf of defts. in an action of negligence privilege was claimed for certain documents in a schedule to the affidavit on the ground that "they came into existence & were made after this litigation was in contemplation & in view of such litigation for the purpose of obtaining for & furnishing to the solr. of deft. co. evidence & information as to the evidence which could be obtained & otherwise for the use of the said solr. to enable him to conduct the defence in this action & to advise defts."

A judge at chambers, after inspecting the documents under the provisions of R. S. C., Ord. 31, r. 19A (2), made an order by which some of the documents were protected & others were ordered to be disclosed, the dividing line being drawn at the date on which pltf's first preferred their claim against defts:—*Held: (1) the judge at chambers & the Ct. of Appeal were entitled under the above rule to inspect the documents for the purpose of deciding on the validity of the claim of privilege, as no particular formula of words in the affidavit could be conclusive against evidence furnished by the documents themselves; (2) after inspecting the documents, protection had been appropriately claimed for them by the affidavit & the dividing line drawn by the judge in chambers was inappropriate in the particular case.*

It is not necessary that the affidavit should state the information was obtained "solely" or "merely" or "primarily" for the solr., if it was obtained for the solr. in the sense of being procured

Semle: the proper procedure was to have applied for inspection or for an order for production under some other sub-sect. of Rule 333.—*TAIT v. BOTHWELL (1912), C P. D. 60.—S. AF.*

n. *Whether contradiction allowed—By controversial affidavit.*]—Pltf., in his affidavit of documents, mentioned "other letters & papers filed herein, the particulars of which I cannot now depose to," & stated "that such documents were filed in this ct. on the motion made by deft. for his discharge from custody, as I am informed & believe":—*Held: an affidavit to show the incorrectness of the affidavit of documents would not be received.*—*LYON v. MCKAY (1885), 10 P. R. 557.—CAN.*

—.]—An affidavit

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as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated.

An affidavit of documents is sworn testimony which stands in a position which is in certain respects unique. The opposite party cannot cross-examine upon it & cannot lead a contention affidavit to contradict it. He is entitled to ask the ct. to look at the affidavit & all the documents produced under the affidavit & from those materials to reach the conclusion that the affidavit does not disclose all that it ought to disclose (BUCKLEY, L.J.).—BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO., [1913] 3 K. B. 850; 83 L. J. K. B. 474; 109 L. T. 64; 57 Sol. Jo. 752, C. A.

Annotation:—As to (2) *Apld.* Adam S.S. Co. v. London Assco. Corpn., [1914] 3 K. B. 1256.

395. No cross-examination.]—LYELL v. KENNEDY, No. 384, *ante*.

396. —.]—STEELE v. SAVORY (1891), 36 Sol. Jo. 12, C. A.

397. —.]—BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO., No. 394, *ante*.

398. Interrogatories upon—As to specific document.]—When a deft., after answer, has obtained an affidavit as to documents in the common form, if he finds that the inquiry in the common form is not sufficiently pointed to enable him to obtain discovery as to specific matters, his proper course is to file a concise statement of the specific matters with respect to which he seeks discovery, with interrogatories, which it will be the duty of pltf. to answer fully; & it will be no answer to deft. to say that some of the matters given in the specific statement were comprised in or that they were all referred to, in the answer, & that the first affidavit was sufficient. A deft. having filed a concise statement, with interrogatories, under the above circumstances, is not entitled, before the answer has come in, to take out a further summons for an affidavit of documents in the same special form as that in which he had interrogated; & such a summons will be dismissed as unnecessary.—NEWALL v. TELEGRAPH CONSTRUCTION CO. (1866), L. R. 2 Eq. 756; 35 L. J. Ch. 827; 14 W. R. 914.

Annotations:—*Consd.* Hall v. Truman, Hanbury (1885), 29 Ch. D. 307. *Refd.* A.-G. v. Emerson (1882), 10 Q. B. D. 191.

399. —.]—After a deft. has made a sufficient affidavit of documents pltf. will not be allowed to administer to him a general roving interrogatory as to documents in his possession,

a controversial affidavit: but, if from any source an admission of its incorrectness can be gathered, the affidavit cannot stand.—SAVAGE v. CANADIAN PACIFIC RY. CO. (1906), 16 Man. L. R. 381.—CAN.

395 i. No cross-examination.]—Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under rule 578 for the purpose of using his evidence upon a motion for a better affidavit.—DRYDEN v. SMITH (1897), 17 P. R. 500.—CAN.

p. Where made by officer of company—(Other officers examinable thereon—& answers admissible in contradiction.)—When an affidavit on production of documents is made by an officer of a co., any other officer of the

co. may be examined upon it, & his answers may be used to impeach the affidavit on an application to compel the filing of a further & better affidavit.—BAIN v. CANADIAN PACIFIC RY. CO. (1905), 15 Man. L. R. 544.—CAN.

q. Original & further affidavits—When latter may be used to contradict former.]—When the officer of defts. who made the affidavit on production was cross-examined upon it, & as a result made a second affidavit producing a number of documents for which he had claimed privilege in the first, the examination on the first affidavit may be used to contradict statements in the second, although there was no further examination.—SAVAGE v. CANADIAN PACIFIC RY. CO. (1906), 3 W. L. R. 124; 16 Man. L. R. 381.—CAN.

PART II. SECT. 11, SUB-SECT. 1.

400 i. After amendment of pleadings—

the effect of which would be to compel deft. to make a further affidavit as to documents. There may possibly be cases in which, after a sufficient affidavit as to documents has been made, the ct. will allow pltf. to deliver an interrogatory as to some specific document or documents, but whether this shall be allowed is a matter within the discretion of the judge in each particular case, & though his decision can be appealed from, the Ct. of Appeal will not readily reverse it.—HALL v. TRUMAN, HANBURY & CO. (1885), 29 Ch. D. 307; 54 L. J. Ch. 717; 52 L. T. 586, C. A.

Annotations:—*Folld.* Nicholl v. Wheeler (1886), 17 Q. B. D. 101. *Expld.* Morris v. Edwards (1890), 15 App. Cas. 309. *Refd.* Edison & Swan United Electric Light Co. v. Holland (1888), 5 R. P. C. 213.

SECT. 11.—FURTHER AND BETTER AFFIDAVIT.

SUB-SECT. 1.—IN GENERAL.

400. After amendment of pleading—New matter introduced.]—Where, after a deft. has made a sufficient affidavit as to documents, pltf. amends his bill, introducing new matters, he is entitled to have from deft. a further affidavit of documents as to the amendments.—WARDEN v. PEDDINGTON (1863), 32 Beav. 639; 55 E. R. 251.

401. Insufficiency of—Delay in objecting to.]—When, in pursuance of a judge's order, an affidavit containing a further & better discovery of documents was delivered to a party to an action on Mar. 28, & he then took no steps to object to its insufficiency until June 13:—*Held*: he had not proceeded with due promptness, & further discovery should be refused him.—GIRDLESTONE v. BRIGHTON AQUARIUM CO. (1876), 40 J. P. 776.

402. Summons for—Questions of privilege not entertained at hearing.]—(1) The practice of considering questions as to the production of documents, in respect of which privilege is claimed, on a summons to consider the sufficiency of the affidavit as to documents, will not be followed for the future.

(2) Counsel's indorsement of an order of ct. is *publici juris*, & must be produced, but all notes made by counsel & all instructions given to him, whether by indorsement on his brief or by notes or observations within, are privileged, & may be sealed up.

(3) Notes made by a shorthand writer employed by one of the parties, ordered to be produced so far as they merely describe what took place in open ct., but with liberty to seal up all notes or observations thereon, & all such parts thereof, if any, as did not relate to the proceedings in ct.—NICHOLL

*New matter introduced.]—*ANTISEPTIC BEDDING CO. v. GUROFSKY (1913), 24 O. W. R. 493; 4 O. W. N. 1221.—CAN.

401 i. Insufficiency of—Delay in objecting to.]—*Seemle*: a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first motion.—BOUGHTON v. CITIZENS' INSURANCE CO. (1885), 11 P. R. 110.—CAN.

r. — No necessity to notify deponent—Before applying for further affidavit.]—It is the duty of a party who is ordered to make discovery to make a full & proper discovery of all documents in his possession or which have been in his possession. It is not necessary for the other party to point out to the defaulting party a manifest failure to

v. JONES (1865), 2 Hem. & M. 588; 5 New Rep. 361; 13 W. R. 451; 71 E. R. 592.

Annotations:—*As to* (2) *Folld. Re Brown, Tyas v. Brown* (1880), 42 L. T. 501. *Refd. Curtis v. Beaney*, [1911] P. 181. *As to* (3) *Folld. Re Brown, Tyas v. Brown* (1880), 42 L. T. 501. *Refd. Re Worswick, Robson v. Worswick* (1888), 38 Ch. D. 370; *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47; *Ainsworth v. Wilding*, [1900] 2 Ch. 315; *Lambert v. Home*, [1914] 3 K. B. 86. *Generally, Mentd. Bullock v. Corrie* (1878), 42 J. P. 232.

403. Form of.]—In an action for infringement defts. alleged that the patent was anticipated by a machine sold to L. The same anticipation had been set up in a previous action relating to the same patent brought by pltf. against other persons, which action was dismissed at the trial on the ground of that anticipation. Pltf. in the previous action appealed, & an order was taken by consent without a hearing, by which judgment was entered for pltf., & certain affidavits made by pltf.'s solr. stated that the alleged anticipation was fraudulent, were ordered to be taken off the file. Pltf. in the present action made an affidavit of documents. In that affidavit, & in another affidavit filed in this action, he referred to the consent order, & in such latter affidavit to the said affidavits filed in the previous action, but he only scheduled the consent order to his affidavit of documents. Defts. in the present action applied by summons that pltf. might be ordered to make a further affidavit, & particularly as to all papers connected with the former action:—*Held*: (1) the affidavits relating to L.'s alleged anticipation were clearly relevant as pltf. had in the present action on the motion for an interim injunction raised the same point that L.'s anticipation was fraudulent; (2) the form of summons was not material, but it was in proper form in the present case, & (3) where it appears probable from a document produced by a party that he had in his possession relevant documents besides those scheduled to his original affidavit, he ought to be ordered to make a further & better affidavit with particular reference to those documents probably in his possession.—*BOWN v. SANSOM, TEALE & CO.* (1888), 5 R. P. C. 510, C. A.

404. Contents of—Whether limited by date of first or second affidavit.]—*JAMES v. PLUMMER* (1888), 23 L. J. N. C. 107, D. C.

405. First order made without jurisdiction—Necessity for setting aside—Before refusing further affidavit.]—*PINK v. SHARWOOD (J. A.) & CO., LTD.*, No. 183, *ante*.

order before applying to the ct. for an order for further discovery. Where it was clear that a discovery affidavit was incomplete the ct. made an order for further discovery & mulcted resp. in costs.—*COLLISON, LTD. v. DICKMAN* (1916), C. P. D. 117.—S. AF.

s. Relevancy of further documents sought—Depending on facts not pleaded—Omission to plead fatal.]—A solr. sued D., who had been his client in prolonged litigation, for slander containing an imputation of professional negligence & dishonesty. D. pleaded privilege & *bona fide* belief in the truth of the words complained of. On a motion for further discovery:—*Held*: in the absence of an express plea of justification, D. was not entitled to discovery of all the documents in pltf.'s possession relating to the litigation, but only to the specific documents containing the facts on which that belief was based.—*HEARN v. DOWNES* (1920), 54 I. L. T. 50.—IR.

PART II. SECT. 11, SUB-SECT. 2.

t. General rule.]—A party who has made an affidavit of documents cannot be ordered to make a further affidavit, unless there is upon the face

of the affidavit itself or of the documents referred to in it, or in his pleadings, or by his admission, something raising a presumption that he has in his possession other relevant documents in addition to those of which he has admitted possession.—*FARRER v. KELSO*, [1917] 2 W. W. R. 1024.—CAN.

a. —.]—If from the affidavit of documents itself, made under G. Ord. 31, r. 11, by a party to an action, or from the documents therein referred to, or from the pleadings of the party from whom discovery is sought, the ct. is of opinion that the affidavit is insufficient, an order for a further affidavit will be made. Except in cases of this description, the party seeking discovery is not entitled to require a further affidavit, nor is an affidavit by him admissible to show the insufficiency of the affidavit of documents made by the opposite party.—*ROSS v. DUBLIN UNITED TRAMWAYS CO.* (1881), 8 L. R. Ir. 213.—IR.

b. —.]—Where it is clear that relevant documents have been omitted from an affidavit of discovery the ct. may order a fuller & further discovery.—*RAINSFORD v. AFRICAN BANKING*

SUB-SECT. 2.—GROUNDS FOR.

406. Reasonable suspicion.]—After a deft. has made an affidavit as to documents in his possession, in the form prescribed by the regulations of the ct., he may be required to make a further affidavit as to particular documents which there is reason to suppose he may possess but which are omitted from the schedule to the first affidavit.

A pltf. may be required to make an affidavit as to documents in his possession after deft. has made a similar affidavit in the usual form, though the latter has not yet complied with an order to make a further affidavit as to particular documents.

If, after an affidavit had been made, the ct. sees anything to raise a reasonable suspicion that deft. has in his possession other documents relating to the matters in question, it may require him to make a further affidavit (*TURNER, L.J.*).—*NOEL v. NOEL* (1863), 1 De G. J. & Sm. 468; 2 New Rep. 294; 32 L. J. Ch. 676; 8 L. T. 555; 9 Jur. N. S. 589; 11 W. R. 791; 46 E. R. 186, L. J.

Annotations:—*Consd. & Distd. Wright v. Pitt* (1868), 3 Ch. App. 809. *Folld. Vyse v. Foster* (1872), L. R. 13 Eq. 602. *Consd. Hastings Corp'n. v. Ivall* (1873), 8 Ch. App. 1019, n.; *Saull v. Browne* (1874), L. R. 17 Eq. 402; *Lycell v. Kennedy* (1884), 27 Ch. D. 1. *Refd. Alcock v. Gill* (1869), 21 L. T. 704.

407. —.]—A pltf., being ordered to make an affidavit as to documents in his possession, filed an affidavit with a schedule of documents not including any title deeds of the property to which the suit related, & of which he was the owner in possession. There was nothing in the proceedings to show whether any title deeds existed. Defts. moved that he might be ordered to file a further affidavit as to title deeds:—*Held*: the probability of pltf. having title deeds did not raise such a "reasonable suspicion" of the insufficiency of the affidavit as to entitle defts. to call upon him for a further one.

In order to make the principle of *Noel v. Noel*, No. 406, *ante*, applicable, it must be shown that the party has made some admission throwing discredit on the sufficiency of his affidavit (*WOOD, L.J.*).

Even if we are to adopt the expression "reasonable suspicion" used in *Noel v. Noel*, No. 406, *ante*, such suspicion must be one founded on the pleadings & affidavits (*SELWYN, L.J.*).—*WRIGHT v. PITT* (1868), 3 Ch. App. 809; 16 W. R. 1073, L. J.

Annotations:—*Apld. Alcock v. Gill* (1869), 21 L. T. 704. *Consd. Hastings Corp'n. v. Ivall* (1873), 8 Ch. App. 1019, n.; *Saull v. Browne* (1874), L. R. 17 Eq. 402.

CORPN., LTD., [1912] C. P. D. 729.—S. AF.

406 i. Reasonable suspicion.]—Even against a party's own affidavit, if the ct. is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered.—*MOXLEY v. CANADA ATLANTIC RY. CO.* (1885), 11 P. R. 39.—CAN.

c. Mere suspicion insufficient—When affidavit regular in form.]—Where an affidavit of documents is in form regular, the ct. will not, on mere suspicion that a document is in the possession, power, or procurement of the deponent, make an order for further & better discovery. The same rule applies where the document in question is in the possession of a person, who is a trustee for other persons as well as for deponent.—*LYSAGHT v. MULLEN* (1898), 32 I. L. T. 65.—IR.

d. Necessity for evidence—Of existence of other documents.]—Where neither the pleadings, the affidavit, nor the answer to the interrogatories lead to any inference as to the existence of the letters or reports sought to be discovered, the motion for a further

Sect. 11.—Further and better affidavit: Sub-sect. 2.]

408. —.]—A railway co. having been made defts. to a suit, an affidavit as to documents was made by their secretary, who was not a deft. The co. answered, & the bill was re-amended, whereupon the secretary made a second & a third affidavit as to documents. He was then examined by plffs., *ex p.*, on their behalf, before the examiner; & in the course of such examination deposed to the possession of certain documents not mentioned in his affidavit. Upon summons by plffs., that the co. might be ordered to make a further affidavit accounting for the documents referred to by the secretary in his examination:—*Held*: the application was irregular, & summons dismissed with costs.—*ALCOCK v. GILL* (1869), 21 L. T. 704.

409. —.]—The schedule to an affidavit of documents made by defts. comprised a letter dated Oct. 19, from U. & Co., whom defts. by their answer admitted to have acted as their solrs. in the cause down to Oct. 17, to their agents in Paris, & letters in reply dated Oct. 20 & 21, which referred to certain documents alleged by plffs. to be material to the questions at issue in the cause. Defts.' affidavit concluded with the usual denial of their having or having had in their possession any other documents relating to the questions at issue in the cause:—*Held*: the affidavit was sufficient, inasmuch as there was nothing in the schedule to raise a reasonable suspicion that anything had been inadvertently or otherwise omitted from the affidavit, it being clear from the letters themselves that they were written & received when U. & Co. were not acting as solrs. for defts.—*IMPERIAL LAND CO. OF MARSEILLES v. MASTERMAN* (1873), 29 L. T. 550; 22 W. R. 66, L. J.

Annotation:—*Refd.* *Hastings Corp'n. v. Ivall* (1873), 8 Ch. App. 1019, n.

410. —.]—*APPLEBY v. WARING* (1880), 15 L. J. N. C. 125.

411. *Admission by party.*—The ct. will order a further affidavit as to documents to be made by a deft., if it is satisfied from the admissions in deft.'s answer that material documents not mentioned in his affidavit may be in his possession, even although the answer does not in express terms admit the existence of such documents. Where a deft. by his answer set out a long list of customers of a business carried on by him, but did not mention in his affidavit as to documents any

books relating to such business:—*Held*: deft. must make a further affidavit.—*SAULL v. BROWNE* (1874), L. R. 17 Eq. 402.

412. —.]—Where an affidavit has been made in answer to an order for discovery of documents, a further order will not be granted unless there are facts or admissions showing that the documents are withheld. It is not enough for the party applying for further discovery to swear to a belief that documents are in the other party's possession. Deft. obtained an order for discovery of documents. The liquidator of pltf. co. made an affidavit, setting out certain documents, & stating that he had no others in his possession. Deft. applied for a further order for discovery on an affidavit, stating a belief that the liquidator had other documents:—*Held*: the liquidator's affidavit was sufficient, & deft. was not entitled to a further order.—*WELSH STEAM COAL COLLIERIES, LTD. v. GASKELL* (1877), 36 L. T. 352, C. A.

Annotation:—*Refd.* *Jones v. Monte Video Gas Co.* (1880), 49 L. J. Q. B. 627.

413. —.]—*JONES v. MONTE VIDEO GAS CO.*, No. 380, *ante*.

414. —.]—*COMPAGNIE FINANCIERE DU PACIFIQUE v. PERUVIAN GUANO CO.*, No. 321, *ante*.

415. —.]—*LYELL v. KENNEDY*, No. 384, *ante*.

416. —.]—In an affidavit of sealing up irrelevant matter it is not necessary for the deponent to state positively that no sealed up portion relates to the matters in question. The affidavit ought to state what has been done, & upon whose investigation the deponent is relying, & if he has not conducted the investigation himself, he ought to pledge his oath to the belief that nothing sealed up is relevant to the matter. The mere fact that the sealing up, or affidavit of sealing up, has not been done without carelessness is not a sufficient ground for ordering a general unsealing. In such cases, as in ordinary cases of discovery of documents, the person seeking discovery is bound by the oath of the party making discovery, unless the ct. is satisfied, not on a conflict of evidence, but from (1) the documents produced, (2) something in the affidavit of documents or sealing, (3) admission of the party making discovery, or (4) necessarily from the circumstances of the case, that the affidavit as to documents or sealing does not state what it ought to state.

affidavit of documents will fail.—*BANK OF MONTREAL v. McDONALD* (1902), 9 N. S. R. 595.—CAN.

e. Existence of other documents.—Evidenced by those produced.—Where, in an action upon a fire insurance policy, pltf., in making discovery of documents, referred in his affidavit to an application for the insurance, which, when produced, showed that at its date he had a set of books connected with the business in respect of which he was effecting the insurance, such books, however, he did not produce:—*Held*: the books were material, & the reference to them in the document produced was sufficient ground for ordering a better affidavit on production. *Qu.*: whether the admissions of pltf. upon his examination of discovery as to the existence of documents other than those mentioned in his affidavit could be looked at to contradict the affidavit.—*SMEDLEY v. BRITISH AMERICA ASSURANCE CO.* (1888), 18 P. R. 92.—CAN.

—.]—Where in an action of slander the financial position of pltf. is one of the issues, & pltf. has included in their affidavit of documents their balance sheet, but

not the documents on which it is founded, the ct. will order them to make a further & better affidavit, on the ground that the admission of the former to be relevant necessarily involves an admission that the latter is also relevant.—*IRISH AGRICULTURAL WHOLESALE SOCIETY v. M'COWAN* (1912), 47 I. L. T. 20.—IR.

g. Admission by party.—A suit was brought by a married woman in which her husband was joined as a deft. Pltf. filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. Defts. applied to compel further production, viz. of documents which, it appeared deft., pltf.'s husband, had in his possession. It was alleged that he held these documents for the benefit of pltf., & that it was intended to use them at the hearing:—*Held*: a better affidavit will only be ordered upon proof of admission under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced.—*BROWN v. CAPRON* (1874), 6 P. R. 203.—CAN.

h. Possession & relevancy.—In an action by a co. for calls on shares, where the ct. was satisfied from the prospectus, the pleadings, & affidavits that there were blocks of cheques, receipts, & minutes in the possession of pltf. co. with reference to a transaction mentioned in the prospectus, which had not been disclosed in the affidavit of documents made by the secretary of pltf. co., a further & fuller affidavit was ordered.—*COMPONENTS TUBE CO. v. NAYLOR* (1898), 32 I. L. T. 37.—IR.

k. Insufficient description of documents.—Pltf. filed a bill against his assignee's representative for an account. On being served with the usual order for the production of documents, pltf. filed an affidavit which described among others, documents in pltf.'s possession generally. Upon the application of deft., an order was granted requiring a more particular affidavit.—*RHODES v. NEILD* (1859), 1 Ch. Ch. 131.—CAN.

l. —.]—In the affidavit of defts.' manager, on production of documents, he stated that defts. had in their possession "the books of the said Bank, consisting of deposit ledgers & liability ledgers, manager's register

In an action by a principal against his agents *pltf.* claimed an account of all sums received & paid by *pltf.* as his agents. *Pltf.* subsequently obtained an order for an affidavit of documents. *Defts.* then obtained liberty to seal up such portions of the documents as were irrelevant, & they sealed up more than 10,000 passages contained in nearly 5,000 books & documents. *Pltf.* then applied for an order on *defts.* to unseal all books & documents, & all portions thereof, which had been sealed up under the order, or such portions thereof as the *ct.* should direct. The judge held that the application that everything sealed up should be unsealed could not be acceded to, & that it was necessary for *pltf.* to establish by particular instances his right to compel *defts.* to unseal. A list of particular documents was then prepared & brought before the judge, who directed certain scheduled items to be unsealed, but refused the rest of the application, & gave *pltf.* the costs as to the parts unsealed, & *defts.* the rest of the costs. On appeal by *pltf.*:—*Held*: *pltf.* was not entitled to a general unsealing of the documents.—*JONES v. ANDREWS* (1888), 58 L. T. 601, C. A.

Annotation:—*Mentd. Sheller v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287.*

417. —.]—Where *pltf.* in an action for passing off had exhibited orders & invoices to their affidavit of documents stating in effect that they were typical of many others in their possession, they were ordered to make a further & better affidavit. In an action for passing off *pltf.* alleged that for a great number of years they had continuously & extensively used, & still used, certain trade marks. In their affidavit of documents they exhibited three orders & three copy invoices for goods of their special brand containing one or other of their said trade marks, & they deposed that they had in their possession numerous orders & copy invoices similar to those produced. *Deft.* refused to accept this as a sufficient affidavit of documents, & asked for inspection of all the orders & copy invoices on which *pltf.* proposed to rely. *Pltf.* refused to give inspection. *Deft.* accordingly applied to the *ct.* for an order directing *pltf.* to file a further & better affidavit of documents. The judge made the order asked for. *Pltf.* appealed:—*Held*: *pltf.* had acted unreasonably in refusing inspection; the order made was right; the appeal must be dismissed with costs.—

of collateral securities, & letter books; & also letters that had passed between the managers at B. & W., which he objected to produce on the ground that they were privileged communications relating solely to *defts.* case & defence, & did not concern *pltf.*'s case:—*Held*: the description of the books was too indefinite, & *defts.* should file a further affidavit showing how many, & which of the books referred to, contained any entry relating to the matters in question in the cause; the rule being that, when objections against productions are made, the affidavit must describe the documents with sufficient distinctness to enable the *ct.* to order production, if the objections should be overruled.—*HECTOR v. CANADIAN BANK OF COMMERCE* (1896), 11 Man. L. R. 320.—CAN.

m. *Insufficient specification* — *Of documents for which privilege claimed.*—*Pltf.* at the close of his case called for all the correspondence between *deft.*, his agents, & third parties. *Deft.* claimed that the letters were privileged:—*Held*: *deft.* should within 24 hours file a further affidavit of discovery in which he should state specifically which letters were written with a view

ANDREW (JOHN HENRY) & Co., LTD. v. KUEHN-RICH (1912), 29 R. P. C. 698, C. A.

418. —.]—*ANGELL v. JOHN BULL, LTD.*, No. 325, *ante*.

419. *Doubts raised by affidavit* — *Inconsistency.*—Upon a motion for discovery & inspection of documents, grounded on a *deft.*'s answer, the *ct.* is not at liberty to disregard the statements in the answer, as to parts of the documents which are not disclosed, however suspicious those statements may be; but, if they are inconsistent with each other, the *ct.* will adopt the statement which is most favourable to *pltf.*; & if such parts of the documents as are disclosed contradict the answer as to the other parts, the *ct.* will order an inspection of such other parts.—*BOWES v. FERNIE* (1838), 3 My. & Cr. 632; 40 E. R. 1070, L. C.

420. —.]—Notwithstanding a statement in *deft.*'s answer that a deed of conveyance, the production of which is sought by *pltf.* for his inspection, is his title deed, & does not in any manner evidence *pltf.*'s title, the deed will be ordered by the *ct.* to be produced if it appear on the face of the answer that its contents may prove material to *pltf.*'s case.

A partition was made, prior to the reign of King Henry VIII., of an ancient manor, by dividing it into two reputed manors, to which divers tenements were respectively allotted in severalty, but a considerable portion of waste lands of the original ancient manor continued undivided, the property of the two lords of the reputed manors, as tenants in common. The information stated that part of *deft.*'s ancient freehold tenements, situate within one of the reputed manors, consisted of uninclosed lands, & that some portion thereof was waste land held of the ancient manor, & that of such the informant was tenant in common with *deft.*: *deft.* admitted, by his answer, that there were such waste lands, but stated that the same were allotted, & formed part of *deft.*'s ancient freehold tenements, & that *deft.*, in the year 1829, obtained from the lord of the reputed manor in which his ancient tenements were situate, a conveyance of the manorial & other rights, fine rents, etc. belonging to the lord over those tenements, except the right to tinstuff & sporting. The information insisted that the uninclosed lands, except the ancient tenements, were held by the

to impending litigation.—*BROTHERS v. KIRSTEIN* (1912), C. P. D. 126.—S. AF.

n. *Failure to substantiate claim of privilege.*—In an affidavit of a party on production of documents, a certain letter was described by its date & as being from a firm of solrs. to deponent, who said that he objected to produce it, that it was a communication between solr. & client, & was privileged. In the same affidavit two other letters were described by their dates & as being from a solr. to a firm of solrs., & a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solrs. for the deponent & others in another action, & he objected to produce them & claimed privilege for them "on the ground that they are communications between solr. & client & between my solrs. & others in the course of their conducting my business":—*Held*: these letters not being written to or by deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by deponent's solrs. to other persons in the course of their

conducting his business; & the opposite party was entitled to a better affidavit on production, in which deponent might set up other grounds of non-production. It is irregular to go into the merits upon an application for a better affidavit.—*HOFFMAN v. ORERAR* (1897), 17 P. R. 404.—CAN.

o. —.]—The tendency of the *cts.* is to widen all avenues to discovery. The affidavit of documents filed by *defts.* stated that they objected to produce "documents numbered 3 to 55 on the ground that they related solely to *defts.* case & not to *pltf.*, nor did they tend to support the case of *pltf.* nor did they, to the best of deponents knowledge, contain anything impeaching the case of *defts.* & that they were privileged from production:—*Held*: as the documents for which privilege was claimed did not appear on the face of the affidavit to be in fact privileged, *defts.* should file a better affidavit.—*HENDERSON v. MERCANTILE TRUST CO.* (1922), 52 O. L. R. 198.—CAN.

p. *Refusal to produce* — *Documents in hands of third person*—*As assignee of deponent.*—*Defts.* objected to produce certain documents, on the ground

Sect. 11.—Further and better affidavit: Sub-sect. 2.

two lords as tenants in common, & were subject to tin-bounds, & that waste & unallotted lands only were subject to tin-bounds. Deft. stated that there was a difference of opinion, as to whether lands subject to tin-bounds were always waste lands, & insisted that the deed of conveyance of 1819 was the title deed of deft., & in no manner evidenced the informant's title. The deed & the map delineated thereon, were, notwithstanding, ordered to be produced for the informant's inspection.—*A.-G. OF PRINCE OF WALES v. LAMBE* (1848), 11 Beav. 213; 17 L. J. Ch. 154; 10 L. T. O. S. 498; 12 Jur. 386; 50 E. R. 798.

421. ———.]—A pltf. is entitled to a further affidavit as to documents only when deft.'s answer & original affidavit are inconsistent, either with themselves or with one another.

Affidavits in reply to an affidavit as to documents are inadmissible.

Seemle: if a specific document is charged by a bill to be in deft.'s possession, & specific information is required in respect of it, & the answer is insufficient, exceptions would be allowed, even though they might not be allowed if the interrogatory as to documents had been general, & deft. had not answered it.—*WESTMINSTER BRYMBO COAL & COKE CO., LTD. v. CLAYTON* (1863), 3 New Rep. 111; 9 L. T. 534; 12 W. R. 123.

422. ———.]—In a suit to restrain a corpn. from permitting a river, which flowed through pltf.'s & relator's land, to be polluted, pltf. made the usual affidavit of documents. In the course of the proceedings questions were raised as to pltf.'s title to certain lands, & his agent filed an affidavit stating that he had in his possession rent books & a deed of exchange which showed pltf.'s title to the lands in question. Upon a summons by defts. that pltf. be ordered to file a full & sufficient affidavit, stating whether he had in his possession any other documents than those mentioned in his affidavit, particularly the rent books & deed of exchange:—*Held*: as there was no inconsistency on the face of pltf.'s affidavit, defts. were not entitled to any further affidavit of documents.—*A.-G. v. CASTLEFORD LOCAL BOARD* (1872), 27 L. T. 644; 21 W. R. 117.

423. ———.]—*JONES v. MONTE VIDEO GAS CO.*, No. 380, *ante*.

424. ———.]—*COMPAGNIE FINANCIERE DU PACIFIQUE v. PERUVIAN GUANO CO.*, No. 321, *ante*.

425. ———.]—*Or sealing*.—*JONES v. ANDREWS*, No. 416, *ante*.

that they were in the possession of a third party, to whom defts. had assigned all their estate for the benefit of their creditors. The assignee had realised the estate & distributed the proceeds amongst the creditors:—*Held*: no excuse for the non-production, & a better affidavit should be ordered.—*BRITISH AMERICA INSURANCE CO. v. WILKINSON* (1875), 6 P. R. 268.—*CAN.*

q. *Parting with possession*—*After service of order to produce*.—A person parting with papers after service on him of an order to produce, was ordered to file a better affidavit, & pay costs.—*ROSS v. ROBERTSON* (1866), 2 Ch. Ch. 56.—*CAN.*

r. *Swearing of affidavit*—*Before service of order to produce*.—The affidavit on production is a substitute for discovery on interrogatories, & a party is entitled to such discovery up to the latest possible date. When an affidavit had been sworn before the service of an order to produce, it was

held to be irregular & insufficient, & a new & better affidavit ordered to be filed.—*KENNEDY v. ROYAL INSURANCE CO.* (1871), 3 Ch. Ch. 489.—*CAN.*

s. *Doubts raised by answers of company official*—*Examined on affidavit sworn by other official*.—When an affidavit on production of documents is made by an officer of a co., any other officer of the co. may be examined upon it, & his answers may be used to impeach the affidavit on an appln. to compel the filing of a further & better affidavit.—*BAIN v. CANADIAN PACIFIC RY. CO.* (1905), 15 Man. L. R. 544.—*CAN.*

PART II. SECT. 12.

t. *Application may be made ex parte*.—The application under Ord. 31, r. 20 (3) for an order requiring a party to state by affidavit whether certain specific documents are, or have at any time been, in his possession, or power, may be made *ex parte*, notwithstanding that privilege is claimed

426. ———.]—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO.*, No. 394, *ante*.

427. *Doubts raised by documents produced or referred to*.—*JONES v. MONTE VIDEO GAS CO.*, No. 380, *ante*.

428. ———.]—*COMPAGNIE FINANCIERE DU PACIFIQUE v. PERUVIAN GUANO CO.*, No. 321, *ante*.

429. ———.]—*LYELL v. KENNEDY*, No. 384, *ante*.

430. ———.]—*JONES v. ANDREWS*, No. 416, *ante*.

431. ———.]—*BOWN v. SANSOM, TEALE & CO.*, No. 403, *ante*.

432. ———.]—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO.*, No. 394, *ante*.

433. *Possession & relevancy*.—In order to justify the requiring of a further affidavit [of documents], it must be shown, not only that there are probably other documents in deft.'s possession but that those documents are probably relevant to the issues in the action (*COTTON, L.J.*).—*SUMSION v. PICTOR* (1886), 30 Sol. Jo. 468, C. A.

434. *Misconception by party*—*Of nature of his case*.—*BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. v. NETTLEFOLD*, No. 382, *ante*.

435. *General circumstances of case*.—*ROBERTS v. OPPENHEIM*, No. 390, *ante*.

436. ———.]—*JONES v. ANDREWS*, No. 416, *ante*.

SECT. 12.—SPECIFIC DOCUMENTS OR CLASSES OF DOCUMENTS.

See R. S. C., Ord. 31, r. 19A. (3), as amended by R. S. C., March 1919, r. 5.

437. *Power conferred by rule*—*With reference to further affidavit in general terms*.—*BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. v. NETTLEFOLD*, No. 382, *ante*.

438. *Documents must be specifically identified*.—To justify an application for discovery of documents under R. S. C., Ord. 31, r. 19A. (3), the party making the application must in his affidavit name & specify, so that they can be identified, the particular documents of which he desires discovery. It is not sufficient to make a general affidavit based on *a priori* reasoning that certain classes of documents must be in his opponent's possession or power.

The discovery sought must be of a species, not a genus.—*WHITE v. SPAFFORD & CO.*, [1901] 2 K. B. 241; 70 L. J. K. B. 658; 84 L. T. 574; 45 Sol. Jo. 519, C. A.

Annotation:—*Consd. Graves v. Heinemann & Armstrong* (1901), 18 T. L. R. 115.

for such documents.—*KEATING v. DUBLIN UNITED TRAMWAYS CO.* (1907), 41 I. L. T. 165.—*IR.*

a. ———.]—The application for an order requiring a party in a cause to make discovery as to a specific document identified in the affidavit supporting the application may be made *ex parte*.—*O'MALLEY v. WALSH* (1903), 37 I. L. T. 75.—*IR.*

b. ———.]—*HENTY & GARDNERS v. BECKETT*, [1914] 2 I. R. 206.—*IR.*

438 i. *Documents must be identified*.—In order to obtain an order for a discovery of documents under Ord. 31, r. 20 (3), it is essential that the party making the application should, in his affidavit, name & specify, so that they can be identified, the particular documents of which he seeks discovery. An order under the rules leaves wholly untouched the privilege claimed by the other side.—*ROBERTS v. DUBLIN UNITED TRAMWAYS CO.* (1909), 43 I. L. T. 203.—*IR.*

PART II.—DISCOVERY OF DOCUMENTS.

439. —.]—**GRAVES v. HEINEMANN & ARMS-STRONG** (1901), 18 T. L. R. 115.

440. —.]—**HUNTLEY BROTHERS v. BACK-WORTH COLLIERIES (OWNERS)**, [1911] W. N. 34.

441. Document referred to in document produced.]—For the purpose of an application for production of certain specified documents on the ground that they relate to matters in question in the action, if a relevant letter scheduled to an affidavit of documents is produced, privilege not being claimed, & it refers to any other letter or document, that other letter or document is at once *prima facie* relevant to the matter in question in the action, & the person making the affidavit of documents must make an affidavit respecting that document.

Letters produced by the party or his solr. as a matter of courtesy, although not scheduled to the affidavit of documents, must, subject to an explanation that they were produced incautiously or inadvertently, be taken to relate to matters in question in the action, & will be treated in the same way as if they had been scheduled. On such an application questions of privilege will not be discussed.—**ORMERON, GRIERSON & Co. v. ST. GEORGE'S IRONWORKS, LTD.** (1906), 95 L. T. 694.

SECT. 13.—SHIP'S PAPERS—MARINE INSURANCE.

442. Former practice still applicable — Effect of Judicature Acts.]—An action having been brought on a policy of marine insurance by the mtgees. of 32-64ths of the ship, & it appearing that pltf. had no ship's papers, but that the ship had been sailed by the mtgor., who was the managing owner, & who had since died, defts. applied for an order that not only pltf. but the mtgor. or his representatives, & also all persons interested in the proceedings & in the insurance on the ship, should produce upon oath the ship's papers, & that in the meantime all the proceedings should be stayed:—**Held**: the old practice had not been superseded by Jud. Act, 1875 (c. 77), Ord. 3, rr. 11-18, & defts. were entitled to the order, which must remain in force until, at all events, pltf. had satisfied the ct. that they had applied to the mtgor. & done all in their power to produce the ship's papers.—**WEST OF ENGLAND BANK v. CANTON INSURANCE CO.** (1877), 2 Ex. D. 472.

Annotations:—**Apprvd. China S.S. Co. v. Commercial Assce.** (1881), 8 Q. B. D. 142. **Consd. London & Provincial Marine & General Insce. v. Chambers** (1900), 5 Com. Cas. 241. **Apld. Boulton v. Houlder**, [1904] 1 K. B. 784. **Consd. Graham Joint Stock Shipping Co. v. Motor Union Insce.**, [1922] 1 K. B. 563.

443. —.]—**CHINA S.S. Co. v. COMMERCIAL ASSURANCE CO.**, No. 461, *post*.

444. Discovery — How far applicable.]—The underwriter has a right to the most extensive discovery relative to the particular transaction which is impeached, but the ct. will interpose to prevent him from making general inquisitorial inquiries.—**JANSON v. SOLARTE** (1837), 2 Y. & C. Ex. 127; 6 L. J. Ex. Eq. 75; 160 E. R. 389.

445. —.]—**Re-insurance.]**—**NORD-DEUTSCHE VERSICHERUNGS GESSELLSCHAFT v. MERCHANT MARINE INSURANCE CO., LTD.** (1892), 67 L. T. 60, n.

Annotations:—**Consd. Willis v. Baddeley** (1892), 61 L. J. Q. B. 769; **China Traders' Insce. v. Royal Exchange Assce. Corp.**, [1898] 2 Q. B. 187.

446. —.]—**ROYAL EXCHANGE ASSURANCE CORPN. v. FABER** (1897), cited 67 L. J. Q. B. 738.

Annotation:—**Apprvd. China Traders' Insce. v. Royal Exchange Assce. Corp.** (1898), 67 L. J. Q. B. 736.

447. In an action by an underwriter on a policy of marine insurance brought by him against a re-insurer the latter is entitled to discovery of ship's papers.—**CHINA TRADERS' INSURANCE CO. v. ROYAL EXCHANGE ASSURANCE CORPN.**, [1898] 2 Q. B. 187; 67 L. J. Q. B. 736; 78 L. T. 783; 46 W. R. 497; 14 T. L. R. 423; 42 Sol. Jo. 507; 8 Asp. M. L. C. 409; 3 Com. Cas. 189, C. A.

Annotation:—**Refd. Tannenbaum v. Heath**, [1908] 1 K. B. 1032.

448. —.]—**Money overpaid by underwriters.]**—The relationship of underwriter & assured is such that the underwriter is entitled to the largest discovery. Therefore the ordinary practice, by which underwriters when sued on a marine policy are entitled to an order for the production upon oath of ship's papers, applies when the underwriters, alleging that the assured have conspired to defraud them by obtaining sums under the policy in excess of those due, sue the assured for the return of such sums.—**BOULTON v. HOULDER BROTHERS & Co.**, [1904] 1 K. B. 784; 73 L. J. K. B. 493; 90 L. T. 621; 52 W. R. 388; 20 T. L. R. 328; 48 Sol. Jo. 310; 9 Asp. M. L. C. 592; 9 Com. Cas. 182, C. A.

449. —.]—**Transit by post.]**—By a policy of insurance goods were insured during their transit by post from Cadiz to Alexandretta, in Syria, against certain perils. The period covered by the policy was from the date of posting until delivery into the hands of the consignee; but, except that the policy covered such portion of the transit as was by land as well as the portion which was by sea, it was in the form of an ordinary Lloyd's policy. In an action on the policy by the assured, defts. sought to obtain from pltf. & all persons interested in the proceedings & in the insurance the subject of the action, production of the various documents specified in the form Appendix K., No. 19, so far as they related to the subject-matter of the insurance:—**Held**: defts. were not entitled to discovery to the full extent of the application, but they were entitled to discovery in the ordinary form under Ord. 31, r. 12, before defence delivered, & the time for delivering such defence was extended until after such discovery should have been given.—**HENDERSON v. UNDERWRITING & AGENCY ASSOCN.**, [1891] 1 Q. B. 557; 60 L. J. Q. B. 406; 64 L. T. 774; 39 W. R. 528; 7 T. L. R. 367, D. C.

Annotations:—**Distd. China Traders' Insce. v. Royal Exchange Assce. Corp.**, [1898] 2 Q. B. 187. **Fold. Village Main Reef Gold Mining Co. v. Stearns** (1900), 5 Com. Cas. 246. **Dbtd. & N.F. Harding v. Bussell**, [1905] 2 K. B. 83. **Consd. Tannenbaum v. Heath**, [1908] 1 K. B. 1032.

450. —.]—**Transit partly by land.]**—By a policy of insurance gold was insured during transit from a mine in the Transvaal, whether in charge of the assured or their employees or otherwise, to the railway station in Johannesburg, thence by rail to the coast, & thence by steamer to Europe. The period covered by the risk was from the moment the gold was placed in the safe at the mine until delivery to the addressee. The policy was in the form of an ordinary Lloyd's policy, with certain alterations. In an action on the policy deft. applied for an order that pltf. should make & file an affidavit of ship's papers:—**Held**: deft. was not entitled to an affidavit of ship's papers, but pltf. must make an affidavit of documents in the ordinary form.—**VILLAGE MAIN REEF GOLD MINING CO. v. STEARNS** (1900), 5 Com. Cas. 246.

Annotations:—**N.F. Harding v. Bussell** (1905), 74 L. J. K. B. 500. **Refd. Tannenbaum v. Heath**, [1908] 1 K. B. 1032.

451. —.]—**In an action against**

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an underwriter upon a policy of insurance, which is substantially a marine insurance the fact that a part of the transit is by land does not affect the right of deft. to an affidavit of ship's papers.—

HARDING v. BUSSELL, [1905] 2 K. B. 83; 74 L. J. K. B. 500; 92 L. T. 531; 21 T. L. R. 401; 10 Asp. M. L. C. 50; 10 Com. Cas. 184, C. A.

Annotations :—*Consd.* Tannenbaum v. Heath, [1908] 1 K. B. 1032. *Refd.* Schloss v. Stevens (1905), 10 Com. Cas. 224. *Mentd.* Re Sutro & Hellbut, Symons, [1917] 2 K. B. 348.

452. ——— Transit by land.]—An order for filing an affidavit of ship's papers cannot be made in an action brought for a loss under a policy of insurance on the transit of goods where the transit is an inland transit. It is immaterial that the transit is partly by inland waters.—SCHLOSS v. STEVENS (1905), 10 Com. Cas. 224, C. A.

Annotation :—*Foll.* Tannenbaum v. Heath, [1908] 1 K. B. 1032.

453. ——— Fire policy.]—The practice with regard to discovery of ship's papers is peculiar to cases of marine insurance, & cannot be extended so as to allow the making of analogous orders for discovery in other cases of insurance.—TANNENBAUM & Co. v. HEATH, [1908] 1 K. B. 1032; 77 L. J. K. B. 634; 99 L. T. 237; 21 T. L. R. 450; 52 Sol. Jo. 375; 13 Com. Cas. 264, C. A.

Annotations :—*Mentd.* The Craghall, [1910] P. 207; Harrison v. Bull (1912), 81 L. J. K. B. 656.

454. ——— Of what documents—All relevant.]—In policy causes a judge at chambers will make an order for the assured to produce to the underwriters, upon affidavit, all papers in the possession of the former, relative to the matters in issue.—GOLDSCHMIDT v. MARRYAT (1809), 1 Camp. 559, 562.

Annotations :—*Extd.* China Traders' Insee. v. Royal Exchange Assee. Corp'n., [1898] 2 Q. B. 187. *Refd.* Threlfall v. Webster (1823), 7 Moore, C. P. 559; Peacock & Poake v. Lowe (1867), 36 L. J. P. & M. 91.

455. ——— ———.]—Pltf. in an action on a policy of marine insurance must himself make, & use all practicable means to procure other persons interested to make, an affidavit of ship's papers. In his affidavit pltf. must disclose not only every material document in his possession, but also every material document in the possession of the other persons interested; or else he must show what efforts he has made to obtain those documents & why he has been unable to obtain them; & he must account on oath for the disappearance of material documents which have been but are no longer in the possession of himself or other persons interested. The action will be stayed until this is done.

Mtgees. of a ship brought an action on a policy insuring the ship against war risks. The ship was insured by this & other policies against war risks to an amount largely exceeding the amount of the mtge. The defence was that the ship had been intentionally lost by her master & crew with the connivance of her owner. The ct. stayed the action until pltf. should make a proper affidavit of ship's papers & procure, or satisfy the ct. that they had used all practicable means of procuring, an affidavit from persons interested & particularly from the owner.—GRAHAM JOINT STOCK SHIPPING Co. v. MOTOR UNION INSURANCE Co., [1922] 1 K. B. 563; 91 L. J. K. B. 370; 126 L. T. 620; 15 Asp. M. L. C. 445; 27 Com. Cas. 130, C. A.

456. ——— ———.]—The affidavit of ship's papers which underwriters are entitled to require from pltf. in an action on a policy of marine insurance is not limited to documents in the

possession of pltf. or other persons interested in the insurance, but extends to all material documents in whosoever possession they may be.—TENERIA MODERNA FRANCO ESPANOLA v. NEW ZEALAND INSURANCE Co., [1924] 1 K. B. 79, C. A.

457. ——— Documents in possession of non-party.]—In an action against an underwriter of a policy of marine insurance for his proportion of the amount insured, deft. applied for a stay of proceedings till discovery of ship's papers should be made by a person on whose behalf the policy had been effected, but who had ceased to be interested in it, & was not under the control of pltf. real or nominal, & was out of the jurisdiction of the ct.:—*Held*: as the person from whom discovery was required was not interested in the action, & the persons by & for whom respectively the action was brought had no power over him, deft. was not entitled to the order.—FRASER & Co. v. BURROWS (1877), 2 Q. B. D. 624; 46 L. J. Q. B. 501.

Annotations :—*Consd.* China Transpacific S.S. Co. v. Commercial Union Assee. (1881), 51 L. J. Q. B. 132. *Overd.* Graham Joint Stock Shipping Co. v. Motor Union Insee., [1922] 1 K. B. 563. *Refd.* Willis v. Baddeley (1892), 67 L. T. 206.

458. ——— ———.]—In an action on a policy of marine insurance pltf. filed an affidavit of ship's papers, & informed deft. that in addition to the documents mentioned in the schedule to the affidavit there were certain other material documents which were the joint property of pltf. & other underwriters, & which, for that reason, would not be produced by pltf. Deft. applied for an order that pltf. should make a further & better affidavit of ship's papers & that the action should be stayed meanwhile:—*Held*: the action must be stayed until pltf. had satisfied the ct. that they had applied to the other underwriters & had done all in their power to produce the other documents.

Although in the ordinary case of discovery of documents a party is not bound to produce documents which are in the joint possession of the party & some other person, the rule does not apply to the case of ship's papers; in such a case, where a joint possession of relative documents is alleged, the party who has to comply with the order must, in order to do so, show that he has done his best to obtain the papers from the party who is jointly entitled to them. The effect of an order for ship's papers is not to stay an action absolutely, but only until the ct. is satisfied that it is practically impossible for the documents to be produced. Where a party to an action states in his affidavit of documents that he & another person, not a party to the action, jointly have in their possession or power certain documents, & the party to the action objects to produce such documents, there is, in the fact that the possession is joint, sufficient reason for refusing to order the party to produce the documents, & the ct. will protect the rights of the other person. In the ordinary case of an affidavit of documents discovery must be made of such documents as are in the possession or power of the party, but in an action on a policy of marine insurance pltf. may be ordered to do his best to produce documents, not only which are not in his sole possession, but which are not in his possession at all (KENNEDY, J.).—LONDON & PROVINCIAL MARINE & GENERAL INSURANCE Co., LTD. v. CHAMBERS (1900), 5 Com. Cas. 241.

459. ——— ———.]—GRAHAM JOINT STOCK SHIPPING Co. v. MOTOR UNION INSURANCE Co., No. 455, ante.

460. ——— ———.]—TENERIA MODERNA

FRANCO ESPANOLA v. NEW ZEALAND INSURANCE Co., No. 456, ante.

461. — Against what persons—All parties interested.]—In an action on a policy of marine insurance to recover the amount of a particular average loss, deft. is entitled, without an affidavit, & under the old practice, which has not been affected by Jud. Act, to an order staying proceedings until the ship's papers & other documents have been produced by pltf. & all persons interested in the proceedings & in the insurance the subject-matter of the action.—**CHINA S.S. Co. v. COMMERCIAL ASSURANCE Co. (1881), 8 Q. B. D. 142; 51 L. J. Q. B. 132; 45 L. T. 647; 30 W. R. 224, C. A.**

Annotations:—Consd. China Traders' Insee. v. Royal Exchange Assee. Corpn., [1898] 2 Q. B. 187. **Apld.** Graham Joint Stock Shipping Co. v. Motor Union Insee., [1922] 1 K. B. 563. **Reid.** Harding v. Bussell, [1905] 2 K. B. 83; Tannenbaum v. Heath, [1908] 1 K. B. 1032.

462. — Stay—Further affidavit notwithstanding.]—ABDELA (ISAAC J.), LTD. v. MUTUAL PROPERTY INVESTMENT, LTD., [1921] W. N. 23, C. A.

463. Production & inspection—When granted—Even though issue not joined.]—TURNER v. ROGERS & TURNER (1851), 18 L. T. O. S. 97.

464. — Before appearance.]—Inspection of the ship's papers in an action on a ship's policy allowed before appearance, pltf. having power to sign judgment in default of appearance under R. S. C. Ord. 13, r. 6.—**ANON. (1875), 20 Sol. Jo. 81; Bitt. Prac. Cas. 32; 1 Char. Cham. Cas. 43.**

465. — Persons having joint control of document—Ordinary rule of production distinguished.]—LONDON & PROVINCIAL MARINE & GENERAL INSURANCE Co., LTD. v. CHAMBERS, No. 458, ante.

466. — Of what documents.]—In an action by a ship-owner against the owners of goods for their proportion of a general average loss, the ct. refused to make an order for defts. to inspect & take copies "of the protest, the account of expenses incurred which constituted the sums sought to be made the subject of general average, & other usual documents in which the general average was claimed."—**TWIZELL v. ALLEN (1839), 5 M. & W. 337; 8 L. J. Ex. 269; 3 Jur. 484; 151 E. R. 143; sub nom. TUNZELL v. ALLEN, 7 Dowl. 496.**

467. — All relevant ones.]—In an action on a policy of marine insurance for a constructive total loss, deft. is entitled, both under the old practice & Evidence Act, 1851 (c. 99), s. 6, to an inspection of all papers in the possession of pltf. relative to the matters in issue, including letters between the captain & pltf.—**RAYNER v. RITSON (1865), 6 B. & S. 888; 35 L. J. Q. B. 59; 14 W. R. 81; 122 E. R. 1421.**

Annotations:—Consd. China S.S. Co. v. Commercial Assee. (1881), 8 Q. B. D. 142; China Traders' Insee. v. Royal Exchange Assee. Corpn., [1898] 2 Q. B. 187.

468. —]—KELLOCK v. HOME & COLONIAL INSURANCE SOCIETY (1866), 12 Jur. N. S. 653.

Part III.—Production and Inspection.

SECT. 1.—IN GENERAL.

469. Loss of right to—Delay.]—Deft. had been ordered by the V.-C. in another suit to give inspection of documents. The order had been made two years, but had not been acted on:—**Held:** this did not prevent an order for production in the present suit.—**BOURNE v. MOLE (1841), 4 Beav. 417; 49 E. R. 400.**

470. — Amendment of pleading.]—Pltf. does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents & its being heard, deprive himself of his right to their production.—**CHIDWICK v. PREBBLE (1843), 6 Beav. 264; 12 L. J. Ch. 338; 49 E. R. 827; sub nom. CHADWICK v. PUBBLE, 7 Jur. 294.**

471. Use of documents—Undertaking as to.]—RICHARDSON v. HASTINGS, No. 1127, post.

472. —]—On motion for production, deft. asked that pltf. might be prevented using them for any collateral purposes, alleging that there were proceedings at law pending. The ct., however, declined so to restrict the order.—**TAGG v. SOUTH DEVON RY. Co. (1849), 12 Beav. 151; 50 E. R. 1017.**

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c. Order to produce—Taken out by one defendant—Whether available to other defendants.]—Under an order to produce taken out by one deft., other defts. have no right to compel production or inspection.—**SEYMOUR v. LONGWORTH (1870), 3 Ch. Ch. 112.—CAN.**

d. — Letter not posted.]—In an action to establish a will, which defts. impeached for want of testamentary capacity, & set up a prior will, deft. included in his affidavit on production, copies of letters from himself

to testatrix, but objected to produce them for inspection on the ground that they were never sent to their destination:—**Held:** all memoranda & writings, or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production, unless they can be protected; & the mere fact in the case of a letter that it was not forwarded to its destination, is no ground for exemption.—**CAMERON v. CAMERON (1885), 10 P. R. 522.—CAN.**

e. — Books in constant use—

473. —]—HOPKINSON v. BURGHLEY (LORD), No. 1130, post.

474. — Information obtained—Not to be made public.]—Pltf. obtaining information from the production of documents in deft.'s possession, is not at liberty to make it public, & an injunction will, if necessary, be granted to restrain him. Pltf., having published statements relative to the matters in question, was, as a condition for making an order for production of documents, required to undertake, "not to make public or communicate to any stranger the contents of such documents."—**WILLIAMS v. PRINCE OF WALES LIFE, ETC. Co. (1857), 23 Beav. 338; 3 Jur. N. S. 55; 53 E. R. 133.**

Annotations:—Reid. Marshall v. Watson (1858), 25 Beav. 501. **Mentd.** Hoare v. Bremridge (1872), 27 L. T. 593.

475. Order to produce—Appeal from—No inspection pending.]—Deft., having been ordered to deposit documents in ct., & having appealed from that order, an order was made that, pending the appeal, pltf. should not be at liberty to inspect the documents.—**KELLY v. HURTON (1867), 15 W. R. 916, L. J.**

476. — Extension of time—Discretion of court.]—The extension of time under an order for

*From place beyond jurisdiction.]—*It is unreasonable that books in constant use should be required to be brought from without the jurisdiction for the purpose of an examination. Unless the examiner in the course of the examination rules that they are necessary.—**COMSTOCK v. HARRIS (1887), 12 P. R. 17.—CAN.**

f. — Before statement of claim.]—Production of documents should not be ordered to be made by deft. for the benefit of pltf. before he delivers his statement of claim, unless the judge is satisfied that the documents called

Sect. 1.—In general.

the production of documents is a matter within the discretion of the ct., & the Ct. of Appeal will not entertain an appeal from an order of the ct. below, granting such an extension of time.—*PERU REPUBLIC v. RUZO* (1874), 30 L. T. 190; 22 W. R. 358, L. JJ.

477. — Discretion of court to grant or refuse.]—Where a document was admitted to be in deft.'s possession, who denied pltf.'s right to certain money, & admitted that such document gave him a control over such money:—*Held*: pltf. was not entitled to require such document to be deposited in the usual way, but was entitled only to an order to inspect & take copies of it.

The object of the ct. in directing the production of documents admitted to be in deft.'s possession, is to enable pltf. to make out his case; but it is the practise so to regulate such orders as to prevent any damage arising to deft. It is for this reason that no orders are more under the discretion of the ct. In the present case, the document in question is a receipt which represents a sum of money, & deft. cannot have the money without producing this receipt. It is, in fact, to him the same as a bank note. Pltfs. claim a sum of £2,000, & say, that it is in the hands of deft. represented by a document in his possession. They do not, however, venture to ask to have the £2,000 paid into ct., but they seek only to have possession of the document; but this is, in fact, the same thing. If it is necessary for the purpose of evidence, the ct. will allow pltfs. to see the document; but with this view it will not be necessary to take it out of the possession of deft., & to deprive him of the control of money against which pltfs. make no case. The only use of the documents to pltfs. is for the purpose of evidence, for when they have once seen it, they can shape their proof of it as they like (*LORD COTTENHAM, C.*).—*BERWICK CORPN. v. MURRAY* (1849), 1 Mac. & G. 530; 1 H. & Tw. 452; 10 L. T. O. S. 61; 13 Jur. 1063; 11 E. R. 1371, L. C.

478. — —.]—Under R. S. C., 1875, Ord. 31, r. 11, a judge has no discretion as to refusing to allow, at the instance of one party to an action, the production of documents in the possession of another party relating to the matter in question, provided the documents are not privileged; & no document, other than a document of title, is privileged, except a communication from the

party's solr., or from an agent employed by or at the instance of the solr.

Where, by the consent of both parties, the documents in question are submitted to the judge, his decision cannot be questioned in a ct. of Appeal.

Letters written to pltf. in an action by his mercantile agent, & containing a mere volunteered opinion on pltf.'s chance of success, which was founded on no more knowledge of the facts than was common to both parties in the action:—*Held*: not protected by the privilege attaching to professional or quasi-professional communications.

That a document would not be admissible in evidence was never a ground either at law or equity for not granting inspection (*JESSEL, M.R.*).—*BUSTROS v. WHITE* (1876), 1 Q. B. D. 423; 45 L. J. Q. B. 642; 34 L. T. 835; 24 W. R. 721; 3 Char. Pr. Cas. 229, C. A.

Annotations:—*Distd.* *Johnson v. Smith* (1877), 36 L. T. 741. *Folld.* *Martin v. Butchard* (1877), 36 L. T. 732. *Distd.* *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315. *Consd.* *Bewicke v. Graham* (1881), 7 Q. B. D. 400. *Appld.* *McLean & Rigg v. Jones* (1892), 66 L. T. 653. *Expld.* *Hope v. Brash*, [1897] 2 Q. B. 188. *Refd.* *Friend v. L. C. & D. Ry.* (1877), 2 Ex. D. 437; *Bullock v. Corrie* (1878), 38 L. T. 102; *Dickson v. Harrison* (1878), 47 L. J. Ch. 686; *Webb v. East* (1880), 5 Ex. D. 108; *Re Holloway, Young v. Holloway* (1887), 12 P. D. 167; *O'Rourke v. Darbishire*, [1920] A. C. 581. *Mentd.* *Grant v. Holland* (1878), 3 C. P. D. 180; *The Theodor Kornor* (1878), 3 P. D. 162.

479. — —.]—In an action against the proprietors of a newspaper for a libel published therein defts., who had admitted the publication of the libel & pleaded an apology & payment into ct., stated in an affidavit of documents made by them that they had in their possession a manuscript which they objected to produce on the ground that it was the original contribution to them, & that which was published by them as admitted in their defence:—*Held*: an order ought not to be made for inspection by pltf. of the manuscript.

It was contended that the case of *Bustros v. White*, No. 478, *ante*, was conclusive to show that, where the party making an affidavit of documents has admitted the relevancy of a document in his possession, the ct. is bound to allow inspection of it by the other party. That case was decided not upon the rule now in question, but upon Ord. 31, r. 11, of the old rules, which correspond to Ord. 31, r. 14, of the present rules.

Since that decision additions have been made to rr. 12 & 18 of Ord. 31 for the express purpose of making it not compulsory on the ct. to order

or are essential to the statement of pltf.'s claim.—*ARTHUR & CO., LTD. v. UNIONS* (1898), 18 P. R. 205.—*CAN.*

g. — *Place of production.*]—Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, if a judge has a discretionary power to order production somewhere else to prevent inconvenience & prejudice to a party's operations.—*DAVIES v. UCHANAN* (1903), 10 B. C. R. 175.—*IN.*

h. — —.]—A local Master has power to order production of documents at a place outside the jurisdiction of the ct. since the determination of the place for production with the discretion of the judge of the instance, & that discretion could not be interfered with.—*LUMBER MANUFACTURERS YARDS v. MOOSE JAW FLOUR MILLS* (1914), 30 L. R. 580; 7 W. W. R. 876; 7 Sask. R. 437.—*CAN.*

i. — *Service of—Effect.*]—Service of an order for production & inspection of books is not such step in an action as would prevent a party

from serving a discontinuance notice.—*O'BRIEN v. O'BRIEN BREWING & MALTING CO.* (1909), 10 W. L. R. 694.—*CAN.*

j. — *At what stage made.*]—Defts. had filed & delivered their statement of defence, but the pleadings had not been closed:—*Held*: pltf. was entitled to the *præcipe* order for production.—*DALE v. HALL* 9 P. R. 106.—*CAN.*

k. — —.]—Production should not be ordered by a deft. who alleges in the pleadings that he is not a proper party to the action, until that question has been determined.—*LUMBER MANUFACTURERS YARDS v. MOOSE JAW FLOUR MILLS* (1914), 30 W. L. R. 580; 7 W. W. R. 876; 7 Sask. L. R. 437.—*CAN.*

l. — —.]—Pltf., a guarantee co., brought an action against the directors of a grain co., alleging that, by false representations, it was induced to issue a guarantee bond to the grain co. under the Grain Act (Man.), under which, upon the default of the grain co., it was compelled to pay a certain sum. Directors were also charged with misfeasance & negligence in the

management of the co. The bond was given in Aug., & in the month following, the co. went into liquidation. It was admitted that pltf. must fail in the action, as then constituted, on all issues, other than the one of false representations. On an appln. to compel one deft. to produce for inspection certain auditor's reports of the grain co.:—*Held*: pltf. was not entitled to ask for production, in respect of the issues as to which it was admitted it could not succeed in the action as then constituted, &, although counsel for pltf. stated that he intended to ask for leave to make the necessary amendments, such production should not be ordered until leave had been obtained & the amendments made.—*LONDON GUARANTEE v. HENDERSON* (1915), 32 W. L. R. 546; 9 W. W. R. 268; 23 D. L. R. 38; 25 D. L. R. 754; 25 Man. L. R. 617, 726.—*CAN.*

m. — —.]—Order for production of documents can be made under Order XI., rule 14, before issues have been framed.—*GOBINDA MOHAN DAS v. KUNJA BEHARY DASS* (1909), 14 O. W. N. 147.—*IND.*

n. *Custody of documents after.*]—

discovery or inspection if the ct. does not think it necessary (A. L. SMITH, L.J.).

I am of opinion that it was a matter of discretion for the judge, & is a matter of discretion for us, whether an order for inspection should be made (LORD ESHER, M.R.).—*HOPE v. BRASH*, [1897] 2 Q. B. 188; 66 L. J. Q. B. 653; 76 L. T. 823; 45 W. R. 659; 13 T. L. R. 478, Q. A.

Annotations:—*Appld.* Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Assocn., [1906] 1 K. B. 403. *Refd.* Maass v. Gas, Light & Coke Co. (1911), 80 L. J. K. B. 1313; *Re* Whitworth, O'Rourke v. Darbishire, [1919] 1 Ch. 320; Lyle-Samuel v. Odhams, [1920] 1 K. B. 135. *Mentd.* Adam v. Fisher (1914), 110 L. T. 537.

480. ——— Vexatious or oppressive.]—The ct. will take care that the production of documents by deft., by which discovery is sought, shall not be vexatious & improper.

A mere statement, however, by deft. that the production of the documents will not help pltf.'s alleged title, will not protect them from being produced.

Whatever has no bearing on this question of partnership will & ought to be protected. But on the other hand deft. must not be allowed to swear to the contents of documents, & say that they would not assist pltf.'s case as to his title to have a partnership declared, although they relate to matters in the suit (WOOD, V.C.).—*MANSELL v. FEENEY* (1861), 2 John. & H. 320; 4 L. T. 437; 9 W. R. 610; 70 E. R. 1079.

Annotations:—*Consd.* Bewicke v. Graham (1881), 7 Q. B. D. 400. *Refd.* Woolley v. Pole (1863), 14 C. B. N. S. 538; Minet v. Morgan (1873), 21 W. R. 467; Budden v. Wilkinson (1893), 4 R. 515.

481. ———.]—*PETRE v. SUTHERLAND* (1887), 3 T. L. R. 275, Q. A.

482. ———.]—*A.-G. v. NORTH METROPOLITAN TRAMWAYS CO.*, No. 51, *ante*.

483. Particulars & production—Right to, distinguished.]—*MILBANK v. MILBANK*, No. 357, *ante*.

SECT. 2.—IN WHAT PROCEEDINGS GRANTED.

See Part. II., Sect. 3, *ante*.

SECT. 3.—WHO MAY ORDER.

R. S. C., Ord. 31, r. 14; Ord. 36, r. 50.

484. Railway commissioners.]—By Regulation of Railways Act, 1873 (c. 48), s. 14, every railway co. is bound to keep at each of their stations books showing every rate for the time being charged for the carriage of traffic, other than passengers & their luggage, from that station to any place to which they book, & every such rate book shall, during all reasonable hours, be open to the

The object of the production of documents in actions, is to enable either party to discover the existence & acquire a knowledge of the contents of the deeds & writings relevant to the case; & when that object is accomplished the documents will go back to the custody of the party producing them.

The master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, & then to allow the party producing them to take them back.—*DARLING v. DARLING* (1883), 10 P. R. 1.—*CAN.*

g. Application for — When party's affidavit unnecessary.]—*Held:* upon an application for inspection of documents, an affidavit of the party, as well as of the attorney, is not necessary.—*MERCHANTS' BANK v. MURRAY J.*—VOL. XVIII.

(1884), 2 Man. L. R. 31.—*CAN.*

r. "Document"—What included in term—Ledger or book of account.]—A ledger or other book of account which contains entries relating to transactions between the parties to an action & also between one of the parties & many other persons having no interest in the case is not a "document" within the meaning of Rules 364 & 366, providing for orders for production & the affidavit thereon.—*ROYAL BANK OF CANADA v. WALLIS*, [1918] 2 W. W. R. 620; 13 Alta. L. R. 416; 41 D. L. R. 383.—*CAN.*

s. Refusal to allow inspection—Discretion of court—Exercise of.]—The high ct. will not in revision interfere where a lower ct., in the exercise of its discretionary power, refuses inspection of documents produced before it under a sealed cover in obedience to an

inspection of any person without payment of any fee, & any co. failing to comply with those provisions shall for each offence, & in case of a continuing offence for every day during which it continues, be liable to a penalty of £5, to be recovered before two justices:—*Held:* (1) the comrs. had jurisdiction to order an inspection, although justices also had the power to inflict a penalty for refusal to allow such inspection; (2) the right of inspection given by sect. 14 was general, & it was immaterial what motive or object a person had in desiring inspection; (3) inspection under the statute included the right of taking extracts or copies; (4) the ct. had power to order that extracts & copies might be taken as ancillary to the right of inspection, & in order to make such right effectual.—*PERKINS v. LONDON & NORTH WESTERN RY. CO.* (1874), 1 Ry. & Can. Tr. Cas. 327.

485. Referee—Official referee.]—The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the chambers of the judge to whom the action is attached.—*DAUVILLIER v. MYERS* (1881), 17 Ch. D. 346; *sub nom.* *DANVILLIER v. MYERS*, 29 W. R. 535.

Annotation:—*Consd.* Macalpine v. Calder, [1893] 1 Q. B. 545. I should require time to consider whether I could agree with the decision in *Dauvillier v. Myers*: because the late Master of the Rolls appears, in that case, to have assumed that a judge of the High Ct. has no power to make an order for production of documents at the trial, whereas such a power has constantly been exercised by common law judges (BOWEN, L.J.).

486. ——— Interlocutory powers.]—An official referee, to whom an action is referred for trial, has jurisdiction to make an order granting a commission to examine witnesses abroad, & a judge at chambers has jurisdiction to review the decision of the official referee granting or refusing such an order.—*HAYWARD v. MUTUAL RESERVE ASSOCN.*, [1891] 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624; 7 T. L. R. 575.

Annotation:—*Refd.* Macalpine v. Calder, [1893] 1 Q. B. 545.

487. ——— Special referee—Charity commissioners.]—The ct. will not make an order on pltf's., where the cause has been by decree referred to comrs., to produce & leave documents, etc., in their possession in the hands of their clerk in ct. for inspection by defts.

As the comrs. are an intermediate tribunal constituted for the purpose of making the inquiry referred to them, with competent authority to do all that should be necessary, & we for the time sworn officers of the ct., they must be considered as intending to do all that is fairly necessary on behalf of either party (*per* CUR.).—*SHREWSBURY SCHOOL (GOVERNOR, ETC.) v. MADDOCK* (1819), 7 Price, 655; 146 E. R. 1091.

order under Civil Procedure Code, s. 130. The power of refusing inspection should be exercised with great caution; & the opposite party should be allowed to inspect & take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate exclusively to the case of the party producing them & contain nothing supporting or tending to support the other side.—*BALAMONEY v. RAMASAMI CHETTIAR* (1906), 1 L. R. 30 Mad. 230.—*IND.*

PART III. SECT. 3.

t. Commissioner—Appointed to hold statutory inquiry—If a magistrate.]—Where the Commr. appointed to hold an inquiry under Commissions of Inquiry Act, 1908, is a magistrate, he has the same power to order production & inspection of documents as

Sect. 3.—*Who may order.* Sect. 4: Sub-sects. 1, 2, 5

488. ——— **Appointed ad hoc.**—KORKIS v. WEIR (ANDREW) & Co., No. 244, *ante*.

——— **In arbitration proceedings.**—See ARBITRATION, Vol. II., p. 628, Nos. 2554–2559.

——— **Between subject & Crown.**—See No. 163, *ante*.

489. **Registrar of Divorce Court.**—In a petition by the wife for dissolution of the marriage, she applied for an allotment of alimony pending suit. Resp. in answer filed a balance-sheet, showing a loss on his whole business for the year, & the registrar made an order on resp. & his partner to produce their account books. They accordingly produced a ledger for the last year, but refused to allow it to be inspected:—*Held*: the registrar had power under Divorce Rules, r. 191 to require an inspection of the ledger, & issued a writ of attachment to enforce compliance with his order.—CAREW v. CAREW, [1891] P. 360; 61 L. J. P. 24; 65 L. T. 167.

Annotation:—*Reid*. Tonge v. Tonge, [1892] P. 51.

SECT. 4.—BY AND AGAINST WHAT PERSONS OBTAINED.

SUB-SECT. 1.—PARTIES.

See Part II., Sect. 4, sub-sect. 1, *ante*.

SUB-SECT. 2.—COMPANIES AND CORPORATIONS.

490. **Officer ceasing to act.**—A bill was filed against A. as the registered public officer of a banking co. A. stated that he had ceased to be such public officer, & that B. then was the public officer of the co.:—*Held*: (1) under Country Bankers Act, 1826, (c. 46), s. 9, it was not necessary to file a supplemental bill, or to obtain any order for the purpose of bringing the new public officer before the ct.; (2) the ct. ordered the production of documents admitted by A. to be in the possession of the co.; the notice of motion being served on A., & the new public officer of the co.—BUTCHART v. DRESSER (1847), 16 L. J. Ch. 198; 9 L. T. O. S. 214; 11 Jur. 196, L. C.

491. **Liquidator—Liability to produce.**—*Re* BARNED'S BANKING CO., *Ex p.* CONTRACT CORPN., No. 318, *ante*.

492. ————*Re* MUTUAL SOCIETY, No. 320, *ante*.

493. ———— **After dissolution of company.**—

a magistrates' ct. under Magistrates' Cts. Act, 1908, sect. 83.—*Re* ST. HELEN'S HOSPITAL (1913), 32 N. Z. L. R. 682.—N.Z.

PART III. SECT. 4, SUB-SECT. 2.

491 i. **Liquidator—Liability to produce.**—Where documents have been traced into the possession of a co. which has since been ordered to be wound up, the ct. will direct the liquidator to produce them or account for his inability to do so.—*Re* DOMINION TRUST CO., LTD., *Ex p.* ROSS, [1921] 1 W. W. R. 1089.—C.

a. **President—Books of—Accounts of company contained in.**—In an action against a co., the defence was that the indebtedness was not that of the co., but of the president in his private capacity. Upon an appln. for a better affidavit on production of documents from the co., it had been determined that the co. had no documents to be produced, & it was

held that upon the examination for discovery of the president as an officer of the co., he could not be compelled to produce documents or books which had been determined not to be in possession of the co., nor his own books or documents; & a *subpoena* served upon the president was set aside *quoad* the production of documents which it called for:—*Held*: the *subpoena* should not be set aside, for the affidavits showed that the accounts of the deft. co. were kept in the books of the president; & the practice of setting aside a *subpoena*, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner.—ALEXANDER v. IRONDALE, BANCROFT & OTTAWA RY. CO. (1898), 18 P. R. 20.—CAN.

b. **Receiver appointed—Documents still in possession of company.**—The opposite party in a suit in entitled to the production of the books of a

Where an action has been brought against a liquidator personally he cannot object, if the co. has been dissolved, to produce the books & documents of the co. received by him as liquidator.—LONDON & YORKSHIRE BANK v. WING (1885), 1 T. L. R. 496, D. C.

494. ————*Re*—In an action on a promissory note, made by deft. as security for the repayment of moneys due to plffs. from a limited co., deft. objected to produce documents relating to the matters in question in the action, being the banker's pass-book & directors' minute book of the co., on the ground that they were in his custody only as liquidator in the voluntary winding up of the co. The co. had been dissolved before the application for discovery of documents was made, but no resolution had been passed under the Cos. Act, 1862 (c. 89), s. 155, for the disposal of the documents belonging to it:—*Held*: plffs. were entitled to inspection of documents, inasmuch as deft. had them in his absolute control.—LONDON & YORKSHIRE BANK v. COOPER (1885), 15 Q. B. D. 473; 54 L. J. Q. B. 495, C. A.

Annotation:—*Distd.* Gowan v. Briggs (No. 2) (1895), 39 Sol. Jo. 330.

Officer of—Joinder of for purpose of discovery.—See Nos. 32–37, *ante*.

——— **Making affidavit of documents.**—See Nos. 310–320, *ante*.

See, also, CORPORATIONS, Vol. XIII., pp. 422 *et*

SUB-SECT. 3.—INFANTS.

See Part II., Sect. 4, sub-sect. 3, *ante*.

SUB-SECT. 4.—LUNATICS AND PERSONS UNSOUND MIND.

See Part II., Sect. 4, sub-sect. 4, *ante*.

SUB-SECT. 5.—MORTGAGOR AND MORTGAGEE.

495. **Proceedings between mortgagor & third party—Mortgagee not compellable to produce.**—If A. has lent money on a deed of assignment, which is deposited in his hands, he is not compellable to produce it on the part of the assignor, in an action between the assignor & a third person.—SCHLENKER v. MOXEY (1824), 1 C. & P. 178, N. P.; *subsequent proceedings* (1825), 3 B. & C. 789.

Annotation:—*Reid*. Doe d. Egremont v. Date (1842), 3 Q. B. 609.

co., although the co. may be in the hands of a receiver, who is entitled to the custody of the books & documents, if he has not actually taken possession of them. The usual order for production was varied in this case by directing only that the books & documents be produced to plffs. or their solrs. on demand after twenty-four hours' notice at the co.'s general offices, & that plffs. or their solrs. be allowed to take copies of, or extracts from, such portions of the contents as related to the matters in question.—MAXWELL v. MANITOBA & N. W. RY. CO. (1896), 11 Man. L. R. 149.—CAN.

c. **Not a party—Whether bound to produce documents.**—An order obtained by plff. requiring a co., not a party to the action, to produce documents for inspection by plff. before the trial was set aside.—McCURDY v. OAK TYRE & RUBBER CO., LTD. (1919), 44 O. L. R. 235; 15 O. W. N. 193.—CAN.

496. —.] mtgee. insisting by his answer to an inquiry in a bill, that he is not bound to produce his title deeds, but admitting that he is mtgee. of part of certain estates, is not bound, in answer to the inquiries of the bill, to say what part, as that would be stating the contents of his title deeds.—*ADDISON v. WALKER* (1841), 4 Y. & C. Ex. 442; 10 L. J. Ex. Eq. 73; 160 E. R. 1079.

497. —.]—*MACKRETH v. DUNN* (1843), 1 L. T. O. S. 202.

498. —.]—A bill was filed by a legatee of a legacy charged on a term of years against the trustee & against the mtgee. of the term under a mtge. made by the surviving trustee, who had power to give receipts. The bill made a case against the mtgee. of knowledge of circumstances which affected him with a breach of trust; but did not allege that the deed disclosed those circumstances. The mtgee.'s answer admitted the deed, & craved leave to refer to it when produced; but denied the notice:—*Held*: pltf. could not have production of the mtge. deed.—*HOWARD v. ROBINSON* (1859), 4 Drew. 522; 28 L. J. Ch. 670; 33 L. T. O. S. 6; 5 Jur. N. S. 136; 7 W. R. 223; 62 E. R. 200.

499. On sale of mortgaged property—Mortgagee consenting to sale.]—A mtgee., who was a party to the suit, consented to a sale of the mtged. property:—*Held*: he must produce & leave in the master's office the title deeds which were necessary in order to complete such sale.—*LIVESEY v. HARDING* (1839), 1 Beav. 343; 48 E. R. 972.

500. Mortgagee of limited interest—Liability to produce—Tenancy in common.]—Motion, on the part of a pltf., for the production of a deed alleged to be in possession of deft. as tenant in common with pltf., refused, it appearing by the answer that deft. had sold his share, & was in possession of the deed in question only as mtgee. to the purchaser. A mtgee. has no right to show the title of his mtgor.—*LAMBERT v. ROGERS* (1817), 2 Mer. 489; 35 E. R. 1027.

Annotations:—*Refd.* Taylor v. Rundell (1841), Cr. & Ph. 104; Sweet v. Hunter (1845), 9 Jur. 807.

501. —.]—Leasehold.]—A bill of discovery was filed by the assignee of the lessor against the assignee of the lessee in aid of an action on the covenants in the lease. The latter had the lease & assignment in his possession, but stated that he held the property by way of security, & he objected to produce them in the absence of the party entitled to the equity of redemption:—*Held*: he was bound to produce them for pltf.'s inspection.—*BALLS v. MARGRAVE* (1841), 4 Beav. 119; 49 E. R. 283.

502. Mortgage prior to limitation of interest—Subsequent settlement for life with remainders—Liability of mortgagee to remainderman.]—By a deed of settlement a general power of appointment over certain estates was reserved to settlors, subject to which the estates were limited to settlors for their lives, with remainders to other persons in strict settlement. Settlors executed their power of appointment by mortgaging the estates:—*Held*: mtgees. could not, in a suit for redemption brought by one of the remaindermen, be ordered to produce the deed of settlement, or to give any discovery as to it.—*CHICHESTER v. DONEGALL* (MARQUIS) (1870), 5 Ch. App. 497; 39 L. J. Ch. 694; 22 L. T. 458; 18 W. R. 531, L. J.

& South Wales Bank

Right to production as between mortgagor & mortgagee.]—See MORTGAGE.

SUB-SECT. 6.—PURCHASES FOR VALUE WITHOUT NOTICE.

503. General rule.]—(1) Before Jud. Act, 1873 (c. 66), a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Ct. of Ch. had concurrent jurisdiction with the common law cts. upon legal titles. Above Act, s. 24 (2), therefore, gives no protection to defts., the ct. having now complete jurisdiction over the whole action.

An action having been brought in the Ch. Div. to recover possession of land & claiming production & delivery of documents alleged to be material to pltf.'s title, defts. pleaded that they were purchasers for valuable consideration without notice, & on this ground objected to the discovery & production of certain documents of title:—*Held*: the objection was invalid.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see* No. 15, *ante*).—*IND, COOPE & CO. v. EMMERSON* (1887), 12 App. Cas. 300; 56 L. J. Ch. 989; 56 L. T. 778; 36 W. R. 243, H. L.; *affg.* S. C. *sub nom.* *EMMERSON v. IND, COOPE & CO.* 33 Ch. D. 323, C. A.

Annotations:—*As to* (1) *Refd.* Morris v. Edwards (1890), 15 App. Cas. 309; McLean & Rigg v. Jones (1892), 66 L. T. 653; Budden v. Wilkinson, [1893] 2 Q. B. 432; A.-G. v. Newcastle-upon-Tyne Corpn., [1899] 2 Q. B. 478. *As to* (2) *Refd.* Mexborough v. Whitwood U. D. C., [1897] 2 Q. B. 111; Milbank v. Milbank (1900), 82 L. T. 63.

504. Need not produce title deeds.]—A purchaser from A. of lands which B. makes title to, getting the deeds making out B.'s title is not bound to discover them.—*SHERLY v. FAGG* (1665), 1 Cas. in Ch. 68; 22 E. R. 699; *sub nom.* *FAGG'S CASE*, cited 1 Vern. 52, L. C.

Annotations:—*Refd.* Millard's Case (1678), Freem. Ch. 43; Sanders v. Deligne & Barnes (1692), Freem. Ch. 123; Jerrard v. Saunders (1794), 2 Vos. 454. *Mentd.* Bromley v. Hamond (1679), 2 Cas. in Ch. 23; Huntington v. Greenville (1682), 1 Vern. 49; Baden v. Pembroke (1688), 2 Vern. 52; Hitchcock v. Sedgwick (1690), 2 Vern. 156; Carter v. Carter (1857), 3 K. & J. 617.

505. —.]—A bill for the discovery of a title; deft. pleads he is a purchaser for a valuable consideration, without notice, etc., & that he had obtained a verdict & judgment in ejectment, etc. The plea was allowed.—*HEYMAN v. GOMELDON* (1673), Cas. temp. Finch, 34; 23 E. R. 19.

506. —.]—*EVERENDEN v. VANACKER* (1676), Cas. temp. Finch, 255; 23 E. R. 140.

507. —.]—*BURLACE v. COOKE* (1677), Freem. Ch. 24; 2 Eq. Cas. Abr. 681; 22 E. R. 1035, L. C.

Annotation:—*Follid.* Jerrard v. Saunders (1794), 2 Vos. 457.

508. —.]—*MILLARD'S CASE* (1678), Freem. Ch. 43; 22 E. R. 1047, L. C.

509. —.]—*PERRAT v. BAILLARD* (1681), 2 Cas. in Ch. 72; 22 E. R. 852, L. C.

510. —.]—*ANON.* (1697), 3 Salk. 85; 91 E. R. 707.

511. —.]—*WATKINS v. HATCHET* (1698), 1 Eq. Cas. Abr. 36; 21 E. R. 856, L. C.

512. —.]—*ANON.* (1704), Freem. Ch. 275; 22 E. R. 1206.

513. —.]—Claimant under a marriage settlement without notice of prior incumbrances shall not be compelled to a discovery.—*WILLIAMS v. LANE* (1726), 8 Bro. Parl. Cas. 291; 3 E. R. 591, H. L.

514. —.]—A deft. is obliged to answer every material fact stated in the information, it will subject him to some penalty or forfeiture; or unless he can plead as a purchaser for a valuable consideration, without notice whether the remedy be at law or in equity (*PARKER, C.B.*).—*A.-G. v. DUPLESSIS* (1752), Park. 144; 145 E. R. 739;

Sect. 4.—By and against what persons obtained:
1.]

nom. DUPLESSIS v. A.-G. (1753), 1 Bro. Parl. Cas. 415, H. L.

Annotations:—Mentd. Muckleston v. Brown (1801), 6 Ves. 52; Stickland v. Aldridge (1804), 9 Ves. 516; Podmore v. Gunning (1836), 7 Sim. 644; Rittson v. Stordy (1855), 3 Sm. & G. 230; Wallgrave v. Tehbs (1855), 2 K. & J. 313; Barrow v. Wadkin (1857), 24 Beav. 1.

515. —.]—Deft. stating by answer a purchase for valuable consideration without notice shall not be compelled to answer further.—JERRARD v. SAUNDERS (1794), 2 Ves. 454; 30 E. R. 721, L. C.

Annotations:—Refd. A.-G. v. Wilkins (1853), 17 Beav. 285; Gomm v. Parrott (1857), 3 C. B. N. S. 47. *Mentd.* Baker v. Mollish (1805), 11 Ves. 68.

516. —.]—Bill by tenant in tail in possession under a marriage settlement for discovery & delivery of title deeds. Plea, mtge. by the tenant for life, alleging himself to be seised in fee, & in possession of the premises & deeds as apparent owner, allowed; upon the rule, that a ct. of equity gives no assistance against a purchaser for valuable consideration without notice.—WALLWYN v. LEE (1803), 9 Ves. 24; 32 E. R. 509, L. C.

Annotations:—Consd. Carter v. Carter (1857), 3 K. & J. 617. *Distd.* Newton v. Newton (1868), 4 Ch. App. 143. *Refd.* Jackson v. Rowe (1828), 4 Russ. 514; A.-G. v. Wilkins (1853), 17 Beav. 285; Finch v. Shaw, Colyer v. Finch (1854), 19 Beav. 500; Phillips v. Phillips (1862), 4 De G. F. & J. 208; Thorpe v. Holdsworth (1868), L. R. 7 Eq. 139; Heath v. Crealock (1873), L. R. 18 Eq. 215; Manners v. Mew (1885), 29 Ch. D. 725; Ind. Coope v. Emmerson (1887), 12 App. Cas. 300; Taylor v. Russell, [1891] 1 Ch. 8. *Mentd.* Jones v. Smith (1841), 1 Hare, 43; Frazer v. Jones (1848), 17 L. J. Ch. 353; Ogilvie v. Jeaffreson (1860), 2 Giff. 353; Stackhouse v. Jersey (1861), 30 L. J. Ch. 421; Hunt v. Luck (1902), 86 L. T. 68.

517. —.]—An information made claim, on behalf of a charity, to a farm, out of which a fixed annual rentcharge had for many years been paid. Deft. admitted the right to the rentcharge, but contended that he represented parties who were purchasers of the farm for valuable consideration, without notice. He admitted he had in his possession title deeds which made out his own title, but did not make out or evidence the title of the charity:—*Held*: deft. was not bound to produce them.—A.-G. v. STRUTT (1840), 3 Beav. 306; 10 L. J. Ch. 24; 49 E. R. 155.

518. —.]—A., the owner of an estate, first mortgaged it to B. & afterwards sold & conveyed it to C., to whom he delivered the title deeds. In a suit by B. against C., insisting on his priority,

C., by his answer, professed to state the contents of the deed of conveyance to A. He admitted the possession of this & the other title deeds, but insisted that he was a purchaser for valuable consideration without notice, & he said that B. had no right or title to the production of the deeds, or any interest therein:—*Held*: B. was entitled to the production of the conveyance to A., but that the other title deeds were privileged.—HUNT v. ELMES (1859), 27 Beav. 62; 28 L. J. Ch. 680; 33 L. T. O. S. 129; 5 Jur. N. S. 645; 7 W. R. 471; 54 E. R. 24.

519. — *Distinction where title legal or equitable.*—ROGERS v. SEALE (1681), Freem. Ch. 84; 2 Eq. Cas. Abr. 70; 22 E. R. 1073, L. C.

Annotations:—N.F. Jerrard v. Saunders (1794), 2 Ves. 454. *Consd.* A.-G. v. Wilkins (1853), 17 Beav. 285.

See, further, EQUITY.

520. — *Unless previous admission of possession made.*—OVEY v. LEIGHTON (1825), 2 Sim. & St. 234; 57 E. R. 335.

Annotations:—Apld. Portarlington v. Soulby (1834), 7 Sim. 28. *Refd.* Duncombe v. Davis (1841), 1 Hare, 184; Lancaster v. Evors (1844), 1 Ph. 349. *Mentd.* Taylor v. Bailey (1838), 8 L. J. Ch. 50; Wich v. Parker (1856), 22 Beav. 59.

521. — *Unless document impeached for fraud.*—A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered, under special circumstances, to be produced.—KENNEDY v. GREEN (1833), 6 Sim. 6; 58 E. R. 497.

Annotation:—Refd. A.-G. v. Thompson (1849), 8 Hare, 106.

522. — —.]—GRESLEY v. MOUSLEY, No. 711, *post*.

523. — *Unless having constructive notice.*—Purchaser for valuable consideration ordered to produce deeds, from the recitals of which, as set forth by the answer, constructive notice apparent.—NEFSOM v. CLARKSON (1838), Coop. Pr. Cas. 93; 47 E. R. 416; *sub nom.* MEESON v. CLARKSON, 2 Jur. 43, L. C.

Annotation:—Refd. Smith v. Beaufort (1842), 1 Hare, 507.

SUB-SECT. 7.—OTHER PERSONS.

524. Sheriff—Action for failure to levy under writ—No inspection of writ.]—After an action brought against the sheriff of Chester for not levying under a writ issued out of the Ct. of Great Session, the ct. refused to grant a rule for the sheriff to give pltf. inspection of the writ in order

PART III. SECT. 4, SUB-SECT. 7.

d. Assignees of contract—Documents in possession of assignors' solicitors—Notice.]—B. & T. as solrs. of G. & W. prepared & retained possession of deeds relative to a contract in which G. & W. were interested. Subsequently all the beneficial interest in the contract was assigned by G. & W. & others to H. W. & Co. On an application by H. W. & Co. for inspection of the documents:—*Held*: the assignees were not entitled to move for inspection unless either in priority with or upon notice to or consent of, their assignors.—*Re* BENNETT & TAYLOR (1865), 2 W. W. & A'R. 15.—AUS.

e. Assignee of insolvent—By sureties for payment of composition.]—Upon an arrangement made by P. with his creditors, deft. M. held the estate of P. in trust to secure the reimbursement or indemnity of pltf's. & one H., who became sureties for the payment of the composition. P. again became insolvent, & deft. M. was appointed his assignee. A bill being filed to enforce the arrangement for indemnity, documents held by M. as assignee were held liable to production.—WAGNER v.

MASON (1874), 6 P. R. 187.—CAN.

f. Partner of party—Partnership books.]—Upon a motion to restrain deft. from receiving moneys due under a contract, & to appoint pltf. receiver of such moneys, an affidavit of deft.'s partner was filed in answer, & he was cross-examined upon it by pltf.: he was unable to answer questions with reference to deft.'s position in regard to the partnership, because he had not with him the books of the partnership from which alone the facts could be ascertained, & he refused to produce such books:—*Held*: he should be ordered to attend for further examination, & to produce the books required, at his own expense.—RUSSELL v. MACDONALD (1888), 12 P. R. 458.—CAN.

g. Execution creditor—Against solicitor—Mortgagee.]—Where a solr. was the mtgee. under a mtge. from a client an order was obtained against him by an execution creditor of the grantor for production of his books & papers, except those which were privileged as containing anything of a confidential nature as between solr. & client, in order that the *bona fides* of

the alleged consideration for the mtge. might be investigated.—SMITH v. MCKAY (1898), 4 T. L. R. 202.—CAN.

h. Solicitor—Not acting in the case—Holding client's muniments of title—Decree binding client.]—When a solr., as such, receives from his client muniments of title, the ct. has jurisdiction, under a decree binding the client, to order his solr. to bring in such of the client's deeds as are in his possession, though he never appeared in the cause, & though it be uncertain when the deeds came into his possession.—HARGRAVE v. HOLLAND (1840), 2 L. Eq. R. 137.—IR.

k. Purchaser of estate—Sale under decree—Original deeds—For comparison with copies furnished.]—Purchasers of an estate, sold under decree, requiring to compare with the original deeds lodged in the Master's office, for the purposes of the sale, copies furnished with the abstract of title, the ct. ordered that the deeds should be handed over to pltf.'s solr., he undertaking to reledge them after the comparison should be made: & that pltf.'s solr. should produce them in this office to the solrs. for the purchasers, &

to frame the declaration, although the writ was in the sheriff's possession.—*R. v. CHESTER (SHERIFF)* (1819), 1 Chit. 476.

SECT. 5.—OF WHAT DOCUMENTS.

SUB-SECT. 1.—RELEVANT DOCUMENTS.

525. General rule.]—It is objected that it is not clearly shown that the document would be evidence for plffs. But the fact whether a document would be evidence or not for the party claiming inspection is not a test to the right to it. Everything which will throw light on the case is *prima facie* subject to inspection (*BLACKBURN, J.*).—*HUTCHINSON v. GLOVER* (1875), 1 Q. B. D. 138; 45 L. J. Q. B. 120; 33 L. T. 605; 24 W. R. 185; 3 Asp. M. L. C. 85; 1 Char. Pr. Cas. 120; *affd.* (1876), 33 L. T. 834, C. A.

Annotations:—*Consd.* *Kearsley v. Phillips* (1882), 10 Q. B. D. 36. *Refd.* *Vivian v. Little* (1883), 11 Q. B. D. 370.

526. What amounts to relevancy—Proximately connected with matter at issue.]—In an action by a consignee of goods against shipowners for damage sustained in consequence of the unseaworthiness of the ship, the ct. made an order, under C. L. P. Act, 1854, s. 50, for pltf. to inspect & take copies of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for the repairs done to the ship, the captain's protest, & the log book, as being documents proximately connected with the matter in issue. *Semble*: since the statute, there is no difference in this respect between the case of an action between the owners & underwriters & any other persons.—*DANIEL v. BOND* (1861), 9 C. B. N. S. 716; 3 L. T. 700; 9 W. R. 313; 1 Mar. L. C. 23; 142 E. R. 282.

Annotations:—*Apld.* *Baker v. L. & S. W. Ry.* (1867), L. R. 3 Q. B. 91. *Refd.* *Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Mentd.* *Peru Republic v. Weguelin* (1872), L. R. 7 C. P. 352.

527. — Petition to restrain marriage of ward of court—Letters promising marriage.]—A mother petitioned that deft. might be restrained from marrying her daughter, being an infant, & a ward

permit them to compare the said deeds with the copies furnished, or to be furnished to them.—*REYNOLDS v. REYNOLDS* (1843), 6 L. Eq. R. 75.—*IR.*

1. Third parties—Books of party destroyed.]—In an action against an insurance co. pursuer alleged that the stock insured & his books had been destroyed by fire. Diligence was granted to defenders to recover books of third parties, who had sold good to pursuer, in order that they might prove the extent of the said sales.—*PORTER v. PHOENIX ASSURANCE CO.* (1867), 5 Macph. (Ct. of Sess.), 533; 39 Sc. Jur. 268.—*SCOT.*

PART III. SECT. 5, SUB-SECT. 1.

525 i. General rule.]—Everything that is relevant to the allegations by pltf. in his claim & tends to prove their truth must be disclosed by deft. as well by production of documents as by answering questions. The production would also show whether any of the material had been garbled, so as to show deft.'s animus.—*LINDSEY v. LESUEUR* (1912), 3 O. W. R. 851; 3 O. W. N. 486; 1 D. L. R. 61.—*CAN.*

526 i. What amounts to relevancy—Proximately connected with matter at issue.]—Copies of documents relied on by the opposite party, & of all documents connected with the subject-matter of the suit, will be ordered by the ct., if material to the party applying for the same, or if non-acquaintance with the documents & their contents would be prejudicial to the case of the

party applying.—*MINITER v. NORTH OF ENGLAND INSURANCE CO.* (1857), 9 Ir. Jur. 187.—*IR.*

526 ii. —In an action of assythemment & damages by the children of a party who had been killed by a stage-coach accident, against the proprietors of the coach, in which pursuers had set forth, that they had been deprived of the paternal care & support, & had been previously injured in their feelings; diligence granted to defenders for recovery of documents, to instruct that deceased did not support his family, but had been separated from them in consequence of his habits, & of an illicit intercourse he carried on; & for recovery of a correspondence alleged to have passed between deceased & the party with whom he had the illicit intercourse.—*BRASH v. STEELE* (1845), 7 Dunl. (Ct. of Sess.) 539; 17 Sc. Jur. 267.—*SCOT.*

526 ii. —*E. H. & others* raised an action against trustees under a trust-disposition & settlement by E. B. for reduction of the trust disposition & settlement. The case having been set down for trial, defenders moved for a diligence for the recovery of medical reports on deceased's health, obtained by pursuers during her lifetime. Pursuers objected that this was an attempt to obtain precognitions of their medical witnesses.

The ct. granted the diligence.—*HENDERSON v. HEDRICH* (1892), 20 R. (Ct. of Sess.) 95; 30 Sc. L. R. 75.—*SCOT.*

of the ct. The ct. directed deft. to produce such letters as contained a promise of marriage.—*SMITH v. SMITH* (1745), 3 Atk. 304; 20 E. R. 977.

528. — Action for breach of contract—Letters of which no copies kept.]—*Held*: deft. was entitled under the common law jurisdiction of the ct., to have an inspection of letters which in the course of a negotiation for taking a farm he as agent for his brother had written to pltf., but of which he had kept no copies, it being sworn that pltf.'s claim in the action was founded upon such letters, & that the inspection was necessary for his defence thereto.—*PRICE v. HARRISON* (1860), 8 C. B. N. S. 617; 29 L. J. C. P. 335; 6 Jur. N. S. 1345; 141 E. R. 1308.

Annotations:—*Apld.* *Owen v. Nickson* (1861), 3 E. & E. 602; *Brown v. Lioll* (1885), 16 Q. B. D. 229.

529. — Action for detinue—Memorandum of agreement.]—Plffs., who were trustees of P.'s marriage settlement & also her exors., administered interrogatories to defts. who, in answer, admitted that they had in their possession a memorandum of a specified date, signed by P., agreeing that the deeds should remain in the custody of N. till repayment of the moneys advanced by him to P.:—*Held*: plffs., on an affidavit stating that they were entirely ignorant of the said memorandum, & had no means of ascertaining anything of its contents, & that it was material & necessary, in order to prosecute the action, that they should have inspection of it, were entitled to inspection of the memorandum, & also to be furnished by defts. with particulars of the lien or mtge. on the deeds relied upon by them.—*OWEN v. NICKSON* (1861), 3 E. & E. 602; 30 L. J. Q. B. 125; 3 L. T. 737; 7 Jur. N. S. 497; 121 E. R. 568.

530. — Action for wrongful dismissal—Employers' books.]—In an action by a superintendent against a railway co. for improperly dismissing him from their employ:—*Held*: pltf. was entitled to have an inspection of all minutes or entries in the co.'s books having any reference to pltf.'s employment.—*HILL v. GREAT WESTERN RY. CO.* (1861), 10 C. B. N. S. 148; 142 E. R. 406.

Annotation:—*Consd.* *Houghton v. London & County Assee.* (1864), 17 C. B. N. S. 80.

530 i. — Action for wrongful dismissal—Employers' books.]—In a suit for wrongful dismissal of a servant of a co., in which pltf. alleged that the motive for dismissing him was his discovery of certain irregularities of the manager with regard to money matters:—*Held*: he was entitled to inspect the accounts which had been checked by himself while in the co.'s service, the press-copy letter-book containing copies of correspondence regarding his own conduct while in the co.'s service, & the account of a particular item in respect of which he alleged he had made discoveries that he imputed to the manager as the cause of his dismissal.—*MITCHELL v. ORIENTAL GAS CO.* (1866), 1 Ind. Jur. N. S. 323.—*IND.*

530 ii. —*Where pltf. claimed damages for wrongful dismissal, alleging that his employment was to sell machinery at a remuneration based on a percentage of the selling price, the ct. ordered the production, before trial, of defts.' books for inspection by pltf. as to entries dealing with sales of machinery after the date of dismissal, such entries being held relevant to the question of damages. Semble: where damages claimed resolve themselves purely into a question of account, the ct. may refuse to order the production of deft.'s books before trial & may leave pltf. first to establish his right of action. The same course may be adopted where the balance of convenience clearly indicates it.—MACKENZIE*

Sect. 5.—Of what documents: Sub-sect. 1.]

531. — Action for breach of promise of marriage—Letters to plaintiff.]—In an action for breach of promise of marriage the ct. will make an order for deft. to inspect & take copies of the letters written by him to pltf., upon affidavit that it is material & necessary for him to have such inspection, etc., in order to support his case at the trial, & to prepare for trial.—*STONE v. STRANGE* (1865), 3 H. & C. 541; 5 New Rep. 318; 34 L. J. Ex. 72; 11 L. T. 717; 11 Jur. N. S. 164; 13 W. R. 350; 159 E. R. 643.

531a. — — — — —.]—In an action for breach of promise of marriage the ct. refused to allow deft. to inspect his letters sent to pltf., upon an affidavit that the promise, "if any," was contained in the letters.—*HAMER v. SOWERBY* (1860), 3 L. T. 734.

531b. — — — — — Letters to defendant.]—Where, on a proposed marriage between pltf. & deft. having been broken off, a mutual return of letters was agreed upon & deft. had returned to pltf. all her letters, but had not received all his in return, the ct. refused to order an inspection of a letter in pltf.'s possession, written by her, & containing, as was alleged, a release of her right of action for a breach of promise of marriage.—*GOODLIFF v. FULLER* (1845), 14 M. & W. 4; 14 L. J. Ex. 104; 153 E. R. 365; *sub nom.* (*GOODLIFF v. FULLER*, 2 Dow. & L. 661.

Annotations:—Distd. Price v. Harrison (1860), 6 Jur. N. S. 1345. *Goodliff v. Fuller* was decided before the passing of Evidence Act, 1851 (c. 99), & under the circumstances of that case probably inspection would be granted now (*WILLIAMS, J.*). *Refd.* Shadwell v. Shadwell (1858), 6 C. B. N. S. 679. An application such as that in *Goodliff v. Fuller* would be successful since the statute (*WILLES, J.*).

532. — Action for fraudulent representation as to ship—Letters of passengers as to condition.]—In an action at the suit of a passenger against the agents to a ship for alleged false & fraudulent representations as to the character, accommodation, & qualities of the ship, the ct. refused to allow pltf. to inspect letters from other passenger to defts., complaining of the condition of the ship, & refusing to proceed in her, & also letters from the captain & the owner written after such complaints. The mere fact that such letters

might afford materials for a cross-examination of deft.'s witnesses, is no ground for inspection.—*RICHARDS v. GELLATLY* (1872), L. R. 7 C. P. 127; 26 L. T. 435; 20 W. R. 630; 1 Asp. M. L. C. 277.

Annotations:—Mentd. Wiedemann v. Walpole, [1891] 2 Q. B. 534; Thomas v. Jones, [1920] 2 K. B. 399.

533. — Document for comparison of handwriting.]—*Qu.*: whether a document required only for comparison of handwriting is a relevant document which deft. is bound to specify or produce.—*WILSON v. THORNBURY* (1874), L. R. 17 Eq. 517; 43 L. J. Ch. 356; 22 W. R. 509.

534. — Negotiations for compromise.]—*BAGNALL v. CARLTON*, [1876] W. N. 215.

535. — Verification of accounts.]—*MORRIS TUBE CO., LTD. v. KYNOCH & CO., LTD.* (1897), 13 T. L. R. 240.

536. — Action for libel.]—*YORKSHIRE PROVIDENT LIFE ASSURANCE CO. v. GILBERT & RIVINGTON*, No. 324, *ante*.

537. — — — — —.]—*BLANC v. BURROWS* (1896), 12 T. L. R. 521, C. A.

538. — — — — —.]—*HOPE v. BRASH*, No. 479,

539. — — — — —.]—Deft. to an action for libel who pleads a justification must state in his defence or in his particulars of justification the specific facts or instances upon which he relies in order to prove his plea, & he can obtain inspection of pltf.'s books or documents only in respect of such specific facts or instances.

To an action by a firm of stock & share dealers for a libel in a newspaper, the innuendo placed upon the alleged libel being that it meant that pltf. carried on their business in an improper manner & were fraudulent stock & share dealers & persons who could not be trusted in business dealings, deft. pleaded a justification & delivered particulars of the plea, in which he alleged that pltf. were not members of the London Stock Exchange, but were concerned in running a "bucket-shop," & that they did not carry on the ordinary & legitimate business of stockbrokers, but were entirely dependent for their profits upon the losses made by their customers. In a further set of particulars deft. gave the names of, &

v. FURMAN & PRATT (1918), W. L. D. 62.—S. AF.

m. — — — — — Income tax receipts—Documents circulation of newspaper.]—In an action for damages for slander by a jeweller against the publishers of a newspaper, pursuer averred that the alleged slander had seriously injured his business credit & reputation:—*Held*: (1) defenders were entitled to recover the income tax receipts of pursuer for those years; (2) pursuer, while not entitled to recover the books generally of defenders, or excerpts from any of them, tending to show the localities in which the paper was circulated, was entitled to recover excerpts tending to show the number of copies in circulation about the date of the alleged slander from the books in which defenders recorded the numbers of papers issued & sold by them.—*MACDONALD v. HEDDERWICK & SONS* (1901), 3 F. (Ct. of Sess.) 674; 38 Sc. L. R. 455; 8 S. L. T. 498.—SCOT.

n. — — — — — Manuscript of defamatory letter.]—In an action against the printers & publishers of a newspaper upon a libel contained in an anonymous letter, pltf. sought discovery of the original manuscript of the letter & a document containing the name of the writer:—*Held*: the documents were not material to the present suit & such an application

was contrary to practice in libel cases.—*UPINGTON v. MURRAY & ST. LEGER* (1877), 7 Buch. 31.—S. AF.

536 i. — Action for libel.]—In an action for libel alleged to have been contained in a letter published in deft.'s newspaper, defence was a denial that the matter complained of was capable of a defamatory meaning. Deft. discovered the original letters, & the originals of two letters subsequently published. These were not defamatory & were set up in the defence, but deft. objected to produce them:—*Held*: the letters were relevant to the issues to be tried & deft. was bound to produce them.—*MCNAB v. WELLINGTON PUBLISHING CO., LTD.* (1914), 33 N. Z. L. R. 1362.—N.Z.

o. — Action to establish partnership—Denial of relevancy.]—A pltf. seeking to establish a partnership, is not bound by deft.'s view of the relevancy or otherwise of papers which he seeks, &, although deft. swears positively that the papers have no bearing upon the case, the ct. will order their production.—*SAUNDERS v. FURNIVALL* (1866), 2 Ch. Ch. 49.—CAN.

p. — Action on insurance policy—Books.]—Where, in an action upon a fire policy, pltf., in making discovery of documents, referred in his affidavit to the application for the insurance, which showed that at its

date he had a set of books connected with the business in respect of which he was effecting the insurance, which books, however, he did not produce:—*Held*: the books were material, & the reference to them in the document produced was sufficient ground for ordering a better affidavit on production.—*SMEDLEY v. BRITISH AMERICA ASSURANCE CO.* (1898), 18 P. R. 92.—CAN.

q. — — — — — Fraud—Letters of agent written after date of policy.]—An insurance co. resisting payment of a policy effected by an agent on the life of a client, on the ground that he was addicted to habits which rendered his life not insurable, & that the declaration made by the agent as to the client's state of health was not true, nor *bona fide*:—*Held*: entitled to recover, preparatory to the trial of an issue, letters of the agent written after the date of the policy.—*INGLIS v. TRUSTEE v. COMMERCIAL INSURANCE CO.* (1831), 9 Sh. (Ct. of Sess.) 842.—SCOT.

r. — — — — — Document proving manager's capacity—Correspondence.]—In an application for further discovery & production in an action on a policy of fire insurance the plea denied the policy & required pltf. to produce & prove it:—*Held*: (1) the plea put pltf. to the proof of the manager's capacity & therefore, the written

extracts from, certain pamphlets on methods of money-making issued by pltfs. In neither set of particulars did deft. give any specific instance of the commission by pltfs. of any fraudulent or improper act, or the name of any person alleged to have been defrauded by, or to have suffered loss at the hands of pltfs. Deft. having taken out a summons for an order that he should be at liberty to inspect the books of pltfs. for a certain period:—*Held*: as the particulars of justification contained no specific instances of the misconduct alleged, they were too general to entitle deft. to inspection of pltfs.' books.—*ARNOLD & BUTLER v. BOTTOMLEY*, [1908] 2 K. B. 151; 77 L. J. K. B. 584; 98 L. T. 777; 24 T. L. R. 365; 52 Sol. Jo. 300, C. A.

Annotations:—*Refd.* *Kent Coal Concessions v. Duguid*, [1910] 1 K. B. 904. *Mentd.* *Gaston v. United Newspapers* (1915), 32 T. L. R. 143.

540. — Books of highway authorities.—In an action by a highway authority to recover expenses incurred in consequence of extraordinary traffic on a highway, the average expense of repairing other highways in the neighbourhood is not a question in issue, & therefore deft. is not entitled to inspection of the books of the highway authority relating to such other highways. Defendant is entitled to inspection by his solr. of books relating to the highway in respect of which the action is brought, but the ct. will not make an order for inspection by an engineer.—*BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN* (1906), 70 J. P. 409; 4 L. G. R. 967, C. A.

Annotations:—*Mentd.* *Colchester Corpn. v. Gepp*, [1912] 1 K. B. 477; *Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1914), 78 J. P. 425.

541. Although fact admitted in answer.—As to which production required.]—A book, admitted to be in deft.'s possession, must be produced, though the answer admits the fact, in reference to which the production is required.—*THOMAS v. MORGAN* (1825), 3 L. J. O. S. Ch. 157.

542. Although disclosing name of witness.—A person who had effected an insurance upon another's life, commenced an action against the trustees of the insurance co., for the recovery of the amount insured. The trustees filed a bill of discovery against him, in aid of their defence

to the action, charging that the declaration upon the basis of which the insurance had been effected, was untrue, & that deft. had in his possession various documents, by which the truth of the matters alleged in the bill would appear, & requiring him to produce them. Deft. stated that he had in his possession the documents, which he enumerated in the first schedule to his answer, but that from a certain period after the death of the person whose life was insured, he considered it possible that the co. had it in contemplation to dispute their liability; & therefore, from that period he contemplated the necessity of bringing the action; & that the documents mentioned in the first schedule were & contained information furnished to him, as to evidence which could be procured or given on his behalf against the co.; & that the producing the same might disclose the names of witnesses intended to be examined, & evidence intended to be given, on his behalf, in the action, & in the present suit; & he submitted that he ought not to be compelled to produce any of the documents mentioned in that schedule. He admitted the possession of certain other documents, mentioned in the second schedule, & then added, that excepting the particulars mentioned in the two schedules, he had not in his possession any documents relating to the matters mentioned in the bill, whereby the truth thereof would appear:—*Held*: (1) the admissions in the answer, coupled with the description of some of the documents given in the first schedule, were sufficient admissions that the documents were such, as under the ordinary rule, pltfs. were entitled to inspect: (2) the statement of the possible effect of the discovery was not a sufficient ground for withholding it; (3) with respect to such of the documents as did not fall within the rule of professional confidence, deft. was not entitled to contend that he was protected from producing them, by the circumstance of their having come into existence after litigation was contemplated, inasmuch as, in the opinion of the ct., that ground of defence was not sufficiently raised by the answer. *Qu.*: whether, as to such documents, that ground of defence, if properly taken, could have been made available?

agreement between him & his co. was relevant & should be discovered; (2) correspondence between the local & head offices of the co. as to the fire & steps being taken to resist any claim that might be made, should be discovered unless the relevancy thereof were denied on affidavit.—*CALDWELL v. WESTERN ASSURANCE CO.* (1916), W. L. D. 111.—S. AF.

a. — Action for personal injuries—*Carriage accident.*—*Business books of defendant.*—In an action for injuries to pltf. & his carriage, alleged to have been caused by deft.'s servants driving "recklessly & negligently," on an examination of deft. for discovery he gave the names of his men who were with his waggon at the time of the accident, but he could not give the weight of the load without his books, which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solrs. wrote stating that deft.'s team was coming from a house on a certain street, & that the weight of the load & waggon together was not less than three tons. This pltf. declined to accept as sufficient:—*Held*: as pltf.'s case rested on "recklessly & negligently driving horses & a conveyance," which deft. contended was impossible on account of the weight of the load; & as it might assist pltf. to find out what house the team was coming from &

the weight of the load, the books must be produced.—*BOYD v. MARCHMENT* (1907), 9 O. W. R. 275; 13 O. L. R. 468.—CAN.

t. — Private memorandum book—*Kept by employee of party.*—In an action for the recovery of the price of wheat alleged to have been delivered by pltf. into an elevator belonging to deft. co.:—*Held*: the manager of the co. must produce a private memorandum book kept by the official in charge of the elevator which contained entries of the receipt of some of the grain in question.—*CAMPBELL v. DOMINION ELEVATOR CO., CHALMERS v. DOMINION ELEVATOR CO.*, [1918] 1 W. W. R. 938.—CAN.

a. — Action for specific performance of contract to purchase property—*Documents relating to the property.*—In a suit for specific performance of a contract to purchase an indigo factory, pltf. in his affidavit of documents set out a list of title-deeds evidencing his title to & the books of accounts & other papers & documents relating to the property agreed to be purchased, & these he claimed to withhold from deft.'s inspection, on the ground that they were not sufficiently material at that stage of the suit:—*Held*: the documents were not protected.—*SUTHERLAND v. SINGHER CHURN DUTT* (1884), 1 L. R. 10 Calc. 808.—IND.

b. — Incidental reference in pleadings.—Defts. agreed to purchase from pltfs. the goods mentioned in indent forms signed by defts. in favour of pltfs. at the prices noted therein, & to pay for the goods at the current rate of exchange, on delivery of the shipping documents. On arrival of the goods, defts. refused to take delivery unless pltfs. consented to fix the rate of exchange at 2s. to a rupee. Pltfs. declined & sued to recover the value of the goods according to the indent prices. In their plaint, pltfs. incidentally referred to the invoices received from England for the purpose of showing that they had received advice of the goods they had purchased & that they would make out their own invoices & send the same to defts. Defts. did not file their written statement, but took out a summons asking for an order against pltfs. for inspection of the original invoices:—*Held*: defts. had not made out a case for inspection of the invoices, inasmuch as under their contract with pltfs. they had nothing to do with the prices which pltfs. paid in England, & the said invoices were not necessary for either pltfs. or defts.' case.—*REPAIR v. KALLEAUYI* (1921), 1 L. R. 46 Bom. 866.—IND.

c. — Action for work & labour.—In an action for work & labour, when it was alleged as a defence that pltf. had entered into an agreement to be

Sect. 5.—Of what documents: Sub-sects. 1 & 2.]

—STOREY v. LENNOX (LORD) (1836), 1 My. & Cr. 525; 6 L. J. Ch. 99; 40 E. R. 476, L. C.

Annotations:—As to (1) Refd. Smith v. Beaufort (1843), 13 L. J. Ch. 33; Combe v. London Corpn. (1845), 15 L. J. Ch. 80; Price v. Harrison (1860), 8 C. B. N. S. 617. *As to (2) Consd.* Marriott v. Chamberlain (1886), 17 Q. B. D. 154. *As to (3) Consd.* Llewellyn v. Budeley (1842), 1 Hare, 527; Wright v. Vernon (1853), 1 Drew. 344. *Refd.* Nias v. Northern & Eastern Ry. (1838), 7 L. J. Ch. 170; Walsingham v. Goodricke (1843), 3 Hare, 122; Lyell v. Kennedy (1884), 27 Ch. D. 1. *Generally, Mentd.* Gloucester Corpn. v. Wood (1843), 3 Hare, 131.

543. No sufficient denial of relevancy to other party's title.]—An action was brought to recover moneys alleged to be due in respect of a customary payment of 4d. for a quantity of coals. Deft. disputed the custom & insisted that the quantity on which the 4d. had been paid had frequently varied; & that the custom had been laid in different terms by parties who represented the interest which pltf. now possessed; & also that some payments to the predecessors of pltf. had included a certain easement, under a specific contract. Deft. filed a bill of discovery in aid of his defence charging in the usual manner that pltf. had various documents in his possession. Pltf. set forth in a schedule to his answer a list of documents in his possession relating to the matters mentioned in the bill & insisted that they related to his title & did not relate to the title of deft., but not expressly denying that they related to the variance in the custom or to the equities on which the bill was founded:—*Held*: pltf. was not protected by his answer from the necessity of producing the documents mentioned in his schedule.—SMITH v. BEAUFORT (DUKE) (1843), 1 Ph. 209; 13 L. J. Ch. 33; 2 L. T. O. S. 113; 7 Jur. 1095; 41 E. R. 611, L. C.

Annotations:—Folld. Harris v. Harris (1845), 9 Jur. 80. *Apld.* Hunt v. Hewitt (1852), 7 Exch. 236. *Folld.* Gresley v. Mousley (1856), 2 K. & J. 288. *Distd.* Lloyd v. Purves (1858), 32 L. T. O. S. 28. *Refd.* Bute v. Glamorganshire Canal Co. (1845), 1 Ph. 681; Combe v. London Corpn. (1845), 15 L. J. Ch. 80; Stainton v. Chadwick (1851), 15 Jur. 1139; Scott v. Walker (1853), 21 L. T. O. S. 181; Earp v. Lloyd (1857), 3 K. & J. 549; Price v. Harrison (1860), 8 C. B. N. S. 617; Chartered Bank of India, Australia, & China v. Rich (1863), 32 L. J. Q. B. 300.

544. —.]—In a suit instituted against the Corpn. of London for discovery, in aid of a defence to a bill brought by them for an account of certain alleged dues to which they claimed a title by prescription, the corpn. admitted the possession of certain charters, books, & documents, relating to the matters in question, which they alleged formed part of their title, & were intended

to be used as evidence against pltf., but which they did not with sufficient precision deny might form part of pltf.'s title, or contain matter impeaching their own defence:—*Held*: pltf. in the bill of discovery were entitled to the production of such documents.

(2) To protect deft. from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or contain evidence which he intends or is entitled to use in support of his case; it must contain no matter supporting pltf.'s title or pltf.'s case, or impeaching the defence, & deft. must aver by his answer, with a reasonable degree of distinctness, that the document does contain no such matter. (3) Production of cases & opinion of counsel thereon, relating to the matters in issue, refused.—COMBE v. LONDON CORPN. (1845), 15 L. J. Ch. 80; 7 L. T. O. S. 153; 10 Jur. 57, L. C.; *on appeal* S. C. *sub nom.* LONDON CORPN. v. COMBE (1854), 4 H. L. Cas. 1089, H. L.; *previous proceedings* (1840), 4 Y. & C. Ex. 139.

Annotations:—As to (1) Folld. Farrier v. Atwood (1866), 14 L. T. 278. *Apld.* A.-G. v. Emerson (1882), 10 Q. B. D. 191. *Refd.* Smith v. Beaufort (1842), 1 Hare, 507; Dipple v. Corles (1852), 22 L. J. Ch. 15; Price v. Harrison (1860), 8 C. B. N. S. 617; Hastings Corpn. v. Ivall (1873), 8 Ch. App. 1019, n.; Minet v. Morgan (1873), 8 Ch. App. 361. *As to (2) Consd.* A.-G. v. Emerson (1882), 10 Q. B. D. 191. *Refd.* Morris v. Edwards (1890), 15 App. Cas. 309; Frankenstein v. Gavin's House-to-House Cycle-Cleaning & Inscr. (1897), 66 L. J. Q. B. 668; A.-G. v. Newcastle-upon-Tyne Corpn., [1899] 2 Q. B. 478; Johnson v. Whitaker (1904), 90 L. T. 535. *As to (3) Consd.* Walsingham v. Goodricke (1843), 3 Hare, 122. *Refd.* Holmes v. Budeley (1844), 1 Ph. 476; Manser v. Dix (1855), 1 K. & J. 451. *Generally, Refd.* Pearce v. Pearce (1846), 1 De G. & Sm. 12.

545. —.]—(1) In an action for the price of an article supplied under a contract, by pltf. to defts., defts. disputed the amount claimed, on the ground that the quantity & quality of the article supplied were not according to the terms of the contract; & defts. had instituted certain experiments; & made observations, having for their object to ascertain the quantity & quality of the article actually supplied & an application was made for an order to inspect the documents sworn to be in the possession of defts., in which the results of these experiments & observations were recorded, & which were also sworn to show that pltf. had fulfilled their contract:—*Held*: pltf.'s affidavit not being contradicted by defts., the order was rightly granted.

It is not sufficient answer to such an application that pltf.'s affidavit is made only on information & belief of the above facts; nor is it sufficient for

paid out of a particular fund only, & not to demand payment until certain expenses connected with the works had been discharged; the ct. ordered defts. to produce all documents relating, not merely to the fund out of which the pltf.'s demand was to be paid, but also those relating to any funds that might be applicable to the discharge of the other expenses connected with the works.—MAYERS v. SMITH (1854), 6 Ir. Jur. 48.—IR.

d. — Action for illegal distress—Defendant's rent-books.]—Pltf., in an action for an illegal distress is not entitled, under Common Law Procedure Act, for an order for the inspection of deft.'s rent-books.—FITZGERALD v. CHRISTMAS (1855), 5 I. C. L. R. 180.—IR.

e. — Action for breach of promise of marriage—Letters between parties.]—In an action for breach of promise of marriage to which the defence is a simple denial of the promise, the ct. will on motion of pltf. direct an inspection & interchange of copies of the letters which have

passed between the parties.—CHUTE v. BLENNERHASSET (1865), 16 I. C. L. R. App. IX.—IR.

f. — Income tax returns.]—Pltf. in an action for breach of promise of marriage applied for diligence for the recovery of deft.'s income tax returns to show his financial position:—*Held*: the same would be allowed.—ROBERTSON v. HAMILTON, [1915] 2 S. L. T. 195.—SCOT.

g. — Action for defamation—Paper containing defamatory expressions.]—In an action of damages for defamatory words, read by a clergyman from a pulpit, against the schoolmaster of the parish, the ct. found that the clergyman was not bound to produce the paper from which it was alleged that he had read the defamatory expressions.—COOPER v. GREIG (1812), 16 Fac. Coll. 508.—SCOT.

h. — Action for debt.]—Pursuer raised action for payment of balance of a debt due by a co. of which defender had been a partner. It was pleaded that pursuer's attorney had, in virtue of a mandate, acceded to a com-

position contract, whereby the co. was discharged of its debts, & that pursuer had homologated the release granted by his attorney. Pursuer averred that the mandate was to agree to a conditional release only, but as the conditions had not been fulfilled he was not bound. The Lord Ordinary granted a diligence for the recovery of all writings that either party might think necessary in support of their respective averments to be produced to the Commissioner to take such excerpts as he should deem of importance to the cause.—CAMPBELL v. CAMPBELL (1823), 2 Sh. (Ct. of Sess.) 139.—SCOT.

k. — Letters between party & his agent—To prove arrangement between parties.]—In an action founded on an arrangement between two parties relative to the settlement of legal proceedings taken against them jointly:—*Held*: pursuer was entitled, with the view of proving the arrangement, which defender disputed, to recover letters which passed at the time of the arrangement & relative thereto

deft. to allege in his affidavit that the documents relate exclusively to his own case.

(3) It is not an objection to the inspection of a document, in the possession of a party, that it relates to his own case, if it also sustains the case of the party applying for the inspection.—*LONDON GAS-LIGHT CO. v. CHELSEA VESTRY* (1859), 6 C. B. N. S. 411; 28 L. J. C. P. 275; 23 J. P. 344; 5 Jur. N. S. 469; 141 E. R. 516.

Annotations:—As to (1) *Refd.* *Price v. Harrison* (1860), 8 C. B. N. S. 617. *Generally, Refd.* *Walsham v. Stainton* (1863), 3 New Rep. 211; *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602; *Fenner v. London & South Eastern Ry.* (1872), L. R. 7 Q. B. 767.

546. —.]—On bill filed to establish a partnership, & for an account of profits, deft., by answer & affidavit, entirely denied the partnership, & swore, in answer to a summons for production of books & papers, that they contained nothing which would support the case made by the bill, but only such matters as would uphold his own contention:—*Held*: pltf. could not be bound by deft.'s view of the effect of the documents, & an order for production was made.—*FARRIER v. ATWOOL* (1866), 14 L. T. 278; *sub nom. FERRIER v. ATWOOL*, 12 Jur. N. S. 365; 14 W. R. 597, L. J.

547. Not referred to in affidavit—But admitted to be in possession.—Pltf., previously to his interrogatories being answered, served deft. with notice of an interlocutory motion for an injunction, & filed an affidavit in support of the motion. Deft. summoned pltf. before the examiner to be cross-examined on his affidavit, & in the course of his cross-examination pltf. refused to produce a document, not referred to in his affidavit, but which he admitted to be in his possession. Thereupon deft. applied to the ct. for an order for its production:—*Held*: the document must be produced, & pltf. pay the costs of the application.—*CLIFF v. BULL* (1869), 38 L. J. Ch. 571; 20 L. T. 841; 17 W. R. 1120.

548. Although not admissible in evidence.—*HUTCHINSON v. GLOVER*, No. 525, *ante*.

549. —.]—*BUSTROS v. WHITE*, No. 478, *ante*.

550. Document as exhibit to document disclosed.—Where, in an affidavit of documents, one

between defender & his agent, who acted for him when the arrangement was alleged to have been entered into.—*KID v. BUNYAN* (1842), 5 Durl. (Ct. of Sess.) 193; 15 Sc. Jur. 47.—**SCOT.**

l. — *Action for wrongful confinement in lunatic asylum—Memoranda written by alleged lunatic in asylum.*—*Held*: defenders in an action of damages for alleged wrongous confinement in a lunatic asylum, were entitled to recover from pursuer all documents & memoranda in his possession written by him in the asylum.—*MACINTOSH v. FRASER, ETC.* (1859), 21 Durl. (Ct. of Sess.) 783; 31 Sc. Jur. 421.—**SCOT.**

m. — *Action for slander—Income tax receipts.*—*KEIR v. OUTRAM & CO., LTD.* (1913), 51 Sc. L. R. 8.—**SCOT.**

547 i. Not referred to in affidavit—But admitted to be in possession.—Where books were in actual use by deft., the ct. refused to order him to make verified copies of entries relative to matters in question for pltf.'s use; but where it was sworn on the part of pltf., & not denied by deft. that the latter had documents so relating, which were not mentioned in his affidavit, he was ordered to produce them.—*MCDONELL v. MCKAY* (1867), 2 Ch. Ch. 141.—**CAN.**

n. Discretion of court—Exercise of.]—The ct. may in the exercise of its discretion refuse to order, at the instance of one party to an action, the

is disclosed to which another is made an exhibit, the ct. will order the exhibit also to be disclosed, on the ground that it might reasonably be supposed to be material to the question in the action.—*DINN v. BRANDON* (1885), 1 T. L. R. 598.

551. Proof of relevancy—By party requiring production.]—To give a right to discovery it must appear that it would be relevant to the question at issue, & where deft. has sworn that documents of which inspection is required do not relate to the question it is for pltf. to show that they do, otherwise the production of such documents cannot be reasonably required.—*COMPAGNIE FINANCIERE ET COMMERCIALE DU PACIFIQUE v. PERUVIAN GUANO CO.* (1885), 1 T. L. R. 188, C. A.

SUB-SECT. 2.—DOCUMENTS REFERRED TO IN PLEADINGS OR AFFIDAVIT.

R. S. C., Ord. 31, r. 15.

552. Production ordered.]—Pltf. claimed by virtue of a remainder in tail expectant on tenant in tail's dying without issue, & was the heir male of the family. Defts. were sisters & heirs general of the tenant in tail, & by their answer showed, that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, & refer to the deeds in their custody; the ct. ordered, before the hearing, defts. to leave with their clerk in ct. the deeds making the tenant to the *præcipe*, & leading the uses of the recovery.—*BETTISON v. FARRINGTON* (1735), 3 P. Wms. 363; 24 E. R. 1102, L. C.

Annotations:—*Consd.* *Shaftesbury v. Arrowsmith* (1798), 4 Ves. 66; *Hylton v. Morgan* (1801), 6 Ves. 293; *Wales (Princess) v. Liverpool (Earl)* (1818), 1 Swan. 114. *Refd.* *Hardman v. Ellames* (1834), 2 My. & K. 732.

553. —.]—Papers specifically referred to in an answer, & admitted to be in deft.'s custody, may be ordered to be inspected by pltf.—*GARDINER v. MASON* (1793), 4 Bro. C. C. 479; 20 E. R. 998, L. C.

Annotation:—*Consd.* *Anon.* (1803), 1 Smith, K. B. 117.

produce:—*Held*: the letters must be produced.—*VAN VOLKENBURG v. BANK OF BRITISH NORTH AMERICA* (1896), 5 B. C. R. 4.—**CAN.**

552 iii. —.]—Ordinarily the affidavit is conclusive, but if, from the affidavit itself or from the documents therein referred to, or from admissions in the pleadings of the party from whom discovery is sought, or from an examination upon it, it appears that the affidavit cannot be trusted, then production may be ordered.—*SAVAGE v. CANADIAN PACIFIC RY. CO.* (1906), 3 W. L. R. 124; 15 Man. L. R. 401.—**CAN.**

552 iv. —.]—Pltf. claimed commissions on insurance effected; deft. insurance co. pleaded that pltf.'s right to commission was dependent upon his abstaining from acting as agent for any other insurance co.; pltf. replied that the agreement under which he sued was a new one, made at the termination of his agency for deft. co., & that it was intended that the clause precluding him from acting for any other co., which formed part of his former agreement, should be dropped from the new one; & if this was not the construction of the document, he asked reformation:—*Held*: defts. must, in making discovery, produce the letters, originally written without prejudice, leading up to the agreement sued upon.—*PEARLMAN v. NATIONAL LIFE ASSURANCE CO.* (1917), 39 O. L. R. 141; 12 O. W. N. 72.—**CAN.**

production of relevant documents in the possession of the other party, but such discretion must be exercised with due regard to legal principles. Where such order was refused on the ground that the application was a fishing one:—*Held*: as it would not be unjust to allow production & no ground for withholding it had been established, an order for production should be made.—*RAINSFORD v. AFRICAN BANKING CORPN., LTD.* (1912), C. P. D. 729.—**S. AF.**

PART III. SECT. 5, SUB-SECT. 2.

552 i. Production ordered.]—An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States, & which was not registered in Ontario:—*Held*: on an application for inspection of the mtge., that the ct. had power to order inspection of the mtge. in question, or of any document sued upon.—*EMMENS v. MIDDLEMISS* (1880), 8 P. R. 320.—**CAN.**

552 ii. —.]—In an action for redemption of shares in a co., deposited by pltf. as collateral security to an over-draft, or in the alternative for damages for their improper sale by the bank defts., in answer to an order for discovery, made an affidavit of documents disclosing possession of a number of letters relating to the matters in question which had passed between the manager of the bank at Victoria & the manager of the bank at Vancouver, which they objected to

Sect. 5.—Of what documents: Sub-sects. 2 & 3.]

554. — Limited to reference by particular party.]—Order for production of papers on a trial limited to those referred to by the answer of the particular deft.; & not extended to any other answer except upon a trial, directed by the ct.; when the production is more general.—**MARSH v. SIBBALD** (1814), 2 Ves. & B. 375; 35 E. R. 361, L. C.

*Annotations:—***Refd.** **Hardman v. Ellames** (1834), 2 My. & K. 732; **Taylor v. Sheppard** (1835), 4 L. J. Ex. Eq. 20.

555. —.]—Pltf. is entitled to the production of documents referred to in the answer, & admitted to be in the custody of deft., although an injunction obtained by pltf. has been dissolved, on the ground, that the contract which he seeks to enforce is illegal.—**EVANS v. RICHARD** (1818), 1 Swan. 7; 36 E. R. 275, L. C.

*Annotations:—***Refd.** **Hardman v. Ellames** (1834), 2 My. & K. 732; **Adams v. Fisher** (1838), 3 My. & Cr. 526; **Smith v. Beaufort** (1842), 1 Hare, 507; **Penarth Harbour Dock & Ry. v. Cardiff Waterworks Co.** (1860), 7 C. B. N. S. 816.

556. —.]—Deft. had commenced an action against pltf. on a promissory note, which the latter alleged by his bill had been long since paid. Deft. admitting by his answer, that it was in his possession:—**Held:** deft. to deposit the note with his clerk in ct., for the inspection of pltf., although an injunction to restrain the action had been dissolved.—**PILKINGTON v. HIMS-WORTH** (1836), 1 Y. & C. Ex. 612; 5 L. J. Ex. Eq. 95; 160 E. R. 250.

*Annotations:—***Refd.** **A.-G. v. Thompson** (1849), 8 Hare, 106. **Mentd.** **Wilton v. Clifton** (1843), 12 L. J. Ch. 425.

557. —.]—If deft., by his answer, refers to the contents of a document, & continues, "as by the said deed, etc., when produced will appear," he is bound on motion to produce it.—**HILL v. GOMME** (1837), 6 L. J. Ch. 258.

558. —.]—Deft., who in his answer refers to a deed in the words, "as by the said indenture, when produced, will appear," must produce it for the inspection, etc., of pltf., although he does not "crave leave to refer to it."—**WELFORD v. STAINTHORPE** (1840), 2 Beav. 587; 48 E. R. 1309.

559. —.]—In an action by the secretary against a provisional committeeman of a projected railway co., for arrears of salary, a judge at chambers ordered that deft. should be at liberty to inspect, & take copies from, the minute book of the co. containing resolutions of the managing committee, referred to in pltf.'s particular of demand as the foundation of his claim. The ct. refused to rescind the order, pltf. not satisfactorily showing that it was not in his power to comply with it.—**SHAW v. HOLMES** (1847), 3 C. B. 952; 136 E. R. 382.

560. —.]—Notice of motion to set aside an award on the ground of misconduct of an arbitrator having been given, an affidavit was sworn by the arbitrator for the purpose of being used by the party in whose favour the award was made at the hearing of the motion. This affidavit referred to certain letters which had passed between that party's solr. & the arbitrator. The affidavit was not filed, but a copy of it had been furnished to the opposite party:—**Held:** the letters were documents referred to in an affidavit within the meaning of R. S. C., Ord. 31, r. 15, & therefore a judge had jurisdiction to make an order for inspection of them under r. 18 of the order.

There is a proviso to r. 18 by which a discretion is given to the judge, but I think that under the circumstances of this case he ought to have exercised his discretion in favour of the party making the application for inspection

(CHITTY, L.J.).—**Re FENNER & LORD**, [1897] 1 Q. B. 667; 66 L. J. Q. B. 498; 76 L. T. 376; 45 W. R. 486, C. A.

561. — Not after amendment of bill.]—On a motion for production of documents, it is for pltf. to show from the admissions in the answer that the documents relate to the contents of the bill as it stands when the motion is made, & therefore, where after an answer admitting possession of certain documents relating to the matters mentioned in the bill, or some of them, pltf. amended his bill by striking out part of it, & then moved upon that answer, the motion was refused.—**HAVERFIELD v. PYMAN** (1847), 2 Ph. 202; 8 L. T. O. S. 489; 41 E. R. 919, L. C.

562. — Unless inequitable.]—(1) Where deft. appears to be a bare trustee for pltf., & offers no explanation to the contrary, the ct. will compel the production of deeds & documents admitted, by his answer, to be in his possession.

(2) The ct. will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even though pltf. may have an interest in such deeds; but, under circumstances, the ct. will direct them to be proved before the examiner.

(3) The mere circumstance of deft. incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production if in other respects such compulsion would be inequitable.—**SPARKE v. MONTRIOU** (1834), 1 Y. & C. Ex. 103; 160 E. R. 43.

563. —.]—Deft., though perhaps he might have objected to answer, having answered, compelled to make a full disclosure.

They [the letters] may be confidential & it may be disagreeable to produce them; but that is determined to be no objection even to a witness giving evidence; still less to a party disclosing that which relates to the very transaction upon which the ct. has said he must make the disclosure (**GRANT, M.R.**).—**TAYLOR v. MILNER** (1805), 11 Ves. 41; 32 E. R. 1003.

*Annotations:—***Refd.** **Baker v. Mellish** (1805), 11 Ves. 68; **Agar v. Regent's Canal Co.** (1815), Coop. G. 212; **Swinborne v. Nelson** (1853), 16 Beav. 416.

564. — Unless privileged.]—If a bill is filed to set aside a conveyance on the ground of fraud, the ct. will not on motion order a production of the conveyance.

Where deft. refers to his schedule as containing all deeds, papers, etc., in his custody or power relating to the matters in question, there pltf. is entitled to the inspection of all such deeds, papers, etc., as of course; unless it appears, by the description of any particular instrument in the schedule, or by affidavit, that it was evidence, not of the title of pltf., but of deft., or that pltf. had otherwise no interest in its production (**LEACH, V.C.**).—**TYLER v. DRAYTON** (1825), 2 Sim. & St. 309; 57 E. R. 364.

*Annotations:—***Consd.** **Llewellyn v. Badeley** (1842), 1 Hare, 527. **Refd.** **Neate v. Latimer** (1836), 2 Y. & C. Ex. 257; **Smith v. Beaufort** (1842), 1 Hare, 507; **Combe v. London Corpn.** (1845), 15 L. J. Ch. 80; **A.-G. v. Thompson** (1849), 8 Hare, 106; **Gresley v. Mousley** (1856), 2 Jur. N. S. 156; **Price v. Harrison** (1860), 8 C. B. N. S. 617.

565. — —.]—**BELSHAM v. HARRISON, BELSHAM v. PERCIVAL**, No. 775, *post*.

In bankruptcy proceedings.]—See **BANKRUPTCY & INSOLVENCY**, Vol. IV., p. 182, Nos. 1686, 1687.

566. Whether admission of possession necessary.]—The statement of deft. by his answer of the contents of an instrument is not a sufficient

ground for an order for the production without an express admission of the instrument being in deft.'s custody or power.—*ERSKINE v. BIZE* (1790), 2 Cox, Eq. Cas. 226; 30 E. R. 105.

567. —.].—Answer admitting the execution of an instrument, & craving leave to refer to it, when produced, is not a ground to move for the production; not admitting, that it is in the possession or power of deft.—*DARWIN v. CLARKE* (1803), 8 Ves. 158; 32 E. R. 314, L. C.
Annotation:—*Consd.* *Hardman v. Ellames* (1834), 2 My. & K. 732.

568. —.].—Pltf. stated certain papers in his bill, but did not allege that they were in his possession; deft., after answer, moved for the production of the papers, & the motion was refused, with costs.—*JACKSON v. SEDGWICK* (1819), 2 Wils. Ch. 167; 37 E. R. 273, L. C.

569. —.].—The ct. will not order deft. to produce documents before the examiner, unless he has by his answer admitted them to be in his possession.

Where deft. had in another cause deposited documents in the hands of his clerk in ct., & a motion was made in the second cause for their production, for proof before the examiner, it was refused with costs, on the ground that possession of the documents had not been admitted by deft.—*PITR v. BONNER* (1835), 4 L. J. Ch. 161.

570. —.].—The ct. cannot, at the instance of deft., order pltf. to produce for deft.'s inspection documents stated in his bill, to be in pltf.'s possession. Where pltf. by his bill states documents to be in his possession, & it is necessary for deft. to see them, in order to put in his answer, the ct., though it cannot compel their production, will extend the time for answering, until after pltf. has produced them. The fact of the documents being in pltf.'s possession must, however, appear upon the record.—*TAYLOR v. HEMING* (1841), 4 Beav. 235; 10 L. J. Ch. 369; 5 Jur. 766; 49 E. R. 329.

Annotations:—*Consd.* *Turner v. Burkinshaw* (1863), 4 Giff. 399. *Refd.* *Bate v. Bate* (1844), 7 Beav. 528.

571. —.].—Deft. answered that he had in his possession a book relating to matters improperly inquired into by the bill, & that, save as aforesaid, he had no books, etc. relating to the matters in the bill mentioned:—*Held*: this was not a sufficient admission to entitle pltf. to production of the book.—*HARFORD v. REES* (1851), 15 Jur. 663.

572. Reference made by party subsequently deceased—Action carried on by executor—No production against latter.].—An order for production cannot be made against an exor. upon admissions in his testator's answer.—*SCOTT v. WHEELER* (1850), 12 Beav. 366; 19 L. J. Ch. 402; 50 E. R. 1101.

573. Applies to exhibits.].—Where deft. makes an affidavit at a judge's chambers identifying a document which is exhibited to him only & not filed, he will be compelled to allow pltf. to take a

copy of that document, although it is sworn to furnish a defence to the action.—*TEBBUTT v. AMBLER* (1839), 7 Dowl. 674; 3 Jur. 435.
Annotation:—*Distd.* *Pratt v. Goswell* (1861), 9 C. B. N. S. 706.

574. —.].—Irrespective of any questions as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has a right to inspect & take copies of the affidavit has a similar right as to the exhibit also.—*Re HINCHLIFFE*, [1895] 1 Ch. 117; 64 L. J. Ch. 76; 71 L. T. 532; 43 W. R. 82; 39 Sol. Jo. 25; 12 R. 33, C. A.

Annotations:—*Distd.* *Sloane v. Britain S.S. Co.*, [1897] 1 Q. B. 185. *Refd.* *Carter v. Roberts*, [1903] 2 Ch. 312.

575. Applies to particulars.].—Documents mentioned in particulars will be ordered to be produced for inspection.—*CASS v. FITZGERALD*, [1884] W. N. 18; Bitt. Rep. in Ch. 178.

576. Not goods in specie.].—In an action for an injunction to restrain deft., his servants, agents, & workmen, from selling any whisky other than that made by pltf. as "Glenlivet" whisky, & from using the term or trade mark "Glenlivet" or any other name colourably like the word "Glenlivet," the ct. was moved by pltf. to discharge an order made in chambers on the application of deft. under R. S. C. 1875, Ord. 31, rr. 16 & 17, for the production of all invoices, letters, bill heads, & brands referred to in pltf.'s statement of claim, which had the word "Glenlivet" written on them, & the casks on which the word was branded:—*Held*: the motion must be refused; "any document" in the order mentioned must mean any document to which reference is made; & although the order must be varied by striking out "casks with brands on them" for convenience sake, the alteration was so slight that deft. would have the costs of this motion in any event.—*SMITH v. HARRIS* (1883), 48 L. T. 869.

SUB-SECT. 3.—DOCUMENTS IN POSSESSION OR POWER.

577. General rule.].—A party is not bound to produce a deed not in his custody or control. The law compels no one to do an impossibility.—*CROTCH v. CROTCH* (1687), 1 Lut. 481; 125 E. R. 253.

578. —.].—The ct. refused to order an exor. to produce certain drafts of his testator, which at the date of the application were in the possession of the bankers on whom they had been drawn.

This ct. has no power to make him deposit with the clerk of records documents which are not in his own custody or power (*STUART, V.C.*).—*BAYLEY v. CASS, CASS v. BAYLEY* (1862), 10 W. R. 370.

Annotation:—*Mentd.* *Smith v. Pilgrim* (1876), 2 Ch. D. 127.

579. Possession of agent—Is possession of principal.].—The ct. will not, on a bill for tithes, praying a discovery of documentary evidence,

PART III. SECT. 5, SUB-SECT. 3.

577 i. General rule.].—When a party admits documents in his possession, he is *prima facie* bound to produce them, or assign a sufficient reason why he should not. But where a party refers to his bill to documents which otherwise he would not be liable to produce, he does not by so doing create a liability to produce them.—*GREEN v. AMEY* (1862), 2 Ch. Ch. 138.—**CAN.**

577 ii. —.].—A petitioner referred for greater certainty to a document as in petitioner's possession:—*Held*: resp. was entitled to its production.—

PEYTON v. LAMBERT (1856), 6 L. Ch. R. 9; 2 Ir. Jur. 93.—**IR.**

o. Possession must be established.].—In ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shown in whose custody it was or what its terms were, & it was proved deft. had written a letter to pltf.'s agent, stating that he was to give up the premises on a certain day:—*Held*: pltf. need not produce the agreement, as it was not sufficiently shown to be in his custody or power.—*DOE d. MITCHELL v. MCLFOD* (1844),

6 O. S. 553.—**CAN.**

p. Books in daily use.].—A deft. was ordered to permit the inspection by pltf. of the books in daily use in deft.'s business, which he objected to produce on that account, but which he was willing to produce at the hearing of the cause.—*HAMELYN v. WHITE* (1874), 6 P. R. 143.—**CAN.**

q. Of assignee for benefit of creditors—Not a party—Interested in result.].—In an action by creditors of a firm to establish the liability of deft. as a partner therein, it appeared that the assignee of the firm for the benefit of creditors (who had received all the

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order a tithe book of a former rector, shown to have been in the possession of deft.'s attorney, to be produced, unless it clearly appear from admissions in the answer that it would assist pltf.'s case.

The possession of the attorney, however, is within the control of pltf.—*BLIGH v. BENSON* (1819), 7 Price, 205; 146 E. R. 948.

Annotations:—Consd. *Firkins v. Lowe*, *Lowe v. Firkins* (1824), M'Cle. 73. *Folld.* *Tomlinson v. Lymer* (1829), 2 Sim. 489. *Consd.* *London Gas Light Co. v. Chelsea Vestry* (1859), 6 C. B. N. S. 411. *Refd.* *Hardman v. Ellames* (1835), 2 My. & K. 732.

580. ———.]—*MURRAY v. WALTER*, No.

581. ———.]—Deft. by his answer stated, that he had handed over some document relating to the matters in question to his agent in Jamaica, to enable him to defend a suit there. That the agent had left the island, & that the documents had been taken possession of by a receiver appointed by the Ct. of Ch. there:—*Held*: (1) this admission entitled pltf. for an order for production; (2) but liberty was given to deft. to relieve himself, if possible, by affidavit, from the effects of this admission.—*MORRICE v. SWABY* (1840), 2 Beav. 500; 48 E. R. 1275.

Annotations:—As to (2) Apld. *Curd v. Curd* (1842), 1 Hare, 274; *Llewellyn v. Baddeley* (1842), 1 Hare, 527.

582. ——— **Production not compellable—Unless enforceable against principal.**—*FENWICK v. REED*, No. 27, *ante*.

583. ——— **Agency must be established.**—Pltf. not entitled to production of documents admitted to be in possession of the solr. of defts., it being suggested such possession was not acquired in that character.—*STAGG v. OWEN* (1837), Coop. Pr. Cas. 12; 47 E. R. 377.

584. ——— **Agent's private documents.**—*Held*: pltf. could not enforce against deft., his trustee, discovery of the private books kept by deft.'s agent containing accounts relating to pltf.'s property.—*COLYER v. COLYER* (1861), 30 L. J. Ch. 408; 4 L. T. 134; 9 W. R. 452.

papers of the firm) was interested in the success of the action, had instigated its being brought, & was providing material in the way of documents, etc., to pltf. for its efficient prosecution:—*Held*: although the assignee might have no direct beneficial interest in the result, he was to be regarded for the purposes of discovery as a quasi-pltf., & deft. was entitled to have production of all documents in the possession of the assignee, & to examine him for the purpose of such production.—*EROTHINGHAM v. ISBISTER* (1891), 14 P. R. 112.—**CAN.**

r. To enable party to answer fully—Whether court will compel.—Supreme Court in Equity Act, 1890, sect. 59, does not empower the ct. to order the production of documents discovered to be in the possession or power of one of the parties. The sect. is limited to discovering whether documents are in his possession or power. If admitted to be, their production may be ordered under sect. 61 (2).

The ct. will not ordinarily compel a pltf. to produce documents in his possession or power although deft. swears that he cannot fully answer without their production. If pltf. on request refuses to produce them, he cannot complain of the insufficiency of deft.'s answer.—*HEGAN v. MONTGOMERY* (1896), 1 N. B. Eq. Rep. 247.—**CAN.**

s. Photographs—To establish iden-

tity.—In an action by persons claiming to be the next of kin of a testator, the beneficiary under the will having predeceased him, against the administratrix with the will annexed, for administration of the estate, deft. denied that pltf. were the next of kin of testator, & alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity, but not as administratrix, photographs of testator, which she objected to produce. Pltf. sought production with a view of establishing the identity of a relative of theirs with testator:—*Held*: the photographs were "documents" within the meaning of a rule of ct., & must be produced.—*FOX v. SLEEMAN* (1897), 17 P. R. 492.—**CAN.**

t. Document the joint property of parties.—An application for a copy of a document before declaration granted, there being but one copy, & pltf. having sworn that it was necessary to enable him to proceed against deft., in whose possession it was, & that it was their joint property.—*WILLIAMS v. GOSSEN* (1829), 3 Ir. L. Rec. 1st ser. 57.—**IR.**

a. Private instrument—Possession must be upon trust.—On an application for liberty to inspect a private instrument in the hands of the opposite party, it must appear to the ct. that the instrument is held in the possession of the latter upon an implied or express trust, for the benefit of the party mak-

585. **Solicitor.]—GREENOUGH v. GASKELL**, No. 743, *post*.

586. ———.]—Books, etc., relating to the matters in question, in the possession, but the property, of deft.'s solrs.:—*Held*: they need not be produced.—*FLIGHT v. ROBINSON* (1844), 8 Beav. 22; 13 L. J. Ch. 425; 8 Jur. 888; 50 E. R. 9.

Annotations:—Folld. *O'Shea v. Wood*, [1891] P. 237. *Mentd.* *Kerr v. Gillespie* (1844), 7 Beav. 572; *Woods v. Woods* (1844), 4 Hare, 83; *Manser v. Dix* (1855), 1 K. & J. 451; *Chartered Bank of India, Australia & China v. Rich* (1863), 32 L. J. Q. B. 300; *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602.

587. ———.]—*WARD v. MARSHALL* (1887), 3 T. L. R. 578.

588. ———.]—Defts. in an action by pltf. propounding a will, having applied for inspection of documents, it appeared that the solr. for pltf. had for many years acted as solr. for testatrix whose will was in dispute, & had in his possession diaries, extracts from diaries, cash ledgers, banker's cash-books containing entries & memoranda relating to deceased & her affairs, which documents were the private property of the solr.:—*Held*: (1) an order could not be made on pltf. to produce them for inspection; (2) the solr. could not be compelled under R. S. C., Ord. 37, r. 7, to produce these documents for the purpose of discovery, nor be called for examination at this stage of the proceedings under Ord. 37, r. 5; (3) an affidavit by which a party objected to produce documents because she claimed them "to be privileged, as communications between herself & her solr.," was insufficient to protect them, it being necessary to show that the letters were professional communications of a confidential character.—*O'SHEA v. WOOD*, [1891] P. 286; 60 L. J. P. 83; 65 L. T. 30; 7 T. L. R. 437, C. A. *Annotation:—As to (3) Consd.* *R. v. Bullivant*, [1900] 2 Q. B. 163.

589. **Liability to incur costs.**—Where deft. holds a covenant for the production of deeds for the maintenance & manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the object of which is to show that a disputed piece of land is not com-

ing the application.—*ALEXANDER v. ALEXANDER* (1832), Alc. & N. 109.—**IR.**

b. Evidencing opponent's title.—The answer admitted that a certain document, evidencing pltf.'s title was in deft.'s possession:—*Held*: that pltf. was not entitled to call for its production at the hearing.—*DOWLING v. LEIGH* (1846), 9 L. Eq. R. 413; 3 Jo. & Lat. 716.—**IR.**

c. Lease—Only one part executed.—In an action on a lease by the landlord against the tenant, the tenant will, on motion, be ordered to produce the lease for the purpose of the action, if it appear that only one part of the lease was executed, & that it is in the tenant's possession.—*BEASLEY v. TYRRELL* (1851), 1 I. C. L. R. 365; 3 Ir. Jur. 340.—**IR.**

d. Although genuineness not admitted.—Where, in an action of contract, it appears that documents, evidencing the contract sued upon, are in the possession of pltf., deft. is entitled to inspect them, although he does not admit their genuineness.—*BENJAMIN v. SAULEZ* (1871), L. R. 6 C. L. 16.—**IR.**

e. Counterpart of lost document.—In ejectment on the title, where the question was, whether the lands in dispute were included in a lease which had been lost, but of which a counterpart was in the possession of pltf., he was ordered to permit deft. to

prised in deft.'s title. *Semble*: (1) it would be a fraud on the covenant for the covenantor to claim the production of the deeds, & then use them for any such purpose; (2) deft. is not bound to incur costs in obtaining production of deeds for the purpose of giving discovery to pltf.—*BETHELL v. CASSON* (1863), 1 Hem. & M. 806; 3 New Rep. 29; 9 L. T. 321; 12 W. R. 200; 71 E. R. 353.

were in possession of any ascertained document which they held as trustees for pltf. so as to entitle him to an inspection of it.—*SHADWELL v. SHADWELL* (1859), 6 C. B. N. S. 679; 28 L. J. C. P. 315; 5 Jur. N. S. 1410; 141 E. R. 618.

Annotations:—*Expld.* Penarth Harbour Dock & Ry. v. Cardiff Waterworks Co. (1860), 7 C. B. N. S. 816. *Distd.* Price v. Harrison (1860), 8 C. B. N. S. 617; Stone v. Strange (1865), 11 L. T. 717.

Documents relating to land.—See No. 1063, *post*.

SUB-SECT. 4.—ONLY DOCUMENTS SPECIFICALLY DESCRIBED.

590. Necessity for specific description.—*STEWART v. EAST INDIA CO.* (1742), 9 Mod. Rep. 387; 88 E. R. 524.

591. —.]—Deft. cannot be ordered to produce deeds, etc. unless described with certainty.—*ANON.* (1803), 1 Smith, K. B. 117.

592. —.]—Rule, that there must be schedule before ct. will order production of deeds & papers, applies only in cases of discovery.—*ANON.* (1821), 6 Madd. 97; 56 E. R. 1021.

593. —.]—A motion by deft. that the pltf. should produce, on oath, all the documents in his possession or power relating to the matters in the suit, deft. not specifying any documents or giving any evidence that pltf. had any, was refused, with costs.—*FIOTT v. MULLINS* (1852), 1 Sm. & G. 1; 22 L. J. Ch. 72; 20 L. T. O. S. 50; 16 Jur. 946; 1 W. R. 6; 65 E. R. 1.

Annotation:—*Distd.* McIntosh v. G. W. Ry. (1852), 1 W. R. 19.

594. —.]—Motion to compel pltf. to produce certain documents, etc., in his possession relating to the matters in question in the suit. The notice of motion specified the particular documents required, & affidavits were filed alleging that the particular documents, so specified, were in possession of pltf.:—*Held*: pltf. must produce the documents.—*M'INTOSH v. GREAT WESTERN RY. CO.* (1852), 1 Sm. & G. 4; 22 L. J. Ch. 72; 20 L. T. O. S. 77; 16 Jur. 989; 1 W. R. 19; 65 E. R. 2; *order varied*, 22 L. J. Ch. 182, L. J. J.

595. —.]—To an action, upon an agreement made between testator & pltf., to recover from the exors. arrears of an annuity, defts. pleaded that it was agreed between pltf. & testator that the agreement should be, & the same was rescinded. Pltf., upon an affidavit stating that he had written some letter to testator relating to the annuity, the words of which he could not remember, & also his belief that defts. intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made, applied to the ct., in the exercise of their equitable jurisdiction at common law, for leave to inspect the letter:—*Held*: it was not shown that the defts.

inspect & take a copy of the counterpart.—*BARRY v. SCULLY* (1872), 1 R. 6 C. L. 449.—*IR.*

PART III. SECT. 5, SUB-SECT. 4.

590 i. Necessity for specific description.—A reference to documents in question as "various letters between the pltf. & the provincial hall commissioner" does not satisfy the requirement of the rule as to documents being "specified."—*NORTHERN CROWN BANK v. ETTER*, [1919] 1 W. W. R. 140.—*CAN.*

590 ii. —.]—A general order to bring in & lodge documents relating to lands, without specifying the particular documents, cannot be sustained.—*CHAYTOR v. PREYTON* (1857), 9 Ir. Jur. 486.—*IR.*

1. Documents not specified in order—Delay in taking objection—

Effect.—Where an order for production does not specify particularly the documents asked to be produced, but no objection is taken to the order until after proceedings have been taken for disobedience of it, & after it has been made clear what document was wanted, the order will not be interfered with.—*R. v. BORRETT* (1905), 24 N. Z. L. R. 584.—*N.Z.*

PART III. SECT. 5, SUB-SECT. 5.—A.

g. Supporting plaintiff's case—Denial by defendant.—An inspection of a document will not be granted to a pltf., on the plea that it contains a particular clause in support of his case, when the existence of such clause is directly denied by deft.—*FREWEN v. THE INCORPORATED SOCIETY* (1854), 3 I. C. L. R. 118.—*IR.*

h. Administration suit—Ownership

SUB-SECT. 5.—DOCUMENTS IN WHICH APPLICANT HAS PROPERTY OR INTEREST.

A. In General.

596. General rule.—Whenever pltf. has established an interest in any instrument in the hands of deft., he is in general entitled to a production of it, & in this case the ct. thought pltf. had established a sufficient interest in the documents required, & ordered a production of them.—*SMITH v. NORTHUMBERLAND (DUKE)* (1787), 1 Cox, Eq. Cas. 363; 29 E. R. 1204.

597. —.]—Pltf. is entitled to a production of such papers only in which he has a common interest with deft.—*BURTON v. NEVILLE* (1790), 2 Cox, Eq. Cas. 242; cited in 4 Ves. at p. 67; 30 E. R. 112, L. C.

Annotations:—*Consd.* Hardman v. Ellames (1835), 4 L. J. Ch. 181. *Refd.* Hylton v. Morgan (1801), 6 Ves. 293; Wales (Princess) v. Liverpool (Earl) (1818), 1 Swan. 114; *Re Roay* (1847), 8 L. T. O. S. 476. *Mentd.* Aston v. Exeter (1801), 6 Ves. 288.

598. Suit for tithes—Tithe book of former rector.—*BIGH v. BENSON*, No. 579, *ante*.

599. Common interest by plaintiff & defendant—As against co-defendant—Right of defendant to inspect.—Pltf. & one of defts. in the suit had a common interest as against another of defts. Upon motion by deft. who had such common interest with pltf., for production by him of a copy of a document which pltf. had obtained against the other deft.:—*Held*: the production of such a paper so obtained was protected.—*REYNOLDS v. GODLEE* (1858), 4 K. & J. 88; 32 L. T. O. S. 35; 70 E. R. 37.

600. Copies of confidential documents—Retained by dismissed servant.—*SIDDELEY-DEASY MOTOR CAR CO. v. THOMSON* (1916), 140 L. T. Jo. 374.

Documents relating to land.—See Sect. 9, subsect. 2, C., *post*.

B. Company and Corporation Records.

601. Corporation—Deeds & documents belonging to—City of London.—In a suit by the City of London, defts., etc. obtained an order to inspect

of documents disputed.—In a suit in which a creditor had obtained an order for the administration of the estate of deceased, a claim was put in for the return of scrip which had been found amongst the papers of deceased in an envelope directed to claimant. It being admitted by administratrix that certain of the scrip belonged to claimant:—*Held*: deft. must file an affidavit of documents relating to the disputed scrips, & should produce such documents for the inspection of the claimant.—*MONCRIEFF v. JOHNSTON* (1901), 36 L. T. 61.—*IR.*

PART III. SECT. 5, SUB-SECT. 5.—B.

k. Company—Books & accounts—Mining company.—Upon a complaint, under Railway & Canal Traffic Act, 1894, sect. 1, subsect. 1, by colliery owners that resp. railway cos.

Sect. 5.—Of what documents: Sub-sect. 5, B., C., D. & E.]

the city books & their bye-laws.—*LONDON CITY v. THOMSON* (1723), 3 Swan. 265, n.; 36 E. R. 856.

602. ————.]—*WARRINER v. GILES* (1733), 2 Stra. 954; 93 E. R. 984.

603. ———— *East India Co.*—*MURRAY v. THORNHILL* (1726), 2 Stra. 717; 93 E. R. 805.

604. ———— *College of Physicians.*—*R. v. WEST* (prior to 1748), cited in 1 Wils. at p. 240.

605. ———— *Clement's Inn.*—Inspection of the books of Clement's Inn, to prove payment of poor's rates, or being within the parish of A., denied.—*ALLAN v. TAP* (1772), 2 Wm. Bl. 850; 96 E. R. 501.

606. ————.]—Everybody has a right to inspect books of the sessions.—*HERBERT v. ASH-BURNER* (1750), 1 Wils. 297; 95 E. R. 628.

607. ————.]—*A.-G. v. POOL CORPN.* (1790), cited in 3 Swan. at p. 268, n.; 36 E. R. 857.

608. ————.]—*YARMOUTH (ISLE OF WIGHT) CORPN. v. BLAKE* (1856), 26 L. T. O. S. 219.

———.]—*See, also, CORPORATIONS*, Vol. XIII., pp. 302–304, Nos. 335–360; p. 349, Nos. 876–879; pp. 422–425, Nos. 1421–1482.

609. *Company—Books & documents—Navigation company.*—A statute by which a navigation co. were incorporated, provided, that all persons interested in the said navigation should have access to the books of the co.:—*Held*: a bond creditor suing the co. for his debt came within the statute, & was entitled to such inspection.—*PONTET v. BASINGSTOKE CANAL CO.* (1835), 2 Bing. N. C. 370; 2 Scott, 543; 5 L. J. C. P. 153; 132 E. R. 145.

610. ————.]—*CARTLAND v. HOUSTON & BRITISH & SOUTH AMERICAN STEAM NAVIGATION CO., LTD.*, [1912] W. N. 110.

611. ———— *Railway company.*—By a railway Act, it was provided that it should be competent to inspect all books, etc., relating to a co., at any general or special meeting. An application having been made to the ct., on the part of deft., against whom an action for calls had been commenced, & who had not availed himself of the privilege, to order an inspection of the minute book of the directors, to enable him to ascertain whether there were a competent body present to make the call in question, the ct. refused to make the order. *Seem*: taking out a summons before a judge at chambers is sufficient demand of inspection from the directors.

The object for giving an inspection of documents, is not to enable deft. to fish out a defence from defect in the proceedings, but, if he has a defence, to assist him how he may be able properly to plead it (*LORD DENMAN, C.J.*).—*BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO. v. WHITE* (1841), 1 Q. B. 282; 2 Ry. & Can. Cas. 863; 4 Per. & Dav. 649; 10 L. J. Q. B. 121; 5 J. P. 528; 5 Jur. 800; 113 E. R. 1139.

had increased the rates for the carriage of coal & that such increase was unreasonable, the commissioners ordered an inquiry as to the damages sustained by the appets. in consequence of their having been compelled to pay these increased rates:—*Held*: the railway cos. were not entitled to discovery of the business books & accounts of appets.—*BLACK & SONS v. CALDONIAN RY., NORTH BRITISH RY., & GLASGOW & SOUTH WESTERN RY. COS.* (1901), 11 Ry. & Can. Tr. Cas. 176.—*SCOT.*

1. ———— *Books of account—At suit of shareholder.*—A shareholder in a co. brought an action to have his name removed from the register on the ground of fraudulent misrepresentation

in the prospectus issued by the co., & applied for leave to inspect books of account disclosed in the affidavits of documents:—*Held*: in the special circumstances of the case, & to save expense such order might be made.—*GIBNEY v. CLAYTON & CO.* (1891), 27 L. R. Ir. 75.—*IR.*

m. ———— *Minutes—Settlement of action—Alleged collusion.*—Two actions involving several parties, referred to the same subject matters of dispute. Pursuer & Defender in one action were called as defenders in the other. This last action was at the instance of a public co., & was settled. Defender in the other action averred that it was settled by collusive arrangement, for

612. ———— *Projected railway company.*—*SHAW v. HOLMES*, No. 559, *ante*.

613. ———— *Mining company.*—An order was made on deft. against one of the committee of management of a mining co., worked on the cost-book principle for inspection of books & papers in the custody of the secretary.—*CHAFFERS v. WOOLMER* (1857), 30 L. T. O. S. 126.

614. ———— *In possession of director after company wound up.*—In an action against a joint-stock co., the ct. or judge may order one of the late directors, the co. having ceased to carry on business, to give pltf. inspection of documents not denied by such director to be in his possession or under his control.—*LACHARME v. QUARTZ ROCK MINING CO.* (1862), 1 H. & C. 134; 31 L. J. Ex. 508; 6 L. T. 502; 10 W. R. 799; 158 E. R. 832. *Annotation*:—*Refd.* *Dickson v. Neath & Brecon Ry.* (1869), L. R. 4 Exch. 87.

615. ———— *Shareholder's petition for winding up.*—*Re HOOVER HILL GOLD MINING CO.* (1883), 27 Sol. Jo. 434.

616. ———— *Subscriber's agreement—At suit of allottee of company.*—In an action by an allottee of railway shares against a member of the provisional committee, to recover back his deposit, the ct. ordered that pltf. should have an inspection & copy of the subscribers' agreement & parliamentary contract, which both pltf. & deft. had signed, & which were in the hands of the solrs. of the co.; the pltf.'s affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, & deft. not showing that they were not within his power or control.—*STEADMAN v. ARDEN* (1846), 15 M. & W. 587; 4 Dow. & L. 16; 15 L. J. Ex. 310; 7 L. T. O. S. 261; 10 Jur. 553; 153 E. R. 983.

Annotations:—*Appld.* *Ley v. Barlow* (1848), 1 Exch. 800. *Consd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Refd.* *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 146.

617. ————.]—Where an action was brought by an allottee in a railway co., for the recovery of his deposit, against a member of the managing committee, & it appeared by affidavit that the subscribers' agreement & parliamentary contract had been signed by pltf. & deft. & was in the hands of the solr. to the co. & to deft.; & that an inspection & copy of those documents was necessary for the purpose of proving pltf.'s case:—*Held*: pltf. had a right to such inspection & copy.—*LEY v. BARLOW* (1848), 1 Exch. 800; 5 Dow. & L. 375; 3 New Pract. Cas. 68; 17 L. J. Ex. 105; 10 L. T. O. S. 376; 154 E. R. 340; *sub nom.* *LEE v. BARLOW*, 5 Ry. & Can. Cas. 1.

Annotation:—*Appld.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

618. ———— *List of shareholders—At suit of creditor.*—Cos. Clauses Act, 1845 (c. 16), s. 36, gives a judgment creditor of a joint-stock co. a right to inspect the list of shareholders if he cannot have execution against the co. This right may be enforced by rule of ct. or order of a judge.—

the purpose of defeating his rights:—*Held*: he was entitled with a view of proving this arrangement, to recover from the agent of the co. excerpts from the minutes of the co., & also letters between himself as country agent, & his correspondent in Edinburgh so far as these related to the alleged arrangement.—*MILLAR v. SMALL* (1856), 19 Dunl. (Ct. of Sess.) 142; 29 Sc. Jur. 68.—*SCOT.*

n. ———— *Accident case—Reports relating to the accident.*—In an action of damages against a tramway co. in respect of personal injuries resulting from an accident, pursuer moved for a diligence to recover all reports relating to the accident made at or

MEADER v. ISLE OF WIGHT FERRY CO. (1861), 9 W. R. 750.

—Statutory inspection under Companies Acts.]—See COMPANIES, Vol. IX., pp. 192, 193, 209, Nos. 1207–1209, 1295, 1296.

C. Manorial Documents.

See R. S. C., Ord. 31, r. 19.

See COPYHOLDS, Vol. XIII., pp. 37–39, Nos. 405–447; p. 41, Nos. 482–484.

D. Parish Books and other Ecclesiastical Documents.

619. Parish books — Right of parishioners to inspect.]—Parishioners have right to view parish books.—LOVE v. BENTLEY (1707), 11 Mod. Rep. 134; 88 E. R. 947.

620. — — —.]—A parishioner has no right to inspect parish books, for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish, & therefore the ct. refused a *mandamus* for that purpose.—R. v. SMALLPIECE (1821), 2 Chit. 288.

621. — — — For parochial purposes only.]—The ct. will not compel the vestry clerk of a parish to produce & permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes.—MAY v. GWYNNE (1821), 4 B. & Ald. 301; 106 E. R. 948.

622. — — —.]—The ct. will not compel parish officers to produce the parish books, for the inspection even of a parishioner, unless he show that it is for parochial purposes only that he desires the inspection.—R. v. OSMOND (1825), 4 L. J. O. S. K. B. 52.

623. — — — Money entrusted to guardians of poor.]—A parishioner rated for the relief of the poor is entitled to inspect & take copies of the accounts of the disbursement of the money intrusted to the guardians of the poor, although the accounts have been allowed by the visitor.—R. v. GREAT FARINGDON BERKS GUARDIANS, ETC. (1829), 9 B. & C. 541; 3 Bott. 6th ed. 97; 8 L. J. O. S. M. C. 3; 109 E. R. 202.

624. — — — Suit as to ownership of estate—Inspection by parson or impropriator.]—In an action in which the question is, whether an estate belongs to the parson or impropriator of a parish or to the parish at large, the parson or impropriator has no right to see the parish books.—COX v. COPPING (1698), 1 Ld. Raym. 337; 5 Mod. Rep. 395; 91 E. R. 1121.

Annotation:—Apld. Burrell v. Nicholson (1832), 3 B. & Ad. 649.

625. — — — Liability for parochial rates.]—Upon a bill of discovery in aid of an action to try whether pltf.'s house was within the limits of a certain parish, & therefore liable to the parochial rates:—*Held*: defts., the parish officers, must produce for his inspection the rate books, account books, minute books, orders, & other documents which related to the matter in question, & were admitted by their answer to be in their possession.—BURRELL v. NICHOLSON (1833), 1 My. & K. 680; 39 E. R. 838, L. C.; *previous proceedings* (1832), 3 B. & Ad. 649.

Annotations:—Consd. Combe v. City of London (1840),

about its time to defenders by any inspector, driver, conductor, or other of their employees, who had been present at the time of the accident.

The ct. granted the diligence, but pointed out that it must be understood that the call was confined to reports made at the time for the purpose of informing the employers of the accident, as distinguished from communications made after it had become apparent that there was going to be

litigation.—FINLAY v. GLASGOW CORPN., [1915] S. C. 615.—SCOT.

PART III. SECT. 5, SUB-SECT. 5.—D.

o. Minute-book of kirk-session — Containing signatures of witnesses to depositions.]—Diligence granted to recover both the minute-book & draft minute-book of a kirk-session, to be used at a jury trial, in respect that they contained the deposition of

4 Y. & C. Ex. 139; Earp v. Lloyd (1857), 3 K. & J. 549. Mentd. Smith v. Beaufort (1812), 1 Hare, 507.

626. Documents of a chapter — St. Paul's.]—KNIGHT v. WOTTON (1725), Cooke, Pr. Cas. 26; 125 E. R. 936.

627. — — — Inspection by prebendary.]—Prebendary may inspect charters, etc., of the chapter in a suit concerning his prebend, at reasonable times.—YOUNG v. LYNCH (1747), 1 Wm. Bl. 27; 96 E. R. 14.

Annotations:—Mentd. R. v. Durham, Bp. (1758), 2 Keny. 296; Mirehouse v. Rennell (1833), 7 Bli. N. S. 241.

628. Vicar's books—Suit for tithes.]—A vicar, pltf. in a suit for tithes, is not compellable to produce & leave in the hands of his clerk in the ct., his vicar's book, & those of former vicars, his predecessors, admitted by him, in his answer to a cross bill filed against him by deft. for a discovery, to be in his possession, & to contain entries relating to the payment of sums of money as compositions, corresponding in amount with the money payments set up by deft. as the *modus* relied on, for the purpose of giving deft. an opportunity of inspecting them, in order to assist him in proving his defence; because, whilst they compel pltf. to produce evidence in his possession material to deft.'s case, they will at the same time protect his own evidence from exposure, where it would be the necessary consequence of obedience to their order.

But the ct. will make a limited special order that he produce the entries in such books relating to the money payments, for the inspection of deft., at the office of pltf.'s solr., requiring him to state on oath that those produced are all that the books contain.—FIRKINS v. LOWE, LOWE v. FIRKINS (1824), M'Cle. 73; 13 Price, 193; 147 E. R. 962.

Annotations:—Folld. Tomlinson v. Lymer (1829), 2 Sim. 489. Refd. Newton v. Berresford (1831), You. 377; Hardman v. Ellames (1835), 4 L. J. Ch. 181; Re Reay (1817), 8 L. T. O. S. 476.

629. Mandamus to compel — Absolute in first instance.]—Rule for an inhabitant of a parish to inspect the parish books, there being an issue to try the customs as to a church rate in which he is interested, may be absolute in the first instance.—ANON. (1814), 2 Chit. 290.

630. — — — Not to support parishioner's claim against parish.]—R. v. SMALLPIECE, No. 620, *ante*.

631. — — — Bishop's register.]—*Mandamus* granted to compel a bishop to allow inspection of his register of presentations & institutions to a living in his diocese, by a person claiming the right of patronage, although the bishop also claimed that right.—R. v. ELY (BP.) (1828), 8 B. & C. 112; 108 E. R. 985; *sub nom.* FINCH v. ELY (BP.), 2 Man. & Ry. K. B. 127; 6 L. J. O. S. K. B. 223.

632. — — —.]—R. v. RIPON (BP.) (1844), 3 L. T. O. S. 202; 8 J. P. Jo. 388.

See, further, ECCLESIASTICAL LAW & POOR LAW.

E. Partnership Books and Documents.

633. Disclosure to partners inter se — Action by executor of deceased parties.]—One of two partners dying, it was agreed between the survivor & the exors. of deceased, that the survivor should continue the business & wind up the affairs of the partnership. It appeared that the surviving

witnesses, & that the draft alone was signed by them.—STURROCK v. GREIG (1849), 12 Durl. (Ct. of Sess.) 166.—SCOT.

PART III. SECT. 5, SUB-SECT. 5.—E.

p. Disclosure to partners inter se — Where plaintiff was & defendant still is partner in another firm—Action relating to plaintiff's interest in that firm.]—Therefore, where pltf., alleging that

5. *Of what documents: Sub-sect. 5, E. & F.; sub-sect. 6.]*

partner divided the debts due to the firm into two classes. The first class, he, without the concurrence of the exors., assumed to himself, & transferred to his new books, having debited himself with the amount of the same in the partnership books. The second class he did not assume; but, having opened new accounts with some of the customers, when he received anything on account of such last debts, he entered the same in such new books, & also in the partnership books. He & his clerk swore that the entries in the partnership books exactly tallied both in dates & sums with the entries in the new books:—*Held*: he must produce for the inspection of the exors., such new books, to see, as to the first class, when he had received such debts, & what profits he had made of the same which the exors. had a right to share; as to the second class, whether he had properly appropriated the payments made by such last debtors, in discharge of the old balances due to the firm, or whether first in discharge of his own advances.—*TOULMIN v. COPELAND* (1839), 3 Y. & C. Ex. 625; 9 L. J. Ex. Eq. 5; 3 Jur. 1048; 160 E. R. 851; *on appeal, sub nom. COPLAND v. TOULMIN* (1840), 7 Cl. & Fin. 349, H. L.

Annotations: —*Mentd.* Digby v. Boycott (1845), 4 Hare. 444; *Re Gedye* (1851), 11 Beav. 56.

634. ———.]—By arts. of partnership, in case of the death of a partner the survivor was to pay the amount of his capital according to the last half yearly rest, & to take the stock, etc. After the death of one, a different arrangement was entered into between his exors., one of whom was the surviving partner, & his widow, who was beneficially interested under the will, by which the surviving partner was to take the stock at a valuation, & get in the credits, & pay the joint debts, & out of the share of the deceased partner in the surplus, to pay his separate debts & the widow's legacy. The widow by this bill sought to set aside this arrangement for fraud, & to have an account of the partnership transactions, & of the profits subsequent to her husband's death:—*Held*: pltf. was entitled to the production of the accounts of the business, as carried on after testator's death.—*HUE v. RICHARDS* (1839), 2 Beav. 305; 48 E. R. 1198.

635. ———.]—*HALL v. HARGREAVES*, [1860] W. N. 69.

636. Disclosure to third persons — Consent of partner necessary.]—A bill of discovery against a surviving partner, charged that he had lately or once in his possession, custody, or power, books, etc., whereby the statements of the bill would appear; & it prayed, that deft. might set forth a schedule of such particulars as were in his custody, etc.; deft. answered, that after the death of his partner he had some books, etc., in his possession, which were delivered to the representatives of his

he had been a partner with deft. & others in the firm of I. & Co., & that, on the dissolution of that firm, the amount then standing to his credit in the partnership books had been carried to his credit in the books of a new firm in which he & deft. only were partners applied for an order on deft. to produce, for pltf.'s inspection, the books of I. & Co., which appln. was resisted by deft. on the ground that the other partners in the firm of I. & Co., had an interest in those books, & were not parties to the present appln., or showing to have consented to it:—*Held*: pltf. was entitled to the order.—*HAJI JAKARIA v. HAJI CASIM* (1876), L. L. R. 1 Bom. 496.—*IND.*

— *Necessity for showing partnership property in documents.]*—Where a document which is not put in issue by pltf.'s bill for an account of partnership dealings, but is stated in the answer as part of deft.'s defence, & is admitted to be in his possession, & offered to be brought in, deft. cannot be compelled to bring it in if no partnership property is shown in it.—*SHEHAN v. GLYNN* (1827), 2 Mol. 387.—*IR.*

PART III. SECT. 5, SUB-SECT. 5.—F.
r. Loan register of Public Debt Office.]—The Loan Register of the Public Debt Office in the Bank of Bengal is a "public document" within

partner, who would not allow him to inspect them; & save as aforesaid, he denied that he had lately or once any books, etc.:—*Held*: this answer was sufficient.—*MACKINTOSH v. BOOKER* (1837), 6 L. J. Ch. 233; *sub nom. MACINTOSH v. BOOKER*, 1 Jur. 258.

637. ———.]—The sole deft. in a suit relating to transactions in which he had been engaged with pltf., had made entries relating to these transactions in the books of a partnership firm of which he was a member:—*Held*: no order could be made on deft. to produce the partnership books without the consent of his partner.—*HADLEY v. MCDUGALL* (1872), 7 Ch. App. 312; 41 L. J. Ch. 504; 26 L. T. 379; 20 W. R. 393, L. J.J.

Annotations: —*Consd.* Rattenberry v. Monro (1910), 103 L. T. 560. *Reid.* Vyse v. Foster (1872), 26 L. T. 282; *Kearsley v. Phillips* (1882), 10 Q. B. D. 36; *Carew v. Carew* (1891), 65 L. T. 167. *Mentd.* Kettlewell v. Barstow (1872), 27 L. T. 258.

638. ——— *Wife's suit for alimony.]*—*CAREW v. CAREW*, No. 489, *ante*.

639. ———.]—In a petition by the husband for dissolution of marriage, the wife applied for an allotment of alimony pending suit. The husband in his answer admitted that his income from his business amounted to £3,000 a year, but objected to produce the books of the business before the registrar on the ground that they would disclose the accounts of the partnership:—*Held*: (1) husband's answer was incomplete, & he must file a fuller & further answer; (2) he ought not at then existing stage of the proceedings to be ordered to file accounts & to attend for the purpose of being cross-examined upon them.

Each case must be considered on its own merits. . . . It must be a very strong case to justify the ct. in calling for documents which would disclose partnership accounts (*JEUNE, J.*).—*TONGE v. TONGE*, [1892] P 51; 61 L. J. P. 87; 67 L. T. 390.

Annotation: —*As to* (2) *Consd.* Sykes v. Sykes, [1897] P. 306.

Statutory right to inspect.]—See *PARTNERSHIP*.

F. Public Documents.

640. Books of custom house.]—*BENSON v. PORT* (1748), cited in 1 Wils. K. B. at p. 240; 95 E. R. 595.

641. Document filed in Rolls Office.]—At the trial of an action of trespass in which the question raised was upon pltf.'s title to an estate, upon which the trespass was alleged to have been committed, a deed was produced by pltf. which came by surprise upon deft., who thereupon submitted to a verdict. Deft. having obtained a rule *nisi* for a new trial upon the ground of surprise, pltf. sought to procure a copy of a deed, said to be in the possession of deft., which it was supposed might vary the title set up on the deed produced by pltf. at the trial:—*Held*: he was not entitled as of right to demand an inspection of the deed;

the meaning of the Evidence Act, 1872, s. 74, & under s. 76, any person having an interest in the document is entitled to inspect the same & obtain certified copies thereof.—*CHANDI CHARAN DHAR v. BOISTAB CHARAN DHAR* (1904), L. L. R. 31 Calc. 284.—*IND.*

s. File of proceedings in Bankruptcy.]—There had been a sale of mortgaged premise in the usual manner in Bankruptcy. The purchaser moved in the matter to be discharged for want of title. Upon a bill being filed for the purpose of setting aside the sale pltf., the purchaser, moved that the agent to the Comr. should produce

& it appearing that the deed was a public document, the contents of which were set forth on the face of an inquisition *post mortem* filed in the Rolls Chapel, the ct. refused to compel the production of its original.—*WOOD v. MOREWOOD* (1841), 9 Dowl. 669; 3 Scott, N. R. 197; 10 L. J. C. P. 229; 5 Jur. 389; *previous proceedings* (1840), 9 Dowl. 44.

642. Books of post office—Qui tam information.]—*CREW v. BLACKBURN* (prior to 1748), cited in 1 Wils. K. B. at p. 240; 95 E. R. 595.

—**Election petition.]**—See Nos. 64, 65, *ante*.

Marked register of votes.]—See Nos. 66, 67, *ante*.

643. Mandamus to compel.]—*ANSTIS'S CASE* (1734), Cunn. 37; 94 E. R. 1048.

SUB-SECT. 6.—DOCUMENTS SUBJECT TO LIEN.

644. Lien no ground of objection.]—A person's having a lien upon a document is no objection to his producing it on a trial at *nisi prius*; but if he fears that it may be abstracted, the judge will allow him to stand by the witness while the witness is examined respecting it.

In an action on a bill of exchange, where the defence is, that the bill had been altered, deft. cannot go into evidence to show that other bills have been likewise altered.—*THOMPSON v. MOSELY* (1833), 5 C. & P. 501, N. P.

Annotation:—Apld. Hope v. Liddell (1855), 7 De G. M. & G. 331.

645. Solicitor's lien—Production by client.]—A party ordered to produce papers, which are in the hands of his solr., must pay his bill of costs, if he cannot otherwise procure them.

In causes, where a motion is made for a party to produce papers in his custody possession or power, the order made is for him to produce them, & if they are in the hands of his solr., & he cannot produce them without paying his bill of costs, he must pay it (*LORD ELDON, L.C.*).—*Ex p. SHAW* (1821), Jac. 270; 37 E. R. 853; *sub nom. Re HOWARD & GIBBS, Ex p. SHAW*, 1 Gl. & J. 124, L. C.

Annotations:—Apprvd. Goodchap v. Weaving (1852), 16 Jur. 586. *Consd.* Liddell v. Norton (1853), Kay, App. xi. *Apld.* Lewis v. Powell, [1897] 1 Ch. 678. *Refd.* Hope v. Liddell (1855), 7 De G. M. & G. 331.

646. —.].—A voluntary deed belonging to deft., which the bill impeached for fraud,

the file of proceedings & depositions at the hearing:—*Held*: a purchaser in bkpcy. has a right to see the file of proceedings & depositions.—*Re SLOANE*, [1825] 2 Mol. 452.—*IR.*

t. Documents held by public board.]—The ct. will compel a public board to produce in evidence papers which have been sent to them in their official character, when they affect the interest of an individual.—*LEVEN v. BOARD OF EXCISE* (1814), 17 Fac. Coll. 586.—*SCOT.*

a. Indictment in criminal prosecution.]—Where pursuer of an action of damages for rape applied to recover from the Crown the indictment, declaration, medical certificate, & recognitions, in a criminal prosecution which had been instituted against defender for the same offence, but which had been abandoned, the ct. allowed the indictment to be produced, but refused the other articles sought to be recovered.—*HILL v. FLETCHER* (1847), 10 Dunl. (Ct. of Sess.) 37; 19 Sc. Jur. 690.—*SCOT.*

PART III. SECT. 5, SUB-SECT. 6.

650 i. Solicitor's lien—Production by solicitor.]—The rule that a solr. is bound to produce documents subject

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to his lien, does not apply when the person asking for their production is the party to pay the amount claimed.—*MOODIE v. THOMAS* (1858), 1 Ch. Ch. 19.—*CAN.*

650 ii. —.].—P. & W. were solrs. for pltf., who afterwards obtained leave to sue as a pauper & appeared by other solrs. P. & W. were served with a *subpoena* to produce at the hearing documents relating to pltf.'s case which had remained in their possession, & upon which they claimed a lien in respect of costs due to them by pltf.:—*Held*:—P. & W. could not be compelled to produce. A solr. who is discharged by his client holds the papers entrusted to him subject to his lien for costs. A solr. has the same lien upon translations as he has upon other documents, & the fact that they have been made by the ct.'s interpreters makes no difference.—*BAI KESSERBAI v. NARANJI WALJI* (1880), 1 L. R. 4 Bom. 353.—*IND.*

650 iii. —.].—The right to be exercised by a solr. claiming a lien largely depends upon the circumstances under which he has ceased to act for his client, the test being whether the solr. has discharged himself or has been discharged by the client. The obliga-

tion on the solr. to give inspection of & to produce documents in his possession over which he has a lien in an administration action is confined to those cases where they are essential to the determination of those questions which arise in the normal administration proceedings when the estate is being actually administered.—*AISHABINI v. AHMED BIN ESSA* (1910), 1 L. R. 35 Bom. 352.—*IND.*

Annotation:—Refd. A.-G. v. Thompson (1849), 8 Haro, 106.

647. —.].—Deft. before answer became bkpt. He put in his answer, stating that certain books & letters were in the possession of his solr., who claimed a lien on them, & that he could not obtain possession thereof. The ct. ordered deft. to produce them, with liberty to apply in case of need.—*RODICK v. GANDELL* (1847), 10 Beav. 270; 9 L. T. O. S. 290; 50 E. R. 586.

Annotations:—Consd. Lewis v. Powell, [1897] 1 Ch. 678. *Refd.* Liddell v. Norton (1853), Kay, App. xi.

648. —.].—Where a member of the managing committee of a railway co. undertakes to wind up their affairs &, by his attornies, who were also the attornies of the co., possessed himself of the deeds of the co.:—*Held*: he is bound to grant an inspection of them to any one of the members, at all reasonable times, & it is no answer to an application for such inspection, that the solrs. claim a lien on them.

If parties have a duty to perform they cannot part with the subject of it, & give to others a lien, so as to deprive the *cestui que trust* of it.—*LEY v. BARLOW* (1848), 1 Exch. 800; 5 Dow. & L. 375; 3 New Pract. Cas. 68; 17 L. J. Ex. 105; 10 L. T. O. S. 376; 154 E. R. 340; *sub nom. LEE v. BARLOW*, 5 Ry. & Can. Cas. 1.

Annotation:—Consd. *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

649. —.].—Where documents belonging to a trust are in the hands of the solr. to the trust, who claims a lien upon them, a trustee deft. cannot by answer refuse to disclose the deeds on the ground that the solr. claims his lien, & will not produce them. The course is for the trustee to obtain an extension of time to put in his answer, which extension of time will be from time to time prolonged, until the trustee can pay off, or procure a waiver of the lien.—*GOODCHAP v. WEAVING* (1852), 16 Jur. 586.

Annotation:—Refd. Lewis v. Powell, [1897] 1 Ch. 678.

650. —.].—**Production by solicitor.]**—A solr. who refused to allow a deed in his possession to be proved on behalf of pltf., because he had a lien on it for costs due from deft., was ordered to produce the deed at his own expense, & to pay all

tion on the solr. to give inspection of & to produce documents in his possession over which he has a lien in an administration action is confined to those cases where they are essential to the determination of those questions which arise in the normal administration proceedings when the estate is being actually administered.—*AISHABINI v. AHMED BIN ESSA* (1910), 1 L. R. 35 Bom. 352.—*IND.*

650 iv. —.].—Whenever a client is bound to produce a deed, for the benefit of a third person, so also is his solr., though the latter may have a lien on it for costs against his client.—*FURLONG v. HOWARD* (1801), 2 Sch. & Lef. 115.—*IR.*

650 v. —.].—If a client, by his conduct, make it impossible for his solr. to continue any longer connected with him, & the solr. in consequence refuses to continue the connection, he will be considered as if discharged by his client, & will not be ordered to give up the client's deeds & papers until his costs are paid: but he must produce them to be used at the hearing & for inspection.—*STEELE v. SCOTT* (1828), 2 Hog. 141.—*IR.*

650 vi. —.].—An attorney, C. refused either to proceed with a cause

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the costs consequent on his refusal.—**BRASSINGTON v. BRASSINGTON** (1823), 1 Sim. & St. 455; 57 E. R. 182.

*Annotations:—***Appld.** *Hope v. Liddell* (1855), 7 De G. M. & G. 331. **Consd.** *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

651. ———.]—A solr. has no lien upon the will of his client & cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest & a power of revocation. Where a deed is sought to be impeached, pltf. is entitled to have it produced & deft. cannot resist the production upon the ground of lien. In a suit instituted against a solr. who had also acted in the capacity of steward for an account & for delivery of title deeds the ct. upon motion ordered the deeds to be delivered up to pltf., upon payment into ct. of so much of the balance claimed by the answer as was not covered by any security.—**BALCH v. SYMES** (1823), Turn. & R. 87; 37 E. R. 1028, L. C.

*Annotations:—***Refd.** *A.-G. v. Thompson* (1849), 8 Hare, 106; *Costa Rica Republic v. Erlanger* (1871), L. R. 19 Eq. 33. **Mentd.** *Roberts v. Jefferys* (1830), 8 L. J. O. S. Ch. 137; *De Bay v. Griffin* (1875), 10 Ch. App. 292, n.; *Angus v. McLachlan* (1883), 23 Ch. D. 330; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; *Re Morris*, [1908] 1 K. B. 473.

652. ———.]—In answer to a rule to produce an agreement to be stamped, deft. swore that he had deposited it, prior to the action, with his town agent, who had a lien thereon. Pltf.'s affidavit stated that the town agent refused to produce it pursuant to instructions from deft. The ct. made the rule absolute for production forthwith.—**HILL v. DANIEL** (1846), 8 L. T. O. S. 187.

653. ———.]—A deed containing a recital alleged to be material to the case of defts. in a suit was in the custody of the solr. of some of the parties to the deed, & he claimed a lien on it in respect of the costs of its preparation. On his being called as a witness by defts., who were not his clients or parties to the deed, to produce it:—*Held*: he could not refuse to do so by reason of his lien.—**HOPE v. LIDDELL** (1855), 7 De G. M. & G. 331; 3 Eq. Rep. 790; 24 L. J. Ch. 691; 25 L. T. O. S. 231; 1 Jur. N. S. 665; 3 W. R. 581; 44 E. R. 129, L. J.J.

654. ———.]—Solrs. employed by the husband to prepare a marriage settlement:—*Held*: not bound to produce it to the trustees until their bill had been paid.—**Re GREGSON** (1858), 26 Beav. 87; 53 E. R. 829.

*Annotations:—***Refd.** *Fowler v. Fowler* (1881), 50 L. J. Ch. 686. **Mentd.** *Re Lawrance, Bowker v. Austin*, [1894] 1 Ch. 556.

unless pltf. furnished him with the necessary funds, or to hand the papers to another attorney, unless repaid costs out of pocket. On pltf.'s petition:—*Held*: C. should hand to the new attorney, D., such papers & documents connected with the cause as, upon inspection, D. might deem necessary to the effectual prosecution of the suit; pltf. consenting that C. should have a lien on any funds that might be realised thereby, & D. undertaking to proceed without delay to bring the suit to a termination, unless counsel should otherwise advise; in which event D. undertook to hand back all the deeds & papers to C., immediately upon receipt of such advice.—**STRANGWAYS v. HARMAN** (1839), 1 L. Eq. R. 467.—**IR.**

650 vii. ———.]—After decree to sell, the solr. of one deft., a mtgee., who had been paid, but had not re-conveyed, having the mtge.-deed in his

possession, being made a party by supplemental bill, admitted by his answer that he held the deed, upon which he had a lien for the mtgee.'s costs. On motion by pltf. against the solr.:—*Held*: he should bring in the deed, without prejudice to any claim that he might have against his own client.—**PLUMPTRE v. O'DELL** (1842), 1 L. Eq. R. 113.—**IR.**

650 viii. ———.]—A witness having obtained possession of documents in the capacity of pltf.'s attorney, on which he has a lien, is not compellable to produce them.—**QUEELEY v. WARREN** (1847), Bl. D. & Osb. 169.—**IR.**

650 ix. ———.]—When a solr. has a lien upon papers of his clients, which are required for the purposes of a suit, the ct. can force him to bring in the deeds; & can preserve his rights as they existed, on the papers.—**EDGE v. BILLING** (1849), 1 Ir. Jur. 285.—**IR.**

655. ———.]—A solr. who is a deft. in a suit cannot refuse to produce documents belonging to his client on the ground that he has a lien for costs, even when pltf. in the suit claim under his client.—**LOCKETT v. CARY** (1864), 3 New Rep. 405; 10 Jur. N. S. 144.

*Annotations:—***Refd.** *Fowler v. Fowler* (1881), 29 W. R. 800; *Pratt v. Pratt* (1882), 47 L. T. 249.

656. ———.]—A solr. having a lien on documents in his possession belonging to his client, party to an action, may not embarrass proceedings taken in the action by a third party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings, even though the documents may have come into the solr.'s possession before the commencement of the action.

At the time of the death of testator his solr., C., had in his possession certain documents belonging to deceased & on which he, C., had the ordinary solr.'s lien. Subsequently the exors. of deceased employed C. to institute an action for the administration of the estate, & the usual administration judgment was pronounced. The action after judgment not being prosecuted with due diligence, conduct of the proceedings was, by order, given to a creditor, the estate being insolvent. The exors. however remained parties & C. continued to act for them:—*Held*: notwithstanding his lien, C. was bound to produce to the creditor the documents in his, C.'s, possession, to enable the creditor to take steps for getting in a mtge. debt due to the estate.—**Re HAWKES, ACKERMAN v. LOCKHART**, [1898] 2 Ch. 1; 67 L. J. Ch. 284; 78 L. T. 336; 46 W. R. 445; 42 Sol. Jo. 381, C. A.

*Annotations:—***Consd.** *Re Jones & Roberts* (1905), 74 L. J. Ch. 458; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. **Foldd.** *Re Caudery, London Joint Stock Bank v. Wightman* (1910), 54 Sol. Jo. 444. **Mentd.** *Re Safety Explosives*, [1904] 1 Ch. 226.

657. ———.]—A solr. will be ordered to produce & deliver up to the receiver appointed in an administration action documents over which he has a lien for costs. It makes no difference that the documents came into solr.'s possession before suit.—**Re CAUDERY, LONDON JOINT STOCK BANK v. WIGHTMAN** (1910), 54 Sol. Jo. 444.

658. ———.]—**Document not possessed for purposes of suit.**—A solr. who had been employed by an administratrix in the administration of deceased's estate, was also employed as her solr. in a suit subsequently instituted by a creditor of deceased. Pending the suit, the administratrix went to reside abroad, & forbade the solr. to proceed any further with the suit. Afterwards the creditor obtained a decree & a receiver of the estate was appointed. Papers relating to the estate

650 x. ———.]—A law-agent who had a hypothec over documents in his possession for a business account due to him by his employer, the pursuer of a jury cause, appointed to produce them, without payment or reservation, under a diligence obtained by defender, but found that pursuer could not use them at the trial without paying his agent's, haver's, account.—**MONTGOMERIE v. A. B.** (1845), 7 Dunl. (Ct. of Sess.) 553.—**SCOT.**

b. ———.]—**Production by personal representative.**—A client cannot compel the exor. of his attorney to produce his papers in ct., though only for the purpose of using them there, & not to take them out of the exor.'s possession, without paying the costs due.—**MAGRATH v. MUSKERRY** (1787), 1 Ridg. Parl. Rep. 469, 476; Vern. & Scr. 171.—**IR.**

c. ———.]—The ct. has not jurisdiction to order the personal

had come into the solr.'s possession, not for the purposes of the suit merely, but for those & other purposes, & he claimed a lien on them for his costs of the suit, & other business. A petition, by the creditor, praying for a reference to ascertain whether the solr. had any lien on the papers, & that he might be ordered to deliver them up to the receiver, was dismissed.—**WARBURTON v. EDGE** (1839), 9 Sim. 508; 8 L. J. Ch. 111; 3 Jur. 166; 59 E. R. 454.

Annotations:—**Consd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Refd.** *Hope v. Liddell* (1855), 7 De G. M. & G. 331. **Mentd.** *Stedman v. Webb* (1839), 4 My. & Cr. 316.

659. ——— **On payment of costs.]**—Two debts, one of whom was a solr., admitted by their answer that documents were in their power: their solr., with his partner, claimed a lien upon them for costs; & on a motion that debts should pay the costs in order to facilitate the production of the documents, the ct. declined to make the order.—**WROUGHTON v. BARCLAY** (1847), 8 L. T. O. S. 442; 11 Jur. 274.

Annotation:—**Refd.** *Lewis v. Powell* (1897), 66 L. J. Ch. 463.

660. ——— **On winding up of company.]**—Under Cos. Act, 1862, c. 89, s. 115, the solrs. of a co. may be compelled, on a summons obtained by the official liquidator in the winding up of a co., to produce documents relating to the co., without prejudice to their lien for costs.—*Re SOUTH ESSEX ESTUARY & RECLAMATION CO., Ex p. PAINE & LAYTON* (1869), 4 Ch. App. 215; 38 L. J. Ch. 305, L. C.

Annotations:—**Consd.** *Re* Capital Fire Insec. Assocn. (1883), 24 Ch. D. 408. **Refd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

661. ——— **—.]**—An order having been made for winding up a co., applications were made by the official liquidator against B., a solr. employed by the co. before the winding up, that B. might be ordered to deliver up the following documents: 1. the share register & minute book, which were in B.'s hands before the commencement of the winding up; 2. other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; 3. documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted applications on the ground that he claimed a lien. The judge ordered that all the documents should be delivered to the liquidator subject to the lien, if any, of B.:—**Held**: (1) the order was right as regarded the share register & minute book, for the directors had not power to create any lien on them which could interfere with their being used for the purposes of the co.; (2) the order was right as to class 2; for a solr. could not assert against documents which came to his hands pending the winding up any such lien as would interfere with the prosecution of the winding up; (3) the order for delivery of class 3 must be discharged, for the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented.—*Re CAPITAL FIRE INSURANCE ASSOCN.* (1883), 24 Ch. D. 408; 49 L. T. 697; 32 W. R. 260; *sub nom. Re CAPITAL*

representatives of a deceased solr. to deliver up title deeds on which they claim a lien.—**ALLEN v. JERVOISE** (1847), 11 L. Eq. R. 583.—**IR.**

d. ——— **—.]**—Deft. stated that a deed was in the possession of the personal representative of a solr. who claimed a lien on it. The ct. ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party

who had it, on payment of the costs due to him.—**MONSEL v. LINDSAY** (1849), 13 L. Eq. R. 144.—**IR.**

e. ——— **—.]**—A person who had acquired right to certain heritable property, under a *mortis causa* deed executed by his mother, conveyed the property to a third person, who raised an action against the representatives of the law-agent who had prepared the *mortis causa* deed, for exhibition &

FIRE INSURANCE ASSOCN., Ex p. BEALL, 53 L. J. Ch. 71, C. A.

Annotations:—**As to** (1) **Expld.** *Re* Anglo-Maltese Hydraulic Dock Co. (1885), 54 L. J. Ch. 730. **Consd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Refd.** *Boden v. Hensby*, [1892] 1 Ch. 101; *Re* Kent Coalfields Syndicate, [1898] 1 Q. B. 754; *Re* Caudery, London Joint Stock Bank v. Wightman (1910), 54 Sol. Jo. 444; *Dessau v. Peters, Rushton*, [1922] 1 Ch. 1. **As to** (2) **Consd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Refd.** *Re* Anglo-Maltese Hydraulic Dock Co. (1885), 54 L. J. Ch. 730; *Boden v. Hensby*, [1892] 1 Ch. 101; *Re* Caudery, London Joint Stock Bank v. Wightman (1910), 54 Sol. Jo. 444; *Dessau v. Peters, Rushton*, [1922] 1 Ch. 1. **As to** (3) **Refd.** *Re* Rapid Road Transit Co., [1909] 1 Ch. 96.

662. ——— **On change or discharge of solicitor.]**—A solr. discharged by his client or his representatives is not bound to produce the papers in his possession for the purposes of the cause his bill of costs not being paid.—**LORD v. WORMLEIGHTON** (1822), Jac. 580; 37 E. R. 969, L. C.

Annotations:—**Distd.** *Evans v. Delegal* (1835), 4 Dowl. 374. **Consd.** *Heslop v. Metcalfe* (1837), 3 My. & Cr. 183. **Distd.** *Simmonds v. G. E. Ry.* (1868), 3 Ch. App. 797. **Consd.** *Re* Boughton, Boughton v. Boughton (1883), 23 Ch. D. 169; *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1; *Re* Rapid Road Transit Co., [1909] 1 Ch. 96. **Refd.** *Re* Lucas, *Ex p. Shore* (1832), 1 L. J. Bey. 115; *Bozon v. Bolland* (1839), 4 My. & Cr. 354; *Re* Faithfull, *Re* L. B. & S. C. Ry. (1868), L. R. 6 Eq. 325; *Belaney v. Ffrench* (1873), 8 Ch. App. 919, n.; *Newington L. B. v. Eldridge* (1879), 12 Ch. D. 349. **Mentd.** *Hunter v. Leathley* (1830), 10 B. & C. 858.

663. ——— **—.]**—Pltf. in a suit became bkpt. & the suit was revived by his assignee who employed a different solr.:—**Held**: the solr. of original pltf. must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause.—**SIMMONDS v. GREAT EASTERN RY. CO.** (1868), 3 Ch. App. 797; 38 L. J. Ch. 87; 19 L. T. 235; 16 W. R. 1100, L. JJ.

Annotations:—**Refd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1; *Re* Rapid Road Transit Co., [1909] 1 Ch. 96.

664. ——— **—.]**—Although a solr. who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate; yet a solr. who has been discharged by the client may set up such lien, & will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one, & extends to all costs due from the client to the solr.—*Re FAITHFULL, Re* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1868), L. R. 6 Eq. 325; 18 L. T. 502.

Annotations:—**Consd.** *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Refd.** *Robins v. Goldingham* (1872), L. R. 13 Eq. 440; *Re* Hanbury, Whitting & Nicholson (1896), 75 L. T. 449.

665. ——— **—.]**—Documents in the possession of a former solr. of a pltf. who claimed a lien for costs upon them will not be ordered to be produced for debts' inspection.—**KETTLEWELL v. BARSTOW** (1872), 20 W. R. 621; *subsequent proceedings*, 7 Ch. App. 686, L. JJ.; *previous proceedings* (1871), 40 L. J. Ch. 375.

Annotation:—**Consd.** *Lewis v. Powell* (1897), 45 W. R. 438.

delivery thereof, the same being in their custody:—**Held**: defenders were entitled to retain the deed until payment of an account due to the agent by his client, the grantor of the *mortis causa* deed.—**PAUL v. MEIKLE** (1868), 7 Macph. (Ct. of Sess.) 235; 41 Sc. Jur. 136.—**SCOT.**

f. *Third person's lien — Cost of production — Indemnity.]*—Where a party referred in his affidavit to

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Sects. 6 & 7.]

666. ———.]—Solrs. for the trustees of an estate which is under the administration of the ct. have not, after their discharge, such a lien for costs & money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.—*BELANEY v. FRENCH* (1873), 8 Ch. App. 918; 43 L. J. Ch. 312; 29 L. T. 706; 22 W. R. 177, L. JJ.

Annotations:—Distd. Re Capital Fire Insee. Assocn. (1883), 24 Ch. D. 408. Consd. Re Boughton, Boughton v. Boughton (1883), 23 Ch. D. 169; Hutchinson v. Norwood (1886), 54 L. T. 842; Re Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. Expld. Re Rapid Road Transit Co., [1909] 1 Ch. 96. Refd. Re Caudery, London Joint Stock Bank v. Wightman (1910), 54 Sol. Jo. 444.

667. ———.]—Deft., shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solrs. Pltf. applied for production of the documents, which deft. resisted on the ground that they were in the possession of his former solrs., who claimed a lien on them:—*Held*: (1) an order for production must be made, with liberty to apply in case deft. found it impossible to produce the documents; (2) pltf. not to attach deft. without leave of the ct.

A solr. has no right to set up a lien acquired in the cause against the rights of other parties in the cause to production (JAMES, L.J.).—*VALE v. OPPERT* (1875), 10 Ch. App. 340; 44 L. J. Ch. 579; 33 L. T. 41; 23 W. R. 780, L. JJ.

Annotations:—As to (1) Consd. Lewis v. Powell, [1897] 1 Ch. 678; Re Rapid Road Transit Co., [1909] 1 Ch. 96. Refd. Polini v. Gray, Sturla v. Freccia (1879), 11 Ch. D. 741; Re Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

668. ———.]—The solr. for the parties to an administration action will not, on a change of solr., be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for the carrying on of the proceedings.—*Re BOUGHTON, BOUGHTON v. BOUGHTON* (1883), 23 Ch. D. 169; 48 L. T. 413; 31 W. R. 517.

Annotations:—Distd. Re Capital Fire Insee. Assocn. (1883), 24 Ch. D. 408. Consd. Boden v. Hensby, [1892] 1 Ch. 101; Re Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. Refd. Batten v. Wedgwood Coal & Iron Co. (1884), 54 L. J. Ch. 686; Hutchinson v. Norwood (1886), 54 L. T. 842; Dessau v. Peters, Rushton, [1922] 1 Ch. 1.

669. ———.]—It is not an answer to an application for production of documents that they are in the hands of resp.'s former solrs., who claim a lien over them for costs & that he disputes the bill; but the order for production will contain liberty to apply in case he really cannot obtain the documents.—*LEWIS v. POWELL*, [1897] 1 Ch. 678; 66 L. J. Ch. 463; 76 L. T. 283; 45 W. R. 438; 41 Sol. Jo. 385.

670. Mortgagee's lien—Deeds deposited as collateral security.]—Where, in suit for the administration of a testator's estate, a mtgee. was ordered to produce before the master all deeds & writings relating to the estate which were in his custody or power, he does not sufficiently account for the non-production of them by stating, that several years before the decree he had

deposited them with a third person as a collateral security for money advanced by him.—*ROGERS v. ROGERS* (1842), 6 Jur. 497.

671. Pawnbroker's lien—Letters deposited with other goods.]—Documents relating to matters in question in a suit were pledged by deft. previous to the institution of the suit:—*Held*: was not compellable to redeem them for the purpose of production.—*LIDDELL v. NORTON* (1853), Kay, App. xi.; 2 Eq. Rep. 668; 23 L. J. Ch. 169; 22 L. T. O. S. 211; 69 E. R. 317.

Annotation:—Distd. Hope v. Liddell (1855), 7 De G. M. & G. 331.

672. Lien for literary work.]—Pltf. had instituted a suit for the recovery of letters & documents, upon which deft. claimed a lien for literary labour performed thereon at pltf.'s request, part of such labour consisting of notes, etc., written upon the documents themselves. Upon a common summons by pltf. that deft. might be ordered to produce the letters & documents, & pltf. be at liberty to inspect the same, the ct. granted the application.—*BROUGHAM (LORD) v. CAUVIN* (1868), 37 L. J. Ch. 691; 18 L. T. 281; 16 W. R. 688.

673. Refusal of holder to part with documents—Effect on party committed for non-production.]—Deft. was committed for the non-production of documents admitted by him to be in his possession or power. It afterwards appearing that, prior to the suit, they had been deposited with a third party, who claimed a lien thereon, which deft. was unable to satisfy, he was discharged from custody without producing them.—*NORTH v. HUBER* (1861), 29 Beav. 437; 30 L. J. Ch. 666; 25 J. P. 484; 7 Jur. N. S. 767; 54 E. R. 696.

674. Lien of clerk to local board—Acting as board's solicitor.]—Where a solr. has been appointed clerk to a local board with a salary, for conducting the legal as well as the ordinary business of the board, it was held by the judge, upon an interlocutory motion in an action for *mandamus* to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—*Held*: on appeal, as such an order would prejudice the clerk's lien, it could not be made before the trial of the action, without payment into ct. of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers, & the ct. ordered that upon that being done the clerk should deliver up to pltf. all books & papers claimed in the action.—*NEWINGTON LOCAL BOARD v. ELDRIDGE* (1879), 12 Ch. D. 349, C. A.

SUB-SECT. 7.—DOCUMENTS RELATING TO LAND.

See Sect. 9, sub-sect. 2, C., post.

Mortgage deeds.]—*See Sect. 4, sub-sect. 5, ante.*

Purchasers for value without notice.]—*See Sect. 4, sub-sect. 6, ante.*

documents in the hands of a third person, who refused to give them up until paid certain charges which were disputed:—*Held*: the opposite party must content himself with inspecting the documents & taking copies, unless he would agree to indemnify his opponent against the cost of obtaining the documents.—*HOGABOOM v. COX* (1892), 15 P. R. 23, 127.—**CAN.**

g. Action for account—Mortgages in dispute—Plaintiff's lien.]—Pltf. filed a bill against his assignee's representative for an account, charging that certain mtges. then in his possession, & apparently belonging to the assignee's estate, in reality were part of pltf.'s estate. Pltf. objected to produce the mtges. on the grounds that they were held by the assignee as

pltf.'s trustee, & that he had a lien on them for moneys expended by him on account of the properties covered by them. The answer denied, on information & belief, that the mtges. had ever been the property of pltf. Upon the application of deft., an order was granted requiring production of the mtges.—*RHODES v. NEILD* (1859), 1 Ch. Ch. 131.—**CAN.**

SUB-SECT. 8.—BANKERS' BOOKS.

See BANKERS & BANKING, Vol. III., p. 129, No. 48; pp. 305-309, Nos. 993-1022.

675. Agent's banking books—Action for account.]—Bill filed against a steward for an account of moneys received in that capacity, & of the interest made by him of it. By his answer he admitted he received this money, & mixed it with his own, & used it accordingly. This admission will induce the ct. to direct a production of his banker's books, though they may contain many other private matters.—*SALISBURY (EARL) v. CECIL* (1786), 1 Cox, Eq. Cas. 277; 29 E. R. 1165, L. C.

Annotation :—*Mentd. Makepeace v. Rogers* (1865), 5 New Rep. 399.

SECT. 6.—THE NOTICE TO PRODUCE.

See R. S. C., Ord. 31, rr. 15, 16.

676. Service of—Where parties producing jointly.]—A. & B., by their joint answer, admit certain documents to be in the possession of A. B. must be served as well as A. with notice for production of them.—*SMITH v. SIDNEY* (1842), 6 Jur. 432.

677. — Essential.]—*Re CREDIT Co.*, No. 59, *ante*.

678. Form of.]—*Re CREDIT Co.*, No. 59, *ante*.

Of what documents.]—See Sect. 5, sub-sect. 2, *ante*.

At what stage of proceedings.]—See Part II., Sect. 5, sub-sects. 2, 3, *ante*.

Sect. 7.—ORDER UNDER EVIDENCE ACT, 1851.

See Evidence Act, 1851 (c. 99), s. 6.

679. General rule.]—The power to order an inspection of documents given by above Act, s. 6, is not a power of compelling the discovery of documents in the possession of the opposite party. To obtain such inspection, it must be shown that an action or legal proceeding is pending; that there are circumstances sufficient to establish a *prima facie* case that the documents are in the

possession or under the control of the opposite party, & that they relate to such action or legal proceeding; & that the appct. would by a bill of discovery or other proceeding in equity obtain an inspection. The right of a pltf. in equity to a discovery is limited to a question in the cause, & to such material documents as relate to the proof of the appct.'s case on the trial, & does not extend to the discovery of the manner in which the opponent's case is to be established, or to evidence which relates exclusively to his case. Under this statute, the appct. must therefore show the nature of the question to be tried, & state with sufficient distinctness the reason of the application & the nature of the documents, in order to satisfy the ct. or judge that the documents are desired to enable the party to support his own case, & not to find a flaw in the case of his opponent; & also that the opponent may admit or deny the possession of the documents, or excuse their production on the ground that they relate exclusively to his own case or that he is privileged from producing them.

Where, therefore, to an action by an architect for the commission due for superintending certain buildings for deft., the affidavit in support of a rule for inspecting pltf.'s journal or day-book alleged that the work was never done; that, if done, it was charged at too high a rate, & also that it was done upon the credit of another, but the authority of that other to pledge deft.'s credit was not negatived :—*Held* : although the affidavit was defective in this respect, yet deft. was entitled to the inspection, to see if there were any entries relating to the work, & what prices were charged.—*HUNT v. HEWITT* (1852), 7 Exch. 236; 21 L. J. Ex. 210; 19 L. T. O. S. 187; 16 Jur. 503; 155 E. R. 931.

Annotations :—*Apld.* *Riccard v. Inclosure Comrs.* (1854), 4 E. & B. 329; *Chartered Bank of India, etc. v. Rich* (1863), 4 B. & S. 73; *Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Refd.* *Price v. Harrison* (1860), 29 L. J. C. P. 335; *Peru Republic v. Weguelin* (1872), 41 L. J. C. P. 144.

680. —.]—The right of pltf., under above Act, to inspect deeds in deft.'s custody, where such a right exists, cannot be limited by what is necessary to make out a *prima facie* case; but it

PART III. SECT. 5, SUB-SECT. 8.

h. General rule.]—The privilege & prohibition contained in the Bank Act against the examination of customer's accounts are given for the protection of the customer himself, & are directed against the voluntary exposing of the customer's accounts by the bank, & do not prevent proper inspection of a customer's account either in an action brought by himself, or by any other person standing in his rights or attacking any transactions between him & the bank, where they are alleged to be collusive, fraudulent, & preferential. When it is sought to have special persons to inspect the books of the adverse party there must be special circumstances, & the person to be allowed to inspect should be named in the affidavit & his qualifications shown.—*CANADIAN BANK OF COMMERCE v. WILSON* (1908), 8 W. L. R. 266.—*CAN.*

k. Account of garnishee.]—In garnishee proceedings an issue had been ordered as to the indebtedness of the garnishee to the judgment debtor, with mutual rights of interrogation & discovery. Before getting discovery or delivering interrogatories the judgment creditor applied on summons for an order that garnishee's bank should deliver a copy of all entries in its bankers' books relating to transactions & accounts of the garnishee during the

relevant period :—*Held* : as the judgment creditor could get the information by discovery, he was not entitled to the order.—*CHALEYER v. SMITH*, [1920] V. L. R. 40.—*AUS.*

l. Account of acceptor of bill of exchange—Action by bank against drawer & indorser.]—An action having been brought by pltf., a banking co., the indorsees, against the drawer & indorser of a bill of exchange, which the latter had drawn & endorsed for the accommodation of the acceptor :—*Held* : deft. was entitled to an inspection of the accounts kept by pltf. with the acceptor.—*NATIONAL BANK OF IRELAND v. DAVIS* (1853), 5 Ir. Jur. 152.—*IR.*

m. Bank being wound up.]—In an action at the instance of a shareholder in a bank which stopped payment, & was in the course of being voluntarily wound up, against the co. & its liquidators, for reduction of a sale of shares by the bank to pursuer, on the ground of false representations pursuer was allowed, with a view to preparation for trial, full access to all books & documents of the bank, & diligence for recovery of such documents "tending to instruct the averments on record," as he might point out at sight of a commissioner; but held that he was not entitled to recover documents prepared by, or under the authority of, the liquidators

appointed to wind up the affairs of the bank, with reference to any action by or against the bank except actions for payment of ordinary debts due to or by the bank.—*ADDIE v. WESTERN BANK* (1864), 36 Sc. Jur. 399.—*SCOT.*

n. Correspondence between head office & branches—Relating to customers not parties.]—Confidential correspondence between a bank & its branches & confidential documents relating to the dealings of the bank with customers not parties to the suit, which are relevant to the issue between the parties, are not privileged & are not excluded from inspection & production.—*RAINSFORD v. AFRICAN BANKING CORPN., LTD.* (1912), C. P. D. 729.—*S. AF.*

PART III. SECT. 6.

o. Service of—Essential—Sufficiency of notice.]—A notice to produce a writ of execution issued by the ct. of request commissioners, some few days after the commencement of an assize, debts being more than 90 miles from the assize town :—*Held* : insufficient.

In trespass for taking goods :—*Held* : a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record.—*MCCRAE v. OSBORNE* (1843), 6 O. S. 500.—*CAN.*

Sect. 7.—Order under Evidence Act, 1851. Sect. 8.]

extends to any deeds which may tend to support or strengthen the case on the part of pltf. The rule that one party has no right to inspect documents which make out the title of the other, does not apply, if they also make out his own. In an action of ejectment on title, the deeds which constitute the title of deft. may be inspected as evidence for pltf., if it appear upon the affidavits that the recitals may tend to support his case; for instance, as to pedigree; & inspection will not be refused on the mere suggestion that possibly it might be made available for the purpose of adapting the evidence to the recitals.

Pltf. claiming as tenant in tail under the will of his great-grandfather, on the determination of successive life estates in the grandfather & father, deft. claiming as devisee of one to whom the grandfather had conveyed the premises, inspection was granted to pltf. of three deeds, one by which the premises were conveyed to testator, the great grandfather, in fee; & one by which they were conveyed by the grandfather to the person under whom deft. claimed; & the deed under which he claimed to have taken from that person, on an affidavit stating that the latter deed would contain recitals showing that the grandfather took under the will of the original deviser, & a recognition of the will.—*COSTER v. BARING* (1854), 2 C. L. R. 811.

681. Sufficiency of grounds.]—In an action by a sharebroker in respect of the purchase of stock, in which the bill of particulars allowed several credits, deft. applied, under above Act. s. 6, for leave to inspect the books, documents, etc., in the possession of pltf., upon an affidavit of his attorney, which stated that, upon the purchase of the stock, pltf., received, as deponent was informed & verily believed, divers bonds, representing the security for the said stock, which securities remained in the hands of pltf., the particulars of which he neglected to furnish to deft., etc., & also divers books, papers, writings, entries, accounts, & other documents in relation to the said stock, etc., & that it was material & necessary, in order to enable deft. to defend the action & to arrive at a just & proper conclusion as to the state of the accounts between him & pltf., that deponent or deft. should inspect & take copies of all such bonds, books, etc., which deponent verily believed were in the possession or under the control of pltf.; that pltf. had delivered to deft. two accounts relating to the matters in question; & that deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, etc., & that the application was made *bonâ fide*, etc.:—*Held*: no ground was shown for an order to inspect under the statute.—*SNEIDER v. MANGINO* (1852), 7 Exch. 229; 21 L. J. Ex. 121; 16 Jur. 153; 151 E. R. 928.

Annotation:—*Distd. Stone v. Strange* (1865), 3 H. & C. 541.

682. —.]—In an action against a director of a co., completely registered, for services rendered to the co., pltf.'s affidavit, in support of an application for an inspection of certain documents, stated that there was, as pltf. believed, in the possession of the co. & of its directors, a book or books containing minutes of the resolutions, orders, & proceedings of the directors of the co. & of the committees thereof, & that he was advised that it might be necessary that the said minutes or some parts thereof, should be adduced on the trial of the cause as evidence on his part; & that with-

out an inspection & copy thereof he could not safely proceed to trial; & that he had no copy thereof in his possession, or control, or any certain information as to the contents:—*Held*: the affidavit was not sufficient for an inspection of the documents under above sect.—*PEPPER v. CHAMBERS* (1852), 7 Exch. 226; 21 L. J. Ex. 81; 18 L. T. O. S. 210; 16 Jur. 19; 155 E. R. 927.

Annotation:—*Refd. Hunt v. Hewitt* (1852), 7 Exch. 236.

683. —.]—Where it reasonably appears upon affidavit that a document in the possession of one party, is material in support of the case of the other party, or to contradict the case set up in answer, as inspection of such documents will be granted.

Definue to recover a mtge.-deed made between P. of the one part & pltf. of the other part. Plea, set up a lien for work done by deft. as attorney for pltf. A bill of particulars of the alleged lien was delivered to pltf., & consisted of deft.'s bill of costs in an action & reference between the said P. & the G. W. R. Co. In support of a rule for an inspection of deft.'s day books, etc., during a stated period, relating to the particulars of lien, pltf.'s affidavit stated that he had not retained deft. in the said action & reference, & that he was not indebted in respect of the said bill of costs, & that deft.'s day books, etc., from which the said bill of costs had been made, would, as he verily believed, show that P. & not pltf. was the real debtor to deft., & that he verily believed that all or some one of the said books would furnish material evidence in support of his case, & that an inspection of such books was material & necessary for the support of the action. On the other hand, deft. made an affidavit stating that the deed in question was a deed whereby P. assigned to pltf. all claims & demands due to P. from the G. W. Ry. Co., for which an action had been brought, which was made the subject of a reference to the arbn. then pending; that after the date of the deed deft. acted as attorney for pltf. in connection with the reference, & at the commencement of the suit had a lien on the deed for his costs & charges so incurred, & for fees paid to counsel for & on account of pltf.:—*Held*: it was to be assumed that there were entries in books from which the bill of particulars had been made out, which might be good evidence for pltf. to rebut deft.'s case, & therefore that pltf. was entitled under above Act to an inspection of the entries in deft.'s books relating to the bill of particulars.—*SCOTT v. WALKER* (1853), 2 E. & B. 555; 1 C. L. R. 940; 22 L. J. Q. B. 404; 21 L. T. O. S. 181; 17 Jur. 916; 118 E. R. 876.

Annotation:—*Consd. Owen v. Nickson* (1861), 3 E. & E. 602.

684. — Support of plaintiff's case—Although disclosing defendant's.]—*LONDON GAS-LIGHT CO. v. CHELSEA VESTRY*, No. 545, *ante*.

685. What documents.]—Sect. 6 of above Act, does not enable a party to an action to search generally his opponent's books & papers with a view of detecting a flaw in his opponent's case, but entitles him to inspect those documents, & those only, in his opponent's possession which are relevant to the case on which appct. relies. Appct. cannot, by alleging that his opponent is in possession of documents material to the issues to be maintained by the former, compel the latter to make affidavits in answer, to discover whether he has any such documents in his possession, & to specify what they are.—*GALSWORTHY v. NORMAN* (1851), 21 L. J. Q. B. 70; *sub nom. ALSWORTHY v. NORMAN*, 15 Jur. 1061, n.

Annotation:—*Refd. Hunt v. Hewitt* (1852), 7 Exch. 236.

686. — Documents of lunacy institutions.]—In an action against the keeper of a lunatic asylum, licensed under 8 & 9 Vict., c. 100, for improper treatment, of pltf., whilst confined there as a lunatic, deft. is not privileged from producing the books required by that statute to be kept; & therefore an order was made under above sect. for pltf. to inspect certain books of the asylum so far as related to the pltf. The ct. also ordered inspection of deft.'s licence, of the order & medical certificates under which pltf. was confined; also of all letters written by pltf.'s wife & the Comrs. of Lunacy to deft., relating to pltf.—*HILL v. PHILP* (1852), 7 Exch. 232; 21 L. J. Ex. 82; 18 L. T. O. S. 261; 16 J. P. 245; 16 Jur. 90; 155 E. R. 929.

Annotations:—Mentd. *Stillwell v. Ruck* (1859), 33 L. T. O. S. 137; *Peru Republic v. Weguelin* (1872), L. R. 7 C. P. 352.

687. —.]—Above Act, s. 6, gives no power to the ct. to call upon a party to discover upon oath what documents he has relating to the matters in issue, but only to produce for inspection & copy such documents as are material & relevant to the case upon which the appct. relies.—*RAYNER v. ALHUSEN* (1851), 2 L. M. & P. 605; 21 L. J. Q. B. 68; 15 Jur. 1060; *subsequent proceedings, sub nom.* *REYNER v. ALHUSEN*, 18 L. T. O. S. 107.

Annotation:—Refd. *Galsworthy v. Norman* (1851), 21 L. J. Q. B. 70.

688. —.]—A feigned issue was brought under the Inclosure Act, 1845 (c. 118), the question being whether pltf., as lord of the manor of L., was interested in the soil of certain lands proposed to be inclosed, in right of the manor, so as to be entitled to dissent from the inclosure. The case of defts. was, that by an agreement made in 1800, between A., the then lord of the manor, & all the persons entitled to rights of common, & an award made thereunder, 146 acres were allotted to the lord in lieu of his manorial rights, & that certain leases & agreements for leases of part of the land so allotted had been subsequently granted by the lords of the manor:—*Held*: under above Act, s. 6, defts. were entitled to have inspection of the following documents; (1) certain deeds of conveyance of the manor to A., & by A. to present pltf.; these, although title deeds, being capable of being used for the purpose of substantiating deft.'s case, & not merely of negating that of pltf.; (2) the leases, & agreements for leases alleged to have been made under the agreement of 1800, which was not in the possession of pltf.; as these might be material to show that the lords of the manor had acted as owners in severalty of the lands in question, & not in virtue of their ordinary manorial rights.

In order to support an application to inspect, it is sufficient if the party applying shows that the documents sought to be inspected are in the possession, custody, or control of the other party, & are material to substantiate his own case; the effect of the evidence to prove that case being a matter to be decided upon the trial, & forming no ground for determining whether the inspection should or should not be ordered.—*RICCARD v. INCLOSURE COMRS.* (1854), 4 E. & B. 329; 3 C. L. R. 119; 24 L. J. Q. B. 49; 24 L. T. O. S. 129; 1 Jur. N. S. 495; 119 E. R. 127; *sub nom.* *WICKHAM v. INCLOSURE COMRS. OF ENGLAND & WALES*, 3 W. R. 113.

689. —.]—An inspection of books & docu-

ments will not be granted under above Act, s. 6, on affidavits which only show the probability of thereby discovering matter advantageous to pltf.'s case.

The owner of a patent for an improved wheel having brought an action for infringement against a railway co., applied to the ct. for an inspection of the co.'s books & other documents, & in support of the rule, filed affidavits which stated that the action was pending in which one issue was on the plea "not guilty," & that the inspection of such documents would materially assist pltf. in proving the infringement, & the jury in ascertaining the amount of damages:—*Held*: there was not sufficient evidence on the affidavits to support the rule, which ought to be granted for the inspection of such documents only as were relevant to the matter in issue.—*SMITH v. LONDON & GREAT WESTERN RY. CO.* (1854), Macr. 223.

690. Breach of promise of marriage.]—Deft. is entitled to inspect documents in pltf.'s possession bearing upon the amount of damages, though there be no issue to be tried. Deft. in an action for breach of promise of marriage applied for leave to inspect letters written by him to pltf. Deft., in his affidavit, admitted the promise to marry, & said he was advised & believed that it was necessary for him on the trial, & to prepare for the trial, to have the letters produced, & that he would derive advantage from the production. Pltf., by affidavit, objected to the production of the letters, on the ground, amongst others, that deft. might refer to some of the letters in mitigation of damages:—*Held*: deft. was entitled to inspection.—*PAPE v. LISTER* (1871), L. R. 6 Q. B. 242; 40 L. J. Q. B. 87; 24 L. T. 70; 19 W. R. 445.

691. Who is a litigant within the act.]—*DOE d. KING v. HOLMES* (1852), 19 L. T. O. S. 248.

692. On mandamus to enforce civil right.]—The prosecutor of any writ of *mandamus* may, since 1 Will. 4, c. 21, plead several matters to the return, by leave of the ct. A *mandamus* the object of which is to enforce a civil right is a proceeding in aid of which, under Evidence Act, s. 6, a judge may grant an order for the inspection of documents by either of the litigant parties, when the return to such writ is traversed.—*R. v. AMBERGATE, ETC. RY. CO.* (1852), 17 Q. B. 957; 18 L. T. O. S. 272; 16 Jur. 777; 117 E. R. 1548.

693. —.]—In answer to a *mandamus* to a railway co., to make a railway the co. returned that they had no funds; upon which the prosecutors pleaded that the co. had funds, & upon that allegation issue was joined:—*Held*: the affirmative of that issue being upon the prosecutors, they were entitled, under above Act, s. 6, to inspect & take extracts from all the books of the railway co. relating to the matters in question.—*R. v. YORK & NORTH MIDLAND RY. CO.* (1852), 19 L. T. O. S. 108.

SECT. 8.—POWER OF COURT TO ORDER ATTENDANCE OF PERSON TO PRODUCE DOCUMENTS.

See R. S. C., Ord. 37, r. 7.

694. Nature & scope of the rule.]—(1) An order made under R. S. C., Ord. 37, r. 7, for the attendance of a person for the purpose of producing

PART III. SECT. 8.

*p. Garnishee proceedings.]—*Where, after judgment in an action in the

common pleas division, an issue on a garnishee application was directed to be tried by a ct. judge & jury:—

Held: such judge had no jurisdiction to make an order to produce before trial, & consequently no authority to

Sect. 8.—Power of court to order attendance of person to produce documents. Sect. 9: Sub-sect. 1, A.]

documents is equivalent to a *subpoena duces tecum* & has the same effect. Such an order, though unqualified in its terms, means that the person named in it must attend with the documents therein mentioned; but it is then open to him to raise any legal objection to the production of any particular document which he is asked to produce.

The production under r. 7 is not a production for the purpose of private inspection, but must have reference to some proceeding in the litigation. (2) An order under r. 7 may be made *ex parte* & it may be made upon a person who is not a party to the action.—*Re SMITH, WILLIAMS v. FRERE*, [1891] 1 Ch. 323; 60 L. J. Ch. 328; 64 L. T. 253. *Annotation:—As to (2) Foll. Zumbek v. Biggs* (1900), 82 L. T. 654.

695. —.]—Motion by plff. that deft. & his partner L., who was not a deft., should produce before the examiner appointed in the action, the books of the partnership. Dft. had declined to produce the books because L., his partner, who was not a party to the action, objected to the books being shown to a stranger:—*Held*: (1) the ct. had jurisdiction to make the order *ex parte*; (2) the ct. ordered deft. & his partner to attend before the examiner & produce the books.—*ZUMBECK v. BIGGS* (1900), 82 L. T. 654; 48 W. R. 507.

696. Order made ex parte.]—Re SMITH, WILLIAMS v. FRERE, No. 694, *ante*.

697. —.]—*ZUMBECK v. BIGGS*, No. 695, *ante*.

698. Whether court will grant production—Strangers to action.]—By R. S. C., Ord. 37, r. 7, the ct. or judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial. In an action brought by plffs. against defts. for an improper use & publication of certain telegrams transmitted by them to plffs., defts. applied, under above rule for the production of certain documents belonging to & in the possession of the E. co., who were not parties to the action, with a view of showing that the news contained in the telegram had been communicated by plffs. to such co., & by them made public, prior to the time at which such news was published by defts. Defts. contended that the production of the documents in question would simplify the proceedings at the trial & save expense:—*Held*: the power conferred on the ct. was one which, if it existed, should be exercised with extreme caution, & no sufficient ground had been shown for the production of the documents asked for.

To make an order on a perfect stranger to produce documents on the mere suggestion that a party to an action may derive some benefit from their production would, in my judgment, be too oppressive a proceeding to be ordered (*WILLIAMS, J.*).—*CENTRAL NEWS CO. v. EASTERN NEWS TELEGRAPH CO.* (1884), 53 L. J. Q. B. 236; 50 L. T. 235; 32 W. R. 493, D. C. *Annotations:—Consd. Straker v. Reynolds* (1889), 22 Q. B. D. 262; *Elder v. Carter* (1890), 6 T. L. R. 283. *Distd. Re Smith, Williams v. Frere*, [1891] 1 Ch. 323.

699. —.]—Plffs. in an action applied under R. S. C., Ord. 37, r. 7, for an order for leave

make any order on a failure to produce.—*COCHRANE v. MORRISON* (1885), 10 P. R. 606.—CAN.

PART III. SECT. 9, SUB-SECT. 1.—A.

q. Extent of privilege—Letters from branch to head office—Raising points

of law.]—In an action on a policy on the life of plff.'s husband, defts. filed an affidavit on production, but objected to produce certain letters between a local & the head office, on the ground that they were privileged, being of a confidential nature & dis-

to inspect the books of persons who were not parties to the action, & for the production of such books at the office of the plff.'s solr.:—*Held*: the ct. had, under above rule, no jurisdiction to make the order.—*STRAKER v. REYNOLDS* (1889), 22 Q. B. D. 262; 58 L. J. Q. B. 180; 60 L. T. 107; 37 W. R. 379; 5 T. L. R. 186, D. C.

Annotations:—Foll. Elder v. Carter (1890), 6 T. L. R. 283. *Distd. Re Smith, Williams v. Frere*, [1891] 1 Ch. 323.

700. —.]—There is no jurisdiction to make an order for production of documents under R. S. C., Ord. 37, r. 7, against a third person not a party to the litigation, when there is no trial or application to the ct. pending, & the production of them is not necessary to carry out an order which has already been obtained.

"You must look at this rule with reference to the purpose for which it was introduced, & it cannot be said that that purpose was to give a litigant a right to discovery which he did not previously possess against persons not parties to the action. That was not the purpose. So to construe it would be to abuse the rule" (*LINDLEY, L.J.*).—*ELDER v. CARTER, Ex p. SLIDE & SPUR GOLD MINE* (1890), 25 Q. B. D. 194; 59 L. J. Q. B. 281; 62 L. T. 516; 54 J. P. 692; 38 W. R. 612; 6 T. L. R. 283, C. A.

Annotations:—Apld. Burchard v. Macfarlane, Ex p. Tindall, [1891] 2 Q. B. 241. *Foll. O'Shea v. Wood*, [1891] P. 286. *Distd. Re Smith, Williams v. Frere*, [1891] 1 Ch. 323.

701. —.]—*Solicitor.]—O'SHEA v. WOOD*, No. 588, *ante*.

702. Where production compellable by subpoena duces tecum.]—RISHDON v. WHITE (1888), 5 T. L. R. 59.

Annotations:—Dtd. Straker v. Reynolds (1889), 22 Q. B. D. 262. *Refd. Elder v. Carter* (1890), 6 T. L. R. 283.

703. Under 6 & 7 Vict. c. 82, s. 5.]—Sect. 5 of above Act, extends to a commission from the Scottish Cts., for the production of documents; & a rule to compel a party to produce the documents required is only a rule *nisi* in the first instance.—*KAY v. GENNEIL* (1844), 2 Dow. & L. 21; 13 L. J. Q. B. 203.

704. —.]—*BURCH. v. MACFARLANE, Ex p. TINDALL*, No. 136, *ante*.

SECT. 9.—RESISTING PRODUCTION—GROUNDS OF PRIVILEGE.

SUB-SECT. 1.—LEGAL PROFESSIONAL PRIVILEGE.

A. In General.

705. General rule.]—(1) In an action for specific performance of a building contract to take on lease building land from defts., defts. sought to protect from production letters which had passed between their solrs. & their surveyors:—*Held*: defts. must produce the letters except such of them as defts. should state by affidavit to have been prepared confidentially after dispute had arisen between plff. & defts., & for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action.

(2) Scottish legal advisers stand on the same footing as English legal advisers (*BRETT, L.J.*).

(3) Communications made to a medical man are not protected. Communications made to a

closing certain legal points in connection with the defence of the action. On a motion to compel production, defts.' manager in an affidavit stated that "it is my custom, in the course of business, frequently to write to the head office on matters involving points

PART III.—PRODUCTION AND INSPECTION.

priest are not protected. Communications made to a friend are not protected.

(4) The protection is of a very limited character & is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property (JESSELL, M.R.).

(5) Evidence obtained by the solr., or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation (JESSELL, M.R.).—WHEELER v. LE MARCHANT (1881), 17 Ch. D. 675; 50 L. J. Ch. 793; 44 L. T. 632; 45 J. P. 728; 30 W. R. 235, C. A.

Annotations:—As to (1) *Consd.* Calcraft v. Guest, [1898] 1 Q. B. 759. As to (4) *Consd.* Kyshe v. Holt, Childs & Brotherton, [1888] W. N. 128; Lowden v. Blakey (1889), 23 Q. B. D. 332; Learoyd v. Halifax Joint Stock Banking Co., [1893] 1 Ch. 686; R. v. Bullivant, [1900] 2 Q. B. 163. As to (5) *Consd.* Westinghouse v. Mid. Ry. (1883), 48 L. T. 462. *Refd.* Kennedy v. Lyell (1883), 23 Ch. D. 387; Pearce v. Foster (1885), 15 Q. B. D. 114; Procter v. Smiles (1886), 55 L. J. Q. B. 467; Sammon v. Bennett (1892), 8 T. L. R. 235.

706. —.]—KNARESBOROUGH & CLARE BANKING CO., LTD. v. LORRIMER (1897), 41 Sol. Jo. 734, C. A.

707. *Extent of privilege—Document in custody of solicitor.*—KINGTON v. GALE (1676), Cas. temp. Finch, 259; 23 E. R. 142.

Annotation:—*Refd.* Banner v. Jackson (1847), 1 De G. & Sm. 472.

708. —.]—The right to protection arises from the necessity of the case, that is to say, a client has a right in availing himself of professional advice to put himself in the most unreserved confidential communication with his solrs. for the purpose of obtaining that solr.'s assistance & advice as a professional man with respect to the question that has arisen or may arise, or with reference to the defence of the suit; & all that is done in that strictly professional character, with a view to protection against a claim that is anticipated, or with a view to protection against a claim that is made—all that is, from the necessity of the case, considered by this ct., to be privileged (JAMES, L.J.).—ORIGINAL HARTLEPOOL

Co. v. MOON (1874), 30 L. T. 585, L.

— As between solicitor & client —
Whether co-extensive.—The privilege of a client, as to discovery, is not co-extensive with that of his solr.; there are cases where the solr. would be protected from discovery, but the client would not.

Where a case was submitted to counsel, & confidential communications were had with his solr. by a deceased owner of a charge on a living, in contemplation of proceedings being taken by the future incumbent, & which had come into the possession of deft., who was the assignee of the charge:—*Held*: these were not privileged.

Where confidential communications took place after the dispute had arisen, between a deft. & a solr., who acted as agent & adviser only, but not as solr.:—*Held*: they were not privileged.—GREENLAW v. KING (1838), 1 Beav. 137; 8 L. J. Ch. 92; 48 E. R. 891.

Annotations:—*Consd.* Fenner v. London & South Eastern Ry. (1872), L. R. 7 Q. B. 767. *Refd.* Llewellyn v. Badeley (1842), 1 Hare, 527; Walsingham v. Goodricke (1843), 3 Hare, 122.

710. —.]—Upon settling interrogatories for the examination of a vendor in the

of law; the head office confer with their general solrs., receive legal advice from them, & then communicate with me. The letters in question are of the same nature as those between solr. & client, & are, as I am advised & believe, privileged for that reason":—*Held*:

not sufficient, & the affidavit should state that the letters came into existence for the purpose of being communicated to the solr., with the object of obtaining his advice or enabling him to defend an action.—THOMSON v. MARYLAND CASUALTY CO.

Master's office, on a question of title between vendor & purchaser:—*Held*: the vendor was not compellable, at the instance of the purchaser, to state his motive for making a certain appointment or to disclose confidential communications made by him to his solr. & counsel respecting the property, although such communications were made merely on behalf of the consulting person singly, & were not made during a suit, during a dispute, or after the threat of a suit.

Qu: whether the client is compellable to disclose any confidential communication between him & his solr. or counsel, which his solr. or counsel would be privileged in refusing to disclose.

Cases laid before counsel on behalf of a client, stand upon the same footing as other professional communications from the client on the one hand to the counsel or solr. on the other; &, as far as relates to any discovery by the counsel or solr. the question of the existence or non-existence of any suit, claim or dispute, is immaterial.—PEARSE v. PEARSE (1846), 1 De G. & Sm. 12; 16 L. J. Ch. 153; 8 L. T. O. S. 361; 11 Jur. 52; 63 E. R. 950.

Annotations:—*Consd.* Manser v. Dix (1855), 1 K. & J. 451; Minet v. Morgan (1873), 8 Ch. App. 361. *Expld.* Original Hartlepool Collieries Co. v. Moon (1874), 30 L. T. 585. *Consd.* Mostyn v. West Mostyn Coal & Iron Co. (1876), 34 L. T. 531. *Refd.* Thompson v. Falk (1852), 1 Drew. 21; Ford v. Do Pontès (1859), 29 L. J. Ch. 883; Lyell v. Kennedy (1883), 8 App. Cas. 217; Ward v. Marshall (1887), 3 T. L. R. 578. *Mentd.* Macintosh v. Dun, [1908] A. C. 390; Greenlands v. Wilmshurst & London Assn. for Protection of Trade, [1913] 3 K. B. 507.

711. —.]—*Privilege belongs to client.*—The privilege of not disclosing communications between solr. & client belongs to the client alone & his representatives, as against third parties, not *inter se*.

All the communications between pltf.'s ancestor & his solr., viz. deft.'s testator, being asked for:—*Held*: if the exors., being served, would consent, an order should be made for production.

The bill alleging a case of fraud in a purchase by a solr. & from his client at an undervalue:—*Held*: the title deeds & documents were not privileged, as they must be material to pltf.'s case.—GRESLEY v. MOUSLEY (1856), 2 K. & J. 288; 2 Jur. N. S. 156; 69 E. R. 789.

712. —.]—*Confined to legal advisers—Scrivener.*—Bill to discover settlements in trust. Plea, that deft. was a scrivener, & had taken oath not to discover the secrets of his clients:—*Held*: the plea would be overruled.—SHALMER v. TRESHAM (1869), 2 Rep. Ch. 29; 21 E. R. 607.

713. —.]—HARVEY v. CLAYTON (1874), 2 Swan. 221, n.; 36 E. R. 599.

Annotations:—*Appld.* Greenough v. Gaskell (1833), 1 My. & K. 98. *Consd.* Turquand v. Knight (1836), 2 M. & W. 98. *Appld.* Jones v. Pugh (1842), 1 Ph. 96.

714. —.]—*Non-professional agent.*—(1) Documents prepared in relation to an intended action, whether at the request of a solr. or not, & whether ultimately laid down before the solr. or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice, & an inspection of such documents cannot be enforced.

Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solr. (COTTON, L.J.).

(1906), 11 O. L. R. 44; 7 O. W. R. 15. —CAN.

r. —.]—*Documents prepared in view of action.*—Documents written with a view to the information of pursuer under the instructions of

Sect. 9.—Resisting production—Grounds of privilege: Sub-sect. 1, A., B. & C. (a).]

It is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged (BRETT, L.J.).

(2) The directors of a co., in answering interrogatories must not only answer as to their own individual knowledge, but in answering for the co. they must get such information as they can from other servants of the co. who personally have conducted the transaction in question, & they cannot properly answer interrogatories by saying they knew nothing about the matter, when it is in their power to obtain information from other servants of the co. who may have personal knowledge of the facts (COTTON, L.J.).—SOUTHWARK WATER CO. v. QUICK (1878), 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 341, C. A.

Annotations:—As to (1) Folld. The Theodor Körner (1878), 3 P. D. 162. Apld. Nordon v. Defries (1882), 8 Q. B. D. 508. Folld. Collins v. London General Omnibus Co. (1893), 63 L. J. Q. B. 428. Consd. Learoyd v. Halifax Joint Stock Banking Co., [1893] 1 Ch. 686; Ainsworth v. Wilding, [1900] 2 Ch. 315; Lambert v. Home, [1914] 3 K. B. 86. Apld. Feuerherd v. London General Omnibus Co., [1918] 2 K. B. 565. Refd. Kyshe v. Holt, Childs & Brotherton, [1888] W. N. 128; Re Worswick, Robson v. Worswick (1888), 36 W. R. 685; Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry., [1913] 3 K. B. 850. As to (2) Folld. Swansea Corpn. v. Quirk (1879), 44 J. P. 378.

715. — Solicitor as patent agent.]—An action was brought by the registered owner of two letters patent for similar inventions, dated in 1883 & 1884, against defts. for infringement of both such patents. One of defts. was the registered owner of letters patent for a similar invention. Particulars of breaches were delivered by pltf. complaining generally of infringement of both patents without in any way distinguishing between them. Defts. delivered particulars of objections, & also their answer to interrogatories, which had been delivered by pltf. Pltf. then discontinued the action so far as related to the patent of 1884. Subsequently defts. delivered interrogatories referring to their answer to pltf.'s interrogatories & interrogating him as to which of the processes therein described infringed the letters patent of 1883, & as to which infringed the patent of 1884. They further interrogated pltf. as to documents in his possession relating to the preparation of the specifications filed under both patents. Pltf. declined to answer, alleging as a ground for such refusal that the particulars of infringement had been sufficiently stated by him; & as to the documents, that they were confidential communications between himself & his solr., & counsel, & that such documents were privileged; & that, as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. Pltf.'s solr. had also acted as his patent agent:—*Held*: (1) pltf. was not obliged to give any further answer as to the particulars of breaches; (2) pltf.'s answer as to documents was insufficient, inasmuch as it did not distinguish communications between himself & his solr. as such, & communications between himself & his solr. in his character of patent agent, communications of the former class alone being privileged; (3) defts. had the right to inspect communications between pltf. & his patent agent which related to the preparation of the specification of the patent of 1884, both the inventions patented being so closely connected that evidence material to the

issue might be disclosed by such inspection.—MOSELEY v. VICTORIA RUBBER Co. (1886), 55 L. T. 482; Griffin's Patent Cases 163; 3 R. P. C. 351.

716. — Pursuivant of Heralds' College.]—A pursuivant of the Heralds' College employed in the conduct & support of a protest against a pedigree sought to be inrolled in the Heralds' College is not a legal adviser, & therefore communications between him & his employer are not privileged in a ct. of law.—SLADE v. TUCKER (1880), 14 Ch. D. 824; 49 L. J. Ch. 644; 43 L. T. 49; 28 W. R. 807.

717. No presumption of fact against party claiming privilege.]—There is no presumption of fact to be made against a party who enforces the rule against the disclosure of knowledge professionally acquired.—WENTWORTH v. LLOYD (1864), 10 H. L. Cas. 589; 33 L. J. Ch. 688; 10 L. T. 767; 10 Jur. N. S. 961; 11 E. R. 1154, H. L. *Annotation:—Refd. A.-G. v. Richmond (No. 1), [1908] 2 K. B. 729.*

B. Once Privileged always Privileged.

718. General rule.]—A correspondence took place between a client & his solr. during the progress of a suit. A compromise was effected, but afterwards a second suit was instituted to set it aside, & to prosecute the original suit:—*Held*: the correspondence was privileged in the second suit.—HUGHES v. GARNONS (1843), 6 Beav. 352; 49 E. R. 862.

719. —.]—Where it is sworn that documents are confidential communications relating to the particular suit, or to another suit, which, though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit.—THOMPSON v. FALK (1852), 1 Drew. 21; 61 E. R. 359.

720. —.]—Upon motion for production of documents, an affidavit was made by pltf. that deft. had in his possession a certain document not admitted in his answer:—*Held*: (1) production could only be obtained of such documents as were admitted by deft. upon his oath to be in his possession, & the Chancery Amendment Act, 1852 (c. 86), s. 18, did not vary the practice so as to entitle pltf. to production, upon any other oath than that of deft. himself; (2) the draft of an answer in another suit was protected under the rule regarding confidential communications.—LAMB v. ORTON (1853), 1 Drew. 414; 22 L. J. Ch. 713; 1 W. R. 207; 61 E. R. 510.

721. —.]—In an action by pltf. against defts. for not unloading at the port of discharge a cargo of rice purchased by defts. from pltf., whereby pltf., who had entered into a charter-party upon terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by & had to pay damages to the ship-owner:—*Held*: defts. were not entitled to inspection of the papers in pltf.'s possession relating to the action brought against them by the ship-owner, including correspondence between them & their solr., & between their solr. & other persons; for such papers would have been privileged from discovery in the former action, & the fact that such action had terminated did not deprive them of their privilege.—BULLOCK v. CURRY (1878), 3 Q. B. D. 356; 47 L. J. Q. B. 352; 38 L. T. 102; 42 J. P. 232; 26 W. R. 330.

Annotations:—Consd. Pearce v. Foster (1885), 15 Q. B. D. 114; Goldstone v. Williams, Deacon, [1899] 1 Ch. 47. Refd. Nordon v. Defries (1882), 51 L. J. Q. B. 415.

counsel, previous to raising an action may be privileged: just in the same

way as a brief prepared for a trial, or as a case for counsel's opinion, would

be privileged.—BARGADDIE COAL CO. v. WARK (1859), 3 Macq. 467.—SCOT.

722. —.] — An order having been made for discovery of documents by pltf. in an action, ltf. stated on affidavit that, among other documents relating to the matters in question in the action, he had in his possession certain documents partially prepared by his solrs. in an action previously brought by him against one D., a person other than deft., for future use in carrying on the action, but which were, in fact, never completed or used owing to such action not proceeding in consequence of D.'s death, & that the whole of the documents were of a private & confidential nature between counsel, solr., & client:—*Held*: the documents were privileged from discovery in the action.—**PEARCE v. FOSTER** (1885), 15 Q. B. D. 14; 54 L. J. Q. B. 432; 52 L. T. 886; 50 J. P. 33; 33 W. R. 919; 1 T. L. R. 502, C. A.

Annotations:—**Apld.** *Procter v. Similes* (1886), 55 L. J. Q. B. 467. **Consd.** *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47.

723. —.] — In an action as to a right in property, documents which were prepared for the purpose of defence to a former action concerning the same right, defended by a predecessor in title of one of the parties, & found in the office of the successors of such predecessor, are privileged from production.—**CALCRAFT v. GUEST**, [1898] 1 Q. B. 759; 67 L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 420; 42 Sol. Jo. 343, C. A.

Annotations:—**Consd.** *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47. **Mentd.** *Ashburton v. Pape*, [1913] 2 Ch. 469.

724. —.] — Where accounts of transactions between deft. in an action & a bank were prepared under the direction of pltf.'s solrs. for the purposes of the action & also with a view to future litigation, & were produced on the examination of deft. before an examiner, & admitted by such deft. to be correct, & made exhibits to the depositions, which depositions & exhibits were entered as read in an order of compromise of the action:—*Held*: (1) they were privileged from production in a subsequent action between pltf's. & the bank, the use of the documents on the occasion of the order of compromise not amounting to a waiver of the privilege; (2) office copies of such depositions in the possession of pltf's. were not privileged.—**GOLDSTONE v. WILLIAMS, DEACON & CO.**, [1899] 1 Ch. 47; 68 L. J. Ch. 24; 79 L. T. 373; 47 W. R. 91; 43 Sol. Jo. 11.

Annotation:—*As to* (2) **Folld.** *Lambert v. Home*, [1914] 3 K. B. 86.

725. Case for counsel's opinion—In another suit—**On same subject-matter.**—Surviving exor., who had not acted in testator's affairs, was protected from the discovery of cases & opinions stated & given on behalf of deceased exor., who had acted, such cases & opinions having relation to a claim against deceased exor. of the same nature as the claim made against the surviving exor.—**ADAMS v. BARRY** (1843), 2 Y. & C. Ch. Cas. 167; 63 E. R. 73.

726. —.] — Where letters were written or cases were stated for the opinion of counsel by a party or his solr., with a view to a suit then in contemplation:—*Held*: they were privileged from production, not only in that suit, but in any subsequent litigation with third parties respecting the same subject-matter, & involving the question to which such letters & cases related.

PART III. SECT. 9, SUB-SECT. 1.— C. (a).

731 i. Letter of client to solicitor—Privileged.—Professional privilege is limited to letters written definitely for submission to a solr. or for procuring evidence for the solr. & for the purposes of the action.—**LION NOTTING MILLS PROPRIETARY, LTD. v. NOYES**

BROTHERS (MELBOURNE) PROPRIETARY, LTD., [1915] V. L. R. 383.—**AUS.**

s. — Whether privileged—Letter not written in contemplation of action.—Deft., one of the members of the firm of G. & C., when proving a claim in the master's office, was called on to produce all the letters to or from L., his solr., in reference to the questions involved in

—**HOLMES v. BADDELEY** (1841), 1 Ph. 476; 14 L. J. Ch. 113; 9 Jur. 289; 41 E. R. 713, L. C.

Annotations:—**Distd.** *Reynell v. Sprye* (1846), 16 L. J. Ch. 117. **Apld.** *Calley v. Richards* (1854), 24 L. T. O. S. 18. **Consd.** *Betts v. Menzies* (1857), 26 L. J. Ch. 528. **Refd.** *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Pearce v. Foster* (1885), 15 Q. B. D. 114.

727. —.] — The attorney of pltf's. in an action communicated to pltf's. in another action against same deft. & involving substantially same question, a case & opinion taken on behalf of pltf's. in the former action, with permission to copy it. Deft. in the actions filed a bill of discovery against pltf's. to whom the case & opinion had been lent:—*Held*: they could not be compelled to produce the copy which they had made.—**ENTHOVEN v. COBB** (1852), 2 De G. M. & G. 632; 19 L. T. O. S. 291; 17 Jur. 81; 42 E. R. 1019, L. J.

Annotation:—**Consd.** *Reynolds v. Godlee* (1858), 5 K. & J. 88.

728. —.] — In a suit by a subscriber to a fund established under the authority of govt., for the purpose of asserting certain claims against the Secretary of State, as being in the position of a trustee:—*Held*: the ct. could not order production of certain opinions of counsel for which deft. claimed privilege, as having been taken in reference to similar proceedings in another suit.—**UNDERWOOD v. SECRETARY OF STATE IN COUNCIL FOR INDIA** (1866), 35 L. J. Ch. 545; 14 L. T. 385; 12 Jur. N. S. 321; 14 W. R. 551, L. J.

729. —.] — (1) Where a case for the opinion of counsel had been stated in reference to a separate litigation about the same subject-matter as the present dispute, & after it had arisen:—*Held*: it was privileged from production.

(2) Where a letter was written between co-defts. respecting a matter in litigation with direction to forward it to their joint solr.:—*Held*: it was privileged from production.—**JENKYNs v. BUSHBY** (1866), L. R. 2 Eq. 547; 35 L. J. Ch. 820; 15 L. T. 310; 12 Jur. N. S. 558.

Annotations:—*As to* (1) **Refd.** *Calcraft v. Guest* (1898), 67 L. J. Q. B. 505. *As to* (2) **Refd.** *Re Whitworth, O'Rourke v. Darbishire*, [1919] 1 Ch. 320.

730. —.] — Upon an application, in probate proceedings, for inspection of certain documents admitted to be in the possession of opposing parties, who objected to produce them:—*Held*: the objection was good, for the documents were privileged, being briefs prepared confidentially by the direction of the solr. for deceased, the sole deft. in a former action, & as a confidential communication between the solr. & the counsel briefed on behalf of that deft. solely with the object & purpose of enabling the counsel to conduct his defence, & on the appeal from the judgment in that action.—**CURTIS v. BEANEY**, [1911] P. 181; 80 L. J. P. 87; *sub nom.* *In the Goods of COOPER*, **CURTIS v. BEANEY**, 105 L. T. 303; 27 T. L. R. 462.

C. Communications between Client and Legal Adviser direct.

(a) Solicitor and Client.

731. Letter of client to solicitor—Privileged.—A pltf. is not entitled to the production of a letter, admitted by deft. to be in his possession, but

proving the claim of G. & C., excepting such as passed in contemplation of G. & C. proving their claim in the present suit:—*Held*: he was bound so to do.—**MACDONALD v. PUTNAM** (1865), 11 Gr. 258.—**CAN.**

t. Notes given by client to solicitor—Where no action contemplated—Power of court to examine with view to deciding

production—Grounds of privilege—sect. 1, C. (a).]

which, deft. states, was written by him to his solr., & directed the solr. to take the opinion of counsel upon the question in dispute between the parties.—*VENT v. PACEY* (1830), 4 Russ. 193; 38 E. R. 778, L. C.

*Annotations:—***Consd.** *Bolton v. Liverpool Corp.* (1833), 1 My. & K. 88; *Storey v. Lennox* (1836), 1 Keen, 341; *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Flight v. Robinson* (1844), 8 Beav. 22; *Manser v. Dix* (1855), 1 K. & J. 451. **Refd.** *Greenough v. Gaskell* (1833), 1 My. K. 98.

732. ———.] — The ct. refused to compel an attorney to show letters written to him by his client in order to enable the letter to prosecute an action for negligence.—*LEWIS v. BRIGGS* (1836), 2 Hodg. 4; 5 L. J. C. P. 224.

733. ———.] — *KNIGHT v. WATERFORD (MARQUESS)*, No. 787, *post*.

734. ———.] — Letters written by a client to his attorney, are privileged communications, & although they may contain matter necessary for the proof of pltf.'s case, the ct. will not enforce their production.—*HARVEY v. KIRWAN* (1837), 7 L. J. Ex. Eq. 50.

735. ———.] — Communications from a party in a suit to his solr. with reference to the suit are privileged communications.—*LLOYD v. LLOYD* (1839), 2 Curt. 262; 163 E. R. 405.

736. ———.] — A., a judgment creditor of P., who was out of the jurisdiction, filed his bill against R., & also against R., a solr., seeking to redeem a mtge. of certain estates belonging to P., executed to R., & to foreclose P. P. & R. were the only parties to the mtge. security, & the bill sought a discovery from R., who was a member of the firm of R. & Co., solrs., of the particulars of, & the names of the parties beneficially interested in the mtge. security; & whether any other mtge. securities had been executed by P., affecting other estates belonging to P., & deft. R. was required to state & set forth all documents & papers in his possession, relative to the matters mentioned in the bill. R., by his answer, admitted the execution of the mtge. security to him by P., & stated that he & his partners in business had acted in the preparation thereof, as the solrs. of the parties interested therein, the particulars whereof, as well as the names of the parties beneficially interested therein, he was unable, without committing a breach of professional confidence to his clients, to disclose, & therefore, ought not to disclose to pltf. Deft. R. also stated, that as the solr. of certain other parties, he prepared several mtge. deeds affecting other property of deft. P., & that he & his partners had in their possession the mtge. securities, & divers letters & papers relating thereto; but which he submitted ought not to be disclosed or produced by him, inasmuch as such mtge. deeds were also prepared, & the letters & papers came into the possession of himself & his partners in their confidential character of solrs. & professional advisers to such persons:—*Held*: the objections raised by deft. R. were valid, & he was not bound to make the disclosure & discovery required of him by pltf.—

privilege claim.]—GRAHAM v. BOGLE, [1924] 1 I. R. 68.—**IR.**

a. *Letter of solicitor to client—Whether privileged—Letter not written in contemplation of action.]—MACDONALD v. PUTNAM* (1865), 11 Gr. 258.—**CAN.**

b. ———.] *Solicitor also engaged in negotiation of transaction*

impeached—For himself & others.]—G. was general solr. for a bank, & was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the bank but on behalf of himself & of other persons:—*Held*: letters written to the bank by G. in reference to the transaction in question were not privileged from production.—*PAWSON v. MERCHANTS BANK* (1885), 11 P. R. 18.—**CAN.**

JONES v. PUGH (1842), 1 Ph. 96; 12 Sim. 470;

117. **Expla.** *Haverhill v. ...* (1843), 3 Hare, 489. **Refd.** *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Banner v. Jackson* (1847), 1 De G. & Sm. 472; *Chant v. Brown* (1849), 7 Hare, 79.

737. Bill of costs—Whether privileged.]— Claimant, who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked on cross-examination, whether the obstacles were suggested by him to his solr., or by his solr. to him:—*Held*: (1) he was not bound to answer, though the communication was before any litigation was in contemplation. (2) the bill of costs delivered in the same matter was privileged.—*TURTON v. BARBER* (1874), L. R. 17 Eq. 329; 43 L. J. Ch. 468; 22 W. R. 438.

*Annotations:—***As to (2)** **Refd.** *Ainsworth v. Wilding*, [1900] 2 Ch. 315; "Daily Express" (1908), Ltd. v. Mountain (No. 2) (1916), 60 Sol. Jo. 654.

738. ———.] — *BURTON v. DODD* (1890), 35 Sol. Jo. 39.

739. ———.] — Pltfs. brought an action against defts. on a policy insuring pltfs. against damages, costs, & expenses, incurred in the defence or compromise of proceedings in respect of matters appearing in a newspaper belonging to pltfs. On an application by defts. for discovery, pltfs. claimed privilege for correspondence with their solrs., papers laid before counsel, & a bill of costs containing items in respect of which pltfs. were seeking to recover:—*Held*: the ordinary rule as to discovery applied, & the documents, including the bill of costs, were privileged, but as pltfs. were suing on the items contained in the bill of costs they ought to give particulars of the items.—"DAILY EXPRESS" (1908), LTD. v. MOUNTAIN (1916), 32 T. L. R. 592; 60 Sol. Jo. 654, C. A.

740. Where litigation contemplated or not—Whether privileged.]— Communications made by a party to an attorney are confidential, although they do not relate to a cause existing or in progress at the time they were made.—*CROMACK v. HEATHCOTE* (1820), 2 Brod. & Bing. 4; 4 Moore, C. P. 357; 129 E. R. 857.

*Annotations:—***Folld.** *Doe d. Shellard v. Harris* (1833), 5 C. & P. 592. **Consd.** *Greenough v. Gaskell* (1833), 1 My. & K. 98; *Taylor v. Blacklow* (1836), 3 Bing. N. C. 235. **Appld.** *Herring v. Cloberry* (1842), 1 Ph. 91. **Consd.** *Pearse v. Pearse* (1846), 1 De G. & Sm. 12. **Dbtd.** *R. v. Cox & Railton* (1884), 14 Q. B. D. 153. **Refd.** *Moore v. Terrell* (1833), 4 B. & Ad. 870; *Minet v. Morgan* (1873), 21 W. R. 467.

741. ———.] — An attorney is bound to disclose communications made to him, which do not regard either the bringing or defending an action.—*WILLIAMS v. MUDIE* (1824), 1 C. & P. 158. Ry. & M. 34, N. P.

*Annotations:—***Expla.** *Clark v. Clark* (1830), 1 Mood. & R. 3. **Dbtd.** *Doe d. Shellard v. Harris* (1833), 5 C. & P. 592. **Consd.** *Greenough v. Gaskell* (1833), 1 My. & K. 98; *Bland v. Wainwright* (1835), 4 L. J. Ex. Eq. 19.

742. ———.] — The ct. will not order a deft. to produce letters which passed between him & his solr., in the relation of solr. & client, in the progress of the cause, or with reference to it, previously to its being instituted, or which con-

c. ———.] *Letter containing opinion on title.]—*In a case between vendor & purchaser, deft. refused to produce a letter on the grounds: that the same was an opinion from M., who was then acting as his counsel & solr. in the matter of the purchase of the lands, upon his title to the lands, & because the same was a communication between himself & his solr. relative to his title:—*Held*: the communication

tain legal advice.—**GARLAND v. SCOTT** (1830), 3 Sim. 396; 57 E. R. 1046.

Annotations:—**Consd.** Storey v. Lennox (1836), 1 Keen, 341; Walsingham v. Goodricke (1843), 3 Hare, 122. **Apld.** Flight v. Robinson (1844), 8 Beav. 22.

743. ———.] — On a bill which sought to charge a solr. with a fraud practised on pltf's. in the course of proceedings on his client's behalf, the ct. refused to order the production of entries & memorandums contained in deft.'s books, or of written communications, made or received by him, relating to those proceedings, & admitted by the answer to be in deft.'s custody.

Generally, it seems that a solr. cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation.—**GREENOUGH v. GASKELL** (1833), 1 My. & K. 98; **Coop. temp.** Brough, 96; 39 E. R. 618, L. C.

Annotations:—**Consd.** Bland v. Wainwright (1835), 4 L. J. Ex. Eq. 19; Meath Bp. v. Winchester (1836), 10 Ell. N. S. 330; Storey v. Lennox (1836), 1 Keen, 341; Turquand v. Knight (1836), 2 Gale, 192; Desborough v. Rawlins (1838), 3 My. & Cr. 515; Mackenzie v. Yeo (1841), 2 Curt. 866; Herring v. Cloberry (1842), 1 Ph. 91; Walsingham v. Goodricke (1843), 3 Hare, 122; Weeks v. Argent (1847), 16 M. & W. 817; Chant v. Brown (1849), 7 Hare, 79; Glyn v. Caulfeild (1851), 3 Mac. & G. 463; Russell v. Jackson (1851), 9 Hare, 387. **Distd.** Brown v. Foster (1857), 1 H. & N. 736; Ford v. Tennant (No. 2) (1863), 32 Beav. 162; Ramsbotham v. Senior (1869), L. R. 8 Eq. 575. **Consd.** Wilson v. Northampton & Banbury Junction Ry. (1872), L. R. 14 Eq. 477. **Expld.** Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644. **Expld.** & **Distd.** R. v. Cox & Ralton (1884), 14 Q. B. D. 153. **Consd.** Re Strachan, [1895] 1 Ch. 439; Ainsworth v. Wilding, [1900] 2 Ch. 315; O'Rourke v. Darbishire [1920] A. C. 581. **Refd.** Moore v. Terrell (1833), 4 B. & Ad 870; Llewellyn v. Baddeley (1842), 11 L. J. Ch. 310; Warde v. Warde (1851), 3 Mac. & G. 365; Ross v. Gibbs, Gibbs v. Ross (1869), L. R. 8 Eq. 522.

744. ———.] — The ct. will not order a solr. to produce documents prepared by deft. as instructions for commencing proceedings at law.

Where an order to produce "a statement of the illness & death" of a party whose life was insured, & a letter inclosing the same, was sent by deft. to his attorney, with a view to commence an action against the insurance office:—**Held**: production would be refused.—**BLAND v. WAINWRIGHT** (1835), 4 L. J. Ex. Eq. 19.

745. ———.] — **GREENLAW v. KING**, No. 709, *ante*.

746. ———.] — **BUSHNELL v. BUSHNELL** (1838), 2 Jur. 774.

747. ———.] — Where an attorney is employed by a client professionally, to transact professional business, all the communications which pass between them in the course, & for the purpose of that business, & not those only which relate to litigation commenced or in contemplation, are privileged communications.—**HERRING v. CLOBERY** (1842), 1 Ph. 91; 11 L. J. Ch. 149; 6 Jur. 202; 41 E. R. 565, L. C.

Annotations:—**Consd.** Pearce v. Pearce (1846), 1 De G. & Sm. 12. **Distd.** Reynell v. Sprye (1846), 16 L. J. Ch. 117; Follett v. Jefferys (1849), 18 L. J. Ch. 389. **Refd.** Walsingham v. Goodricke (1843), 3 Hare, 122; Calley v. Richards (1854), 19 Beav. 401; Charlton v. Coombes (1863), 4 Giff. 372; Minet v. Morgan (1873), 8 Ch. App. 361; Wheeler v. Le Marchant (1881), 17 Ch. D. 675.

748. ———.] — To entitle confidential communications to the protection which is ordinarily

extended to them in a suit, it is not necessary that they should have been made in contemplation of the suit, it is sufficient if they relate to & were made in the course of the dispute which is the subject of the suit.—**CLAGETT v. PHILLIPS** (1842), 2 Y. & C. Ch. Cas. 82; 7 Jur. 31; 63 E. R. 36.

Annotations:—**Refd.** Walsingham v. Goodricke (1843), 3 Hare, 122; Manser v. Dix (1855), 1 K. & J. 451; Lyoll v. Kennedy (1883), 8 App. Cas. 217.

749. ———.] — Upon a motion that deft. might produce documents in the schedule to his answer:—**Held**: (1) written communications which passed between deft. & his solr. before any dispute had arisen between the parties to the suit were privileged, so far as they contained legal advice or opinions, but not otherwise, although relating to the matters which formed the subject of the suit.

(2) There is no essential difference, with respect to the privilege of professional confidence, between cases stated for the opinion of counsel & other communications.—**WALSINGHAM (LORD) v. GOODRICKE** (1843), 3 Hare, 122; 1 L. T. O. S. 456; 67 E. R. 322.

Annotations:—**As to** (1) **Folld.** Hawkins v. Gathercole (1851), 1 Sim. N. S. 150. **Distd.** Manser v. Dix (1855), 1 K. & J. 451. **N.F.** Wilson v. Northampton & Banbury Junction Ry. (1872), L. R. 14 Eq. 477. **Dbtd.** Minet v. Morgan (1873), 8 Ch. App. 361. **Refd.** Woods v. Woods (1844), 4 Hare, 83; Chant v. Brown (1849), 7 Hare, 79; Thomas v. Rawlings (1859), 27 Beav. 140; Pearce v. Foster (1885), 54 L. J. Q. B. 432.

750. ———.] — (1) The ct. will not order the production of confidential communications between solr. & client, which took place, either in the progress of the suit, or with reference to the suit previous to its commencement.

(2) Confidential communications between attorney, or counsel & client, anterior to the suit, & without reference thereto, are not privileged.

(3) The privilege does not extend to letters written in the relation of principal & agent, & not of solr. & client.

(4) In a suit for specific performance cases submitted to counsel subsequent to the contract relating to the sale, the objections taken by the purchaser to the vendor's title, steps taken by vendors to clear up objections, etc.:—**Held**: to be communications made with reference to the dispute which resulted in the litigation & privileged.—**FLIGHT v. ROBINSON** (1844), 8 Beav. 22; 13 L. J. Ch. 425; 50 E. R. 9; *sub nom.* **ROBINSON v. FLIGHT**, **FLIGHT v. ROBINSON**, 8 Jur. 888; *subsequent proceedings*, *sub nom.* **ROBINSON v. WALL** (1847), 10 Beav. 73.

Annotations:—**As to** (1) **Consd.** Woods v. Woods (1844), 4 Hare, 83; O'Shea v. Wood, [1891] P. 237. **Refd.** Chartered Bank of India, Australia & China v. Rich (1863), 32 L. J. Q. B. 300. **As to** (2) **Dbtd.** Manser v. Dix (1855), 1 K. & J. 451. **As to** (3) **Refd.** Kerr v. Gillespie (1844), 7 Beav. 572; Woolley v. North London Ry. (1869), L. R. 4 C. P. 602.

751. ———.] — Communications & statements made by a client to his confidential adviser, touching the matter in dispute before any suit has been instituted, are not entitled to protection, except under some extraordinary circumstances.

But advice given to a client confidentially upon such statements is a document, the production of which will not be compelled.—**BLUCK v.**

privileged.—**WILSON v. BRUN-**
(1867), 2 Ch. Ch. 137.—**CAN.**

— *Portion read to
citor of opposing party.*—Pltf's
deft. for specific performance of an
ment to purchase certain pre-
Deft.'s solr. prepared a draft
ment which contained a cove-
of indemnity by pltf's, & sent it

to pltf.'s solrs., P. & W., for approval.
W. called upon B., deft.'s solr., &
informed him that M., one of the pltf's,
refused to sign any deed which con-
tained the covenant. At this interview
W. read to B. portions of a letter
written by V., M.'s solr., to his client.
Deft. called upon pltf's, to produce this
letter for inspection:—**Held**: the

letter was privileged, & the fact that
portions of it had been read to deft.'s
solr. was no waiver of the privilege as
regarded the parts which were not
read.—**KAY v. POORUNCHAND POONA-**
LAL (1880), 1 L. R. 4 Bom. 631.—**IND.**

— *In an affidavit of
a party on production of documents a
certain letter was described by its date,*

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GALSWORTHY (1860), 2 Giff. 453; 3 L. T. 399; 7 Jur. N. S. 91; 66 E. R. 189.

752. ———.]—Pltfs. claimed to be transferees of a mtge. from defts., who were originally the mtgees. Defts. by their answer denied the transfer, or its validity, & required the usual affidavit of documents from pltfs. Pltfs. admitted documents, but claimed to withhold them, on the ground as to some that they related to their own title exclusively, & not to that of defts.:—*Held*: (1) in such circumstances it was the case of defts. to show that pltfs. had no title, & that they were entitled to the production; (2) correspondence between a client & his solr. was privileged from production, not merely where it related to the subject-matter of dispute then in existence, but as being correspondence between client & solr. acting in the course of his business as the solr.—BOYD v. PETRIE (1869), 20 L. T. 934; 17 W. R. 903, L. J.J.

753. ———.]—Documents passing between defts. or their agents & their solr. *ante litem motam*, & stated in the affidavit as to documents to be "confidential communications between solr. & client with reference to matters which are now in question in this cause," are described sufficiently to protect them from production.—MACFARLAN v. ROLT (1872), L. R. 14 Eq. 580; 41 L. J. Ch. 649; 27 L. T. 305; 20 W. R. 945.

Annotation:—*Consd.* Wilson v. Northampton & Banbury Junction Ry. (1872), L. R. 14 Eq. 477.

754. ———.]—(1) A pltf. will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, & belief, contain anything impeaching his case, or supporting or material to the case of deft.

(2) A pltf. will not be compelled to produce confidential correspondence between himself or his predecessors in title & their respective solrs. with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation.—MINET v. MORGAN (1873), 8 Ch. App. 361; 42 L. J. Ch. 627; 28 L. T. 573; 21 W. R. 467, L. C. & L. J.

Annotations:—As to (1) *Refd.* Hastings Corp'n. v. Ivall (1873), 8 Ch. App. 1017; Gardner v. Irwin (1878), 48 L. J. Q. B. 223; Bristol Corp'n. v. Cox (1884), 53 L. J. Ch. 1144; Roberts v. Oppenheim (1884), 26 Ch. D. 724; Procter v. Smiles (1886), 55 L. J. Q. B. 467; A.-G. v. Newcastle-upon-Tyne Corp'n., [1899] 2 Q. B. 478; Johnson v. Whitaker (1904), 90 L. T. 535. As to (2) *Consd.* Original Hartlepool Collieries Co. v. Moon (1874), 30 L. T. 585. *Apld.* Turton v. Barber (1874), L. R. 17 Eq. 329; Bacon v. Bacon (1876), 34 L. T. 349. *Foll.* Mostyn v. West Mostyn Coal & Iron Co. (1876), 34 L. T. 531. *Consd.* Lyell v. Kennedy (No. 2) (1883), 9 App. Cas. 81. *Apld.* Lowden v. Blakey (1889), 23 Q. B. D. 332; Calcraft v. Guest, [1898] 1 Q. B. 759. *Refd.* Procter v. Smiles (1886), 55 L. J. Q. B. 467; O'Shea v. Wood, [1891] P. 286.

755. ———.]—Instruction submitted to solrs. or counsel for the purpose of obtaining legal advice, & their notes or opinions thereon, correspondence between a party to an action, or his

predecessor in title, or persons acting on their behalf, & their legal advisers, & correspondence between members of a firm of solrs. as to matters about which they have been consulted by their clients, are privileged from inspection, whether written before or after litigation was commenced or in contemplation.—MOSTYN v. WEST MOSTYN COAL & IRON CO., LTD. (1876), 34 L. T. 531, S. C. *Annotation*:—*Refd.* Wheeler v. Le Marchant (1881), 17 Ch. D. 675.

756. ———.]—In a suit to which trustees were defts. production was sought of letters which had passed between the trustees & their solrs. with reference to the trust, & of memoranda & instructions to counsel prepared by the solrs. on behalf of the trustees. Some of these documents related to a former suit which had sought to set aside a deed of release impeached in the present suit. None of the documents had been charged to the trust estate:—*Held*: all these documents were privileged.—BACON v. BACON (1876), 34 L. T. 349.

757. Communication must be professional.]—Privilege of solr. & client extends to all communications for professional advice but not to employment in matters not professional.—WALKER v. WILDMAN (1821), 6 Madd. 47; 56 E. R. 1007.

Annotations:—*Consd.* Storey v. Lennox (1836), 1 Keen, 341. *Distd.* Bunbury v. Bunbury (1839), 2 Beav. 173. *Consd.* Walsingham v. Goodricke (1843), 3 Hare, 122. *Apld.* Carpmael v. Powis (1846), 1 Ph. 687; *Refd.* v. Langlois (1849), 1 Mac. & G. 627.

758. ———.]—If A. is made a party to a bill for an account of a testator's estate, on the ground that he holds assets by collusion with the exor., he cannot protect himself from answering fully, by denying the collusion & demurring to the other parts of the bill.

If a bill states that A. is the solr. of B. & of C., & then sets forth various dealings of A., in the affairs of B. & C. but does not allege that these affairs came to his knowledge in his character of solr., A. cannot demur to the discovery, on the ground that the matters came to his knowledge only in that character.—WAYTE v. SURMAN (1823), 2 L. J. O. S. Ch. 28.

759. ———.]—The protection of communications made by a client to his attorney, applies to all cases in which the relation of attorney & client subsists, & to all cases where the client applies to the attorney in his professional capacity.—DOE d. SHELLARD v. HARRIS (1833), 5 C. & P. 592, N. P.

Annotations:—*Consd.* Shore v. Bedford (1843), 12 L. J. C. P. 138; R. v. Cox & Railton (1884), 14 Q. B. D. 153. *Refd.* Moore v. Terrell (1833), 4 B. & Ad. 870; Taylor v. Blacklow (1836), 3 Scott. 614.

760. ———.]—GREENLAW v. KING, No. 709, ante.

761. ———.]—FLIGHT v. ROBINSON, No. 750, ante.

762. ———.]—A deft. admitted the possession of documents, but stated that they were all prepared & made since the dispute arose, in contempla-

& as being from a firm of solrs. to deponent, who said that he objected to produce it, that it was a communication between solr. & client, & was privileged:—*Held*: the statement was sufficient to protect the document from production.—HOFFMAN v. CRERAR (1897), 17 P. R. 401.—CAN.

757 i. Communication must be professional.]—Communications between solr. & client are privileged, no matter at what time made, so long as they are professional & made in a professional character. The following clause, in an affidavit on production, was held a sufficient statement of the

nature of the document produced:—"I object to produce the documents set forth in the second part of the first schedule, on the ground that, being communications between solr. & client, they are privileged."—HAMELYN v. WHITE (1874), 6 P. R. 143.—CAN.

757 ii. ———.]—A solr. may, by his answer to a bill against him & his client, refuse to discover any deeds or facts confidentially communicated to him.—STRATFORD v. HOGAN (1812), 2 Ball & B. 164.—IR.

757 iii. ———.]—The ct. will not permit a solr. to disclose any communications

made to him in that character, & will not speculate about their materiality.—BIGGS v. HEAD (1837), 1 Sau. & Sc. 335.—IR.

i. ———. Allegation of fraud.]—When a bill charges that deft. was connected with the preparation & execution of fraudulent leases, & seeks a discovery of the matters alleged to be fraudulent, he cannot by a plea of professional confidence, protect himself from discovery.—KELLY v. JACKSON (1849), 1 Ir. Jur. 233.—IR.

g. ———.]—In a suit in which the bill charged fraud against all the defts., two of them were ordered to

tion of the litigation of that dispute, & her defence against pltf.'s claim, but she did not connect them with her professional advisers:—*Held*: they were not privileged, & ought to be produced.

A bill was filed, insisting on a partition already made between pltf. & deft., who were tenants in common. The bill contained an alternative prayer for a partition under the ct. Deft. insisted on the invalidity of the partition, but admitted the possession of documents showing the manner in which she had since dealt with her share of the property:—*Held*: pltf. had an interest in them, if it were only for the purpose of ascertaining who were tenants in common with him.—*MADEN v. VEEVERS* (1844), 7 Beav. 489; 49 E. R. 1155.

Annotation:—*Mentd.* A.-G. v. Chambers (1849), 12 Beav. 159.

763. —.] — Where the privilege of communications between solr. & client extended to all matters within the scope of the ordinary duties of a solr., & the sale of estates being one of such matters:—*Held*: a solr. was not at liberty to disclose what had passed in conversations which he had had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.

Semble: if the agent had been examined he would have been bound to answer.

If the question raised by the demurrer of a witness to interrogatories be one which the ct. can dispose of in that shape, it is bound to do so, & not to reserve the objection to the hearing.—*CARPMAEL v. POWIS* (1846), 1 Ph. 687; 15 L. J. Ch. 275; 41 E. R. 794, L. C.

764. —.] — *ORIGINAL HARTLEPOOL COLLIERIES Co. v. MOON*, No. 708, *ante*.

765. —.] — The doctrine of privilege is now extended to all communications from a client to his solr. in his professional capacity.—*EADIE v. ADDISON* (1882), 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

766. —.] — *O'SHEA v. WOOD*, No. 588, *ante*.

Solicitor's private documents. — See Nos. 584–588, *ante*.

767. Where solicitor does not act in cause. — An attorney, who has in that character received papers from a client, cannot be called to produce them in a cause, although he does not act therein as the attorney of the party.—*PARKER v. YATES* (1827), 12 Moore, C. P. 520.

768. —.] — A. acted as the solr. of deft. in the matters in dispute up to the time of the filing of the bill, when he ceased to act as solr. in these matters, though he continued deft.'s solr. in other business. At deft.'s request A. wrote for deft. his observations upon the bill:—*Qu.*: whether these observations were privileged from production or not.—*MOXHAY v. Inderwick* (1845), 5 L. T. O. S. 36; *sub nom.* *MOXHAY v. TREDERWICK*, 9 Jur. 343.

769. —.] — Communications between a per-

son & his legal adviser who had been a solr., but at the time of the communications had, without his knowledge, ceased to practise, are privileged.

The communications had reference to the validity of a will, & passed between pltf. & his legal adviser between the date of the will & the death of testator. It was objected that they could not have taken place in contemplation of a suit respecting the validity of the will, & were, therefore, not protected:—*Held*: this did not take them out of the rule.—*CALLEY v. RICHARDS* (1854), 19 Beav. 401; 24 L. T. O. S. 18; 2 W. R. 614; 52 E. R. 406.

770. Husband & wife—Employing same solicitors—Matters of separate interest. — Wherever husband & wife have distinct interests, & the wife is induced in dealing with those interests to act under the advice of an attorney employed & paid by the husband, the attorney must be deemed to act as the attorney of both husband & wife, & each of them has a right to call for the production & to have full inspection of all documents that may come into the possession of the attorney during such employment relating to the transactions & to the advice given to the wife.—*WARDE v. WARDE* (1851), 3 Mac. & G. 365; 21 L. J. Ch. 90; 18 L. T. O. S. 189; 15 Jur. 759; 42 E. R. 301, L. C.

Annotations:—*Consd.* Manser v. Dix (1855), 1 K. & J. 451. *Refd.* Ford v. De Pontès (1859), 29 L. J. Ch. 883; O'Shea v. Wood, [1891] P. 237.

771. — *Employing different solicitors—Matters of common interest.* — A married woman living apart from her husband must, as between herself & her husband or those claiming under him, disclose all correspondence with her solr. which relates to business in which she & her husband were mutually interested, & in which there was nothing adverse to him. But where her interest is adverse to her husband, & where rightly or wrongly she acts as a *feme sole*, her communications & correspondence will be privileged.—*FORD v. DE PONTÈS* (1859), 29 L. J. Ch. 883; 32 L. T. O. S. 383; 5 Jur. N. S. 993; 7 W. R. 299.

Annotation:—*Refd.* Mornington v. Mornington (1861), 2 John. & H. 697.

772. Parties in dispute having common solicitor. — Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other.—*BAUGH v. CRADOCKE* (1832), 1 Mood. & R. 182, N. P.

Annotation:—*Folld.* Perry v. Smith (1842), 9 M. & W. 681.

773. —.] — Where, upon the sale of an estate, the same attorney was employed by the vendor & by the purchaser, a communication from the purchaser to the attorney, asking for time to pay the purchase-money, was held not to be privileged.—*PERRY v. SMITH* (1842), 9 M. & W. 681; Car. & M. 554; 11 L. J. Ex. 269; 152 E. R. 288.

Annotations:—*Mentd.* Re Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648; British & Benington's v. N. W. Cachar Tea Co., etc., [1923] A. C. 48.

774. Death of client—Claim of privilege by

produce all letters written to them, in reference to the subject of the suit & before the dispute arose, by a co-deft., who had been their solr. in the original transaction, save only such letters as they should show by affidavit to contain legal advice or opinions.—*SANKEY v. ALEXANDER* (1874), 8 I. R. Eq. 241. —IR.

h. Communications in contemplation of litigation—Reports as to steps actually taken. — Documents which contain the purport of interviews with, & of advice received from, pltf.'s solrs. & counsel as to pltf.'s position in

regard to their claim & as to the steps to be taken thereto, are privileged. Documents which record the steps taken by pltf's. from time to time in prosecuting their claim against deft. are not privileged.—*RYRIE v. SHIVSHANKAR GOPALJI* (1890), 1 L. R. 15 Bom. 7. —IND.

k. — *Solicitor one of defendants.* — Communications between a solr. deft. & another deft., for whom he is acting as solr., with a view to his advising or to his conduct of the case on behalf of his client, are privileged.—*MCGREGOR v. PHARAZYN* (1902), 22

N. Z. L. R. 414. —N.Z.

i. —.] — In a reduction-improbation of a bond of caution on the ground of fraud, the parties to which had also been parties in three actions of relief previously raised, the defender in the reduction having been examined under a diligence against havers at pursuer's instance:—*Held*: pursuer was not entitled to recover any correspondence that might have passed between defender or others in his behalf & his law-agents, subsequent to the date of the first action of relief, nor prior to that date, in so far as such

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administrator or executor.]—(1) Motion that certain writings should be produced which were referred to by a witness in his deposition, such witness being the solr. of the party in the cause opposing a codicil, resisted on the ground of privilege:—*Held*: information collected by the solr. from a subscribed witness to the codicil is not privileged:—*Semble*: it would be otherwise if collected by the client & communicated to the solr.

(2) Letters written to the principal solr. by another solr., also employed by the client to collect evidence in the matter, & with directions to communicate it to the principal solr., are privileged.

(3) Letters written by testator to his solr. with regard to a bond executed by testator in favour of the party propounding the codicil, are not privileged communications as between the solr. & the exor. opposing the codicil, by whom he was also employed as his solr. in this matter.—*MACKENZIE v. YEO* (1841), 2 Curt. 866; 1 Notes of Cases, 516; 5 Jur. 1041; 163 E. R. 612.

775. ———.]—The draft of an answer prepared for a deceased deft., but not put in, is a privileged document in the hands of his administratrix. But if the administratrix, by her answer, admit possession of, & set out part of the contents of the document, & crave leave to refer to the same, she loses the privilege as to the part so set out, but retains it as to the remainder.

The general rule which entitles a pltf. to inspect all documents partially set out & referred to for greater certainty in an answer, does not apply to privileged documents.—*BELSHAM v. HARRISON*, *BELSHAM v. PERCIVAL* (1846), 15 L. J. Ch. 438; 10 Jur. 772; *sub nom.* *BELCHAM v. PERCIVAL*, 7 L. T. O. S. 300.

776. ———.] — *RUSSELL v. JACKSON*, No. 929, *post*.

777. Death of solicitor — Whether privilege extends to executor.]—*FENWICK v. REED*, No. 27, *ante*.

778. Party acting as own solicitor.] —Motion for the production, by deft., of deeds relating to a mtge. given by pltf., a client, to deft., a solr., to secure money & charges for business. The bill sought to impeach the account & the mtge.:—*Held*: (1) notwithstanding the objection that the deeds constituted deft.'s title, they must be produced; (2) deft.'s books, the part not of use in the cause having been sealed up, must also be produced.

(3) Where papers prepared by deft. since the commencement of that suit, & for the purposes of his defence, were ordered to be produced:—*Held*:

correspondence related to any contemplated action of relief at the defender's instance.—*JARVIS v. ANDERSON* (1841), 3 Dunl. (Ct. of Sess.) 990.—*SCOT*.

m. — Dated considerably prior to commencement of action.]—Documents of a confidential nature in the hands of a law-agent of a bank, & of dates considerably prior to the raising of an action, but subsequent to the time when the bank had reason to expect legal proceedings are protected.—*HAY, THOMSON & BLAIR v. EDINBURGH & GLASGOW BANK* (1858), 20 Dunl. (Ct. of Sess.) 701; 30 Sc. Jur. 363.—*SCOT*.

n. — Reports of government officials prior to dispute between parties—When dispute deemed to commence.]—Documents prepared for the purpose

of obtaining a solr.'s opinion as to the effect of a contract & the opinion itself are privileged from disclosure in the event of subsequent litigation. Reports made by Govt. officials prior to any dispute between the parties are not privileged. The commencement of a dispute is not necessarily the date of issue of summons, though in this case the Ct. held it should be so regarded.—*RUMSEY'S ESTATE v. UNION GOVERNMENT* (1912), C. P. D. 1012.—*S. AF*.

PART III. SECT. 9, SUB-SECT. 1.— **C. (b).**

o. Case for opinion of counsel—Not relating solely to case of one party.]—Pltf. had given a mtge. on a steamboat, & the mtgee. afterwards sold the vessel, & the question was whether he was to be charged with the amount of

deft., being his own solr., had no privileged paper, such as those which pass between solr. & client.—*HILES v. MOORE* (1843), 1 L. T. O. S. 202.

client.]—TWO defts., A. & B., who were both solrs. of B., admitted the possession of certain documents but alleging that he had acted as solr. of B., insisted they were privileged from production. B., by a separate answer, denied that he had employed A. as his solr. On a motion to produce, notice of which was given to both defts.:—*Held*: the answer of B. could not be read in aid of the motion against the answer of A.—*BLENKINSOPP v. BLENKINSOPP* (1848), 11 Beav. 134; 11 L. T. O. S. 61; 50 E. R. 768; *on appeal*, 2 Ph. 607, L. C.; *previous proceedings* (1846), 16 L. J. Ch. 88.

Annotation:—*Refd.* *Chant v. Brown* (1849), 7 Hare, 79.

Communication between company & legal advisor—Right of shareholder to production.]—
See Nos. 979, 980, post.

(b) Counsel.

780. General rule.]—*BULSTRODE v. LECHMORE* (1676), 1 Cas. in Ch. 277; *Freem. Ch.* 5; 22 E. R. 799, L. C.

781. Case for opinion of counsel.] —Demurrer to a bill, requiring deft. to set forth a case with counsel's opinion, for that pltf. was not entitled to any such discovery, the opinion being taken for deft.'s own private use & satisfaction:—*Held*: demurrer overruled.—*RADCLIFFE v. FURSMAN* (1730), 2 Bro. Parl. Cas. 514; 1 E. R. 1101, H. L.

Annotations:—*Folld.* *Richards v. Jackson* (1812), 18 Ves. 472. *Apld.* *Preston v. Carr* (1826), 1 Y. & J. 175. *Consd.* *Bolton v. Liverpool Corp.* (1833), 1 My. & K. 88. *Apld.* *Meath, Bp. v. Winchester* (1836), 10 Bli. 330. *Consd.* *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12. *Refd.* *Re Columbine, Ex p. Allen* (1853), 1 Banker. & Ins. R. 43; *Wilson v. Northampton & Banbury Ry.* (1872), 20 W. R. 938; *Minet v. Morgan* (1873), 8 Ch. App. 361.

782. ———.]—Demurrer to so much of a bill as called for a discovery of cases, laid before counsel, & the opinions, overruled, as covering facts material to pltf.'s case.—*RICHARDS v. JACKSON* (1812), 18 Ves. 472; 34 E. R. 396, L. C.

Annotation:—*Consd.* *Pearse v. Pearse* (1846), 1 De G. & Sm. 12.

783. ———.]—Under the general charge in a bill, that deft. has divers papers, writings, etc., in his possession or power, relating to the matters in the bill mentioned, pltf. is entitled to the production of cases, submitted for the opinion of counsel, admitted by the answer of deft. to be in his possession, but not to the opinions given upon those cases.

Though a pltf. is, generally speaking, entitled to the production & discovery of all papers relating

the purchase-money, or merely with certain securities received on the sale in lieu of such amount. Deft., the mtgee.'s executor, admitted the possession of a copy of a letter from the mtgee., refusing to join in the sale, & an opinion of counsel relating to the same matter, but alleged that these documents did not relate to pltf.'s title or the case made by the bill:—*Held*: pltf. was entitled to production, as pltf.'s case & that of deft. were, in the circumstances stated, so interwoven & inseparably connected that nothing could relate to the one without also relating to the other.—*HAMILTON v. STREET* (1850), 1 Gr. 327.—*CAN*.

p. ———.]—Opinions upon, or steps taken in reference to, a suit in which pltf. & defts. are putting forward opposing contentions cannot be

to the matters in the bill mentioned, in deft.'s possession or power, it seems that he is not entitled to the production of letters stated by the answer of deft. to have been received by him since the filing of the bill, in answer to inquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause, nor to any particulars respecting such letters, which would disclose the names of the witnesses, or the facts likely to be proved by them.—*PRESTON v. CARR* (1826), 1 Y. & J. 175; 148 E. R. 634; *previous proceedings* (1825), M'Cle. & Yo. 457.

Annotations.—*Consd.* Bolton v. Liverpool Corp'n. (1833), 1 My. & K. 88. *Distd.* Bland v. Wainwright (1835), 4 L. J. Ex. Eq. 19. *Consd.* Meath, Bp. v. Winchester (1836), 10 Bl. N. S. 330; Storey v. Lennox (1836), 1 Keen. 341; Walsingham v. Goodricke (1843), 3 Hare, 122. *Distd.* Felkin v. Herbert (1861), 30 L. J. Ch. 798. *Refd.* Llewellyn v. Badeley (1842), 1 Hare, 527.

784. —.] — Cases & statements for the opinion of counsel, admitted by the answer of deft. to be in his custody, possession, or power, were ordered to be produced for the usual purposes. But it would seem that, for the future, cases laid before counsel in the progress of the cause, or prepared in contemplation of, or with reference to the cause, will not be ordered to be produced for the purposes of the cause.

Tithe collectors' books admitted by the answer of the rector to be in his possession or power, & to relate to the matters in the bill mentioned, but which, as he stated, would not in any manner assist or make out pltf.'s case, were ordered on motion to be produced for the usual purposes.—*NEWTON v. BERRESFORD* (1831), 1 You. 377; 159 E. R. 1039.

Annotations.—*Consd.* Walsingham v. Goodricke (1843), 3 Hare, 122. *Refd.* Combe v. City of London (1840), 4 Y. & C. Ex. 139.

785. —.] — *BOLTON v. LIVERPOOL CORPN.*, No. 991, *post*.

786. —.] — A petitioner claiming a portion of bkpt.'s property has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that bkpt. has prevaricated in his statements.—*Re COLLIER, Ex p. COLLIER* (1834), 4 Deac. & Ch. 364, Ct. of R.

787. —.] — (1) In a suit for tithes instituted by a rector against a party who was both patron of the rectory & lord of the manor in which the land for which the tithes claimed were situate, suggesting that a customary payment of £40 *per annum*, alleged by deft. to have been made from time immemorial in lieu of all tithes, was founded on a series of corrupt contracts by way of resignation bonds & otherwise, between successive patrons & rectors. Upon a supplemental bill of discovery filed by the rector:—*Held*: deft. was bound to produce all such private documents in his custody relating to the matters inquired after by the bill as did not constitute his title to the inheritance of the manor, or the lands of which the tithes were claimed, or the inheritance of the tithes.

(2) Pltf. is not bound by deft.'s construction of

documents in his possession, not his title deeds, if it be clear from the circumstances that they may relate to pltf.'s title.

(3) Upon a rector's bill for tithes, & a supplemental bill for discovery of documents impeaching the defence:—*Held*: deft. was not bound to produce certain old briefs in his possession, in order to prove pltf.'s allegation that a former rector's bill, which had been met by the same defence, was dismissed in consequence of collusion between the parties, & deft. was not bound to produce certain leases which had been granted by his predecessors of the lands for which the tithes were sought.

(4) A pltf. is not entitled to the production of documents which cannot, from their nature, be evidence of his title, though they may impeach that of deft.

(5) Cases stated for the opinion of counsel, whether of old date, or made with reference to or in contemplation, of an existing suit or action, are not evidence against the party on whose behalf they are stated, or whose interests they affect; therefore, if they tend to impeach that party's title, he is not compellable by suit in equity to produce them.

(6) Confidential letters between solr. & client are similarly protected.—*KNIGHT v. WATERFORD (MARQUESS)* (1836), 2 Y. & C. Ex. 22; 160 E. R. 296; *subsequent proceedings* (1841), 4 Y. & C. Ex. 283.

Annotations.—*As to* (1) *Consd.* O'Rourke v. Darbishire, [1920] A. C. 581. *As to* (3) *Refd.* Holmes v. Baddeley (1844), 1 Ph. 476. *As to* (4) *Refd.* O'Rourke v. Darbishire, [1920] A. C. 581. *As to* (5) *Refd.* Combe v. City of London (1840), 4 Y. & C. Ex. 139. *As to* (6) *Consd.* Pearse v. Pearse (1846), 1 De G. & Sm. 12. *Refd.* Holmes v. Baddeley (1844), 1 Ph. 476.

788. —.] — A case for the opinion of counsel, stated by the answer to have reference to the matters in question in the cause, & to have been submitted to counsel after the matters in dispute in the case had arisen, is a privileged communication, which deft. is not bound to produce.—*NIAS v. NORTHERN & EASTERN RY. CO.* (1838), 3 My. & Cr. 355; 2 Keen, 312; 7 L. J. Ch. 170; 2 Jur. 295; 40 E. R. 963, L. C.

Annotations.—*Consd.* Flight v. Robinson (1844), 8 Beav. 22. *Refd.* Pearse v. Pearse (1846), 1 De G. & Sm. 12; Minet v. Morgan (1873), 8 Ch. App. 361. *Mentd.* Birch v. Barker (1841), 5 Jur. 430.

789. —.] — A bill of discovery was filed in aid of an issue directed under the Tithe Commission, on a question of a *modus*, & a production prayed of certain documents, including cases & opinions of counsel relating to the matters in question in the cause, in deft.'s possession, & admitted by him to be so. An order for production was obtained, there being no counsel at that time instructed to oppose, but upon a motion to discharge that order subsequently:—*Held*: those documents were protected, & pltf. having asked for & obtained more than he was entitled to, because no one appeared, must pay the costs, & no order could then be made for a production which must depend on a subsequent order.—*BIRCH v. BARKER* (1841), 5 Jur. 430.

said to relate solely to the case of pltf. & are not privileged.—*RYRIE v. SHIVSHANKAR GOPALJI* (1890), 1 L. R. 15 Bom. 7.—*IND.*

q. — *Submitted when litigation pending*.—If cases submitted to counsel refer to a litigation then pending, they are privileged communications; but when they do not, & a subsequent litigation arises, the opposite party is entitled to their production, if they tend to prove affirmatively his case.—*RUSHTON v. BLAIR* (1838), 6 Ir. L. Rec.

N. S. 345.—*IR.*

r. — *Submitted when litigation not pending*.—*Proving case of other party*.—*RUSHTON v. BLAIR* (1838), 6 Ir. L. Rec. N. S. 345.—*IR.*

s. — *Shown to other party*.—The giving of an extract or copy of an opinion of counsel, which a solr. procured for his client on the subject-matter of a suit, to a solr. engaged in litigation against him, does not necessarily prevent the opinion, or the case on which it was taken, from being

privileged.—*CAREY v. CUTHBERT* (1872), 6 I. R. Eq. 599.—*IR.*

t. — *With view to compromise*.—In the course of the execution of a diligence for recovery of writings in an action at the instance of A. against B., the latter demanded production of a memorial laid before counsel, & his opinion, on the ground that they had been communicated to B. prior to the institution of the action. To this it was objected that they were confidential, & that they had been

Sect. 9.—Resisting production—Grounds of privilege: Sub-sect. 1, C. (b), (c), (d) & D.]

790. —.] — COMBE v. LONDON CORPN., No. 544, *ante*.

791. — WALSINGHAM (LORD) v. GOODRICKE, No. 749, *ante*.

792. — In a suit by a *cestui que trust* to set aside a purchase of the trust property, made thirty years before by the trustee, the trustee insisted on the knowledge of the transaction & long acquiescence therein by the *cestui que trust*, & in this answer to a cross-bill the *cestui que trust* admitted that he had an opinion of counsel on his right, which he had taken many years before :—*Held*: (1) the opinion was a privileged communication; (2) an order for its production would be refused.—WOODS v. WOODS (1844), 4 Hare, 83; 14 L. J. Ch. 9; 4 L. T. O. S. 92; 9 Jur. 102, 615; 67 E. R. 570.

793. —.] — PEARSE v. PEARSE, No. 710, *ante*.

794. —.] — Letters were alleged by a deft. to have passed between him & his solr. in the course of & for the purpose of professional business, which the solr. was employed to transact for him, & a case was alleged to have been professionally & confidentially submitted to counsel by the solr. of deft. & on his behalf:—*Held*: the opinion was not privileged.

A case was alleged to have been submitted to counsel by deft.'s solr., in contemplation of legal proceedings & with reference to the title of deft. at issue in the present suit:—*Held*: the opinion was privileged.—BEADON v. KING (1849), 17 Sim. 34; 13 Jur. 550; 60 E. R. 1039.

— Taken by company—Whether defendant shareholder entitled to production.]—*See* No. 980, *post*.

795. — Ante litem motam.] — Cases & the opinions of counsel thereon were anterior to the litigation:—*Held*: they were privileged from production.—REECE v. TRYE (1846), 9 Beav. 316; 50 E. R. 365.

796. — —.] — Cases & opinions anterior to any litigation are privileged.

A deft., by his answer, stated, that he was advised that the cases & opinions stated in the schedule, were privileged:—*Held*: the privilege was not sufficiently shown by the answer; but liberty was given to supply the omission by affidavit.—PENRUDDOCK v. HAMMOND (1847), 11 Beav. 59; 50 E. R. 739.

797. — —.] — Instructions by a purchaser to his counsel for the preparation of the draft agreement to purchase were given long ante litem motam:—*Held*: (1) they were privileged in a subsequent suit, which sought to impeach & set aside the sale, on the ground that the vendor was a trustee who had no power to sell; (2) the draft agreement itself as approved by counsel, & the opinion of counsel upon alterations in the draft were privileged.—MANSER v. DIX (1855), 1 K. & J. 451; 3 Eq. Rep. 650; 24 L. J. Ch. 497; 25 L. T. O. S. 113; 1 Jur. N. S. 466; 3 W. R. 313; 69 E. R. 536.

Annotations:—As to (1) Folld. Macfarlan v. Rolt (1872), L. R. 14 Eq. 580. Conn. Minet v. Morgan (1873), 8 Ch. App. 361; Mostyn v. West Mostyn Coal & Iron Co. (1876), 34 L. T. 531. Reff. Re Holloway, Young v. Holloway (1887), 12 P. D. 167. As to (2) Reff. Mostyn v. West Mostyn Coal & Iron Co. (1876), 34 L. T. 531.

798. — —.] — FLIGHT v. ROBINSON, No. 750, *ante*.

shown with the view to a compromise. B. prayed the ct. to ordain them to be produced:—*Held*: the application must be dismissed.—THOMSON'S

TRUSTEES v. CLARK (1823), 2 Sh. (Ct. of Sess.) 262.—SCOT.

Taken by public

799. — — Or after.] — MOSTYN v. WEST MOSTYN COAL & IRON CO., LTD., No. 755, *ante*.

800. — Opinion must be given professionally.] — The opinion given by an ex-chancellor upon matters thereafter in litigation can in no respect be considered as professional advice, & is not protected from discovery.—SMITH v. DANIELL (1874), L. R. 18 Eq. 649; 44 L. J. Ch. 189; 30 L. T. 752; 22 W. R. 856.

Annotation:—Reff. English v. Tottie (1875), 1 Q. B. D. 141.

801. — Taken by local authority—Application to inspect by ratepayer.] — BRISTOL CORPN. v. COX, No. 366, *ante*.

802. — — —.] — A parochial elector of a parish in a rural district having threatened to take legal proceedings against the rural district council to compel them to repair a road which he alleged was a public road repairable by the inhabitants, the district council prepared cases for the opinion of counsel in reference to their liability & obtained counsel's opinion thereon. The parochial elector claimed the right under Local Government Act, 1894 (c. 73), s. 58, ss. 5, to inspect the cases for the opinion of counsel & all opinions of counsel with documents & plans accompanying:—*Held*: (1) the cases for opinion of counsel & counsel's opinion thereon were "documents" within sect. 58, sub-sect. 5 of the above Act which a parochial elector as such was entitled under the sub-sect. to inspect; (2) inasmuch as the parochial elector desired to inspect the documents, not as a ratepayer, but as a litigant, with a view of obtaining evidence in support of his claim, the ct. would not enforce his right of inspection by *mandamus*.—R. v. GODSTONE RURAL COUNCIL, [1911] 2 K. B. 465; 80 L. J. K. B. 1184; 75 J. P. 413; 27 T. L. R. 424; 9 L. G. R. 665; *sub nom.* R. v. GODSTONE RURAL DISTRICT COUNCIL, *Ex p.* HASTIE, 105 L. T. 207, D. C.

Annotation:—As to (1) Reff. R. v. Hampstead B. C., Ex p. Woodward (1917), 116 L. T. 213.

803. — When made exhibit to affidavit.] — Pltf. suing in *forma pauperis* cannot be ordered to produce for inspection by deft. the case laid before counsel under R.S.C. Ord. 16, r. 23, & his opinion thereon, even where they have been made exhibits to the affidavit filed.—SLOANE v. BRITAIN S.S. Co., [1897] 1 Q. B. 185; 66 L. J. Q. B. 72; 75 L. T. 542; 45 W. R. 203; 13 T. L. R. 124; 41 Sol. Jo. 126, C. A.

— Taken by trustees—& persons analogous thereto.] — *See* Sub-sect. 1, L., *post*.

804. All instructions to counsel.] — NICHOLL v. JONES, No. 402, *ante*.

805. Draft document settled by counsel.] — FEAVER v. WILLIAMS, No. 930, *post*.

806. — Advertisement.] — A successful pltf. in an chancery action, brought to restrain the infringement of his trade mark, drafted an advertisement of the proceedings in & result of the action for publication in a trade journal; before publication the draft was submitted to counsel, & the advertisement as settled by him was published. One of the defts. in the chancery action, alleging the advertisement to be libellous, brought an action for libel in respect of its publication, & sought to obtain inspection of the draft advertisement:—*Held*: the document was privileged from production within the rule as to professional privilege adopted in *Minet v. Morgan*, No. 754, *ante*.—LOWDEN v. BLAKEY (1889), 23 Q. B. D.

An opinion of counsel given to a public officer ought not to be produced in evidence.—EDWARDS v. MACINTOSH (1823), 3 Murr. 369.—SCOT.

332; 58 L. J. Q. B. 617; 61 L. T. 251; 54 J. P. 54; 38 W. R. 64; 5 T. L. R. 599, D. C.

Annotation:—*Reid*. *Calcraft v. Guest*, [1898] 1 Q. B. 759.

807. Briefs to counsel.—Counsel's briefs which have been used at a trial & returned to the client are privileged as to the matters therein.—*Re COLUMBINE, Ex p. ALLEN* (1853), 1 Bankr. & Ins. R. 43.

808. — Observations written upon.—The reports of an accountant employed by deft.'s solr. to investigate books are privileged from production; so also are drafts of pleadings & observations made upon briefs, though the briefs themselves are not privileged when they consist of matter *publici juris*.—*WALSHAM v. STANTON* (1863), 2 Hem. & M. 1; 3 New Rep. 241; 9 L. T. 603; 12 W. R. 199; 71 E. R. 357.

Annotations:—*Consd.* *Lyell v. Kennedy* (1884), 27 Ch. D. 1. *Reid*. *Wilson v. Northampton & Banbury Junction Ry.* (1872), L. R. 14 Eq. 477; *Bullock v. Corrie* (1878), 38 L. T. 102; *Re Brown, Tyas v. Brown* (1880), 42 L. T. 501; *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47; *Curtis v. Beane*, [1911] P. 181.

809. ——*CURTIS v. BEANEY*, No. 730, *ante*.

810. — Endorsements on—Not privileged.—*WALSHAM v. STANTON*, No. 808, *ante*.

811. ——*NICHOLL v. JONES*, No. 402, *ante*.

812. ——*PLUMLEY v. HORRELL*, [1868] W. N. 240.

813. ——*A lunatic was tenant in tail in possession of an estate with remainder to his committee in tail. An agreement for making a road for the common benefit of the lunatics of two adjoining estates was entered into & approved by the Lords Justices on behalf of the lunatic, & as it was alleged, by the committee on her own behalf. The lunatic died without issue, & the agreement was not executed in his lifetime. After his death the committee refused to execute or perform the agreement. In a writ for specific performance she declined to produce the indorsements upon counsel's briefs, shorthand notes, & other documents relating to the proceedings in lunacy:—Held: she must produce them as showing whether she was bound by the agreement in respect of her own interest.—Re BROWN, TYAS v. BROWN* (1880), 42 L. T. 501; 28 W. R. 575.

See Sub-sect. 1, K., post.

Communications made for purposes of fraud.—*See Sub-sect. 1, J., post.*

(c) Solicitors' Partners and Legal Professional Agents.

814. Communications between solicitor & professional agent—Privileged.—A deft. will not be ordered to produce papers containing confidential communications between him & his solr. or between his country solr. & town solr. made in the relation of solr. & client during the progress of the suit, or with reference to it, previous to its commencement.—*HUGHES v. BIDDULPH* (1827), 4 Russ. 190; 38 E. R. 777, L. C.

Annotations:—*Folld.* *Bolton v. Liverpool Corpn.* (1833), 1 My. & K. 88. *Apld.* *Steele v. Stewart* (1843), 13 Sim. 533. *Folld.* *Goodall v. Little* (1851), 1 Sim. N. S. 155. *Consd.* *Minet v. Morgan* (1873), 8 Ch. App. 361. *Reid.* *Greenough v. Gaskell* (1833), 1 My. & K. 98; *Hardman v. Ellames* (1835), 4 L. J. Ch. 181; *Meath, Bp. v. Winchester* (1836), 10 Bl. 330; *Storey v. Lennox* (1836), 1 Keen. 341; *Llewellyn v. Badeley* (1842), 1 Hare, 527; *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Flight v. Robinson* (1844), 8 Beav. 22; *Holmes v. Baddeley*

807 i. Briefs to counsel.—A general claim of privilege for counsel's brief is insufficient, such portions as are

claimed to be privileged should be particularised.—*CALDWELL v. WESTERN*

(1844), 1 Ph. 476; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Follett v. Jefferyes* (1849), 13 Jur. 465; *Manser v. Dix* (1855), 1 K. & J. 451.

815. ——*MACKENZIE v. YEO*, No. 774, *ante*.

816. ——*GOODALL v. LITTLE*, No. 15, *post*.

817. ——*A deft. cannot be compelled to answer as to the contents of letters passing between himself & his professional adviser, & relating to the matters in dispute in the suit.*

If . . . letters . . . have passed between the client's professional adviser & his town agent, they must be considered privileged (STUART, V.-C.).—CATT v. TOURLE (1870), 23 L. T. 485; 19 W. R. 56.

818. Communications between members of same firm—Privileged.—*MOSTYN v. WEST MOSTYN COAL & IRON CO., LTD.* No. 755, *ante*.

819. Deceased partner—Communication made to firm—Sult by executors—No privilege.—In a suit by the exors. of a deceased partner in a firm of solrs., for an account of the partnership dealings & transactions, the surviving partner admitted that certain documents material to the account were in his possession:—*Held*: the fact that those documents related to the private business which had been entrusted in confidence to the professional management of the firm by their clients, could not be admitted as a reason to excuse the production of those documents.—*BROWN v. PERKINS* (1843), 2 Hare, 540; 8 Jur. 186; 67 E. R. 223.

Annotations:—*Consd.* *Bevan v. Webb*, [1901] 2 Ch. 59. *Reid.* *Dadswell v. Jacobs* (1887), 34 Ch. D. 278.

(d) Other Legal Advisers.

820. Foreign legal advisers — Dutch.—(1) Necessary communications between a solr. & client, through an unprofessional person, are privileged; but it not appearing in this case that the communications were wholly of a professional or confidential nature, such privilege was disallowed.

(2) A case was submitted since the institution of the suit, for the opinion of Dutch counsel:—*Held*: the opinion was privileged.—*BUNBURY v. BUNBURY* (1839), 2 Beav. 173; 9 L. J. Ch. 1; 48 E. R. 1146.

Annotations:—*As to* (1) *Folld.* *Reid v. Langlois* (1849), 2 H. & Tw. 59. *Reid.* *Ross v. Gibbs, Gibbs v. Ross* (1869), L. R. 8 Eq. 522.

821. — Scottish.—The same privilege with respect to the non-production of confidential communications as between an English solr. & his client, is extended to like communications as between a Scottish solr. & law agent practising in London, though not admitted an English solr., & his client in Scotland.—*LAWRENCE v. CAMPBELL* (1859), 4 Drew. 485; 28 L. J. Ch. 780; 5 Jur. N. S. 1071; 7 W. R. 336; 62 E. R. 186; *sub nom.* *LAURENCE v. CAMPBELL*, 33 L. T. O. S. 355.

Annotations:—*Apld.* *Minet v. Morgan* (1873), 8 Ch. App. 361; *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81. *Reid.* *Wheeler v. Le Marchant* (1881), 30 W. R. 235; *Lowden v. Blakey* (1889), 23 Q. B. D. 332.

822. ——*WHEELER v. LE MARCHANT*, No. 705, *ante*.

D. Communication between Client and Legal Adviser through Agent as Medium.

823. General rule.—(1) A bill was filed against a banking co. to compel them to replace a sum of money alleged to have been improperly

ASSURANCE Co. (1916), W. L. D. 111. —S. AF.

. 9.—*Resisting production—Grounds of privilege: Sub-sect. 1, D. & E.*

transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by pl'tfs. in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:—*Held*: the letter was not privileged & must be produced.

(2) There is not a syllable which shows that any communication direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man, that is the solr., for advice. If it had been so, I apprehend that it would have been protected upon principles well understood (JESSEL, M.R.).

(3) The extent of the rule [which protects confidential communications from discovery as regards the other side] goes not merely to a communication made to the professional agent himself by the client directly; it goes to all communications made by the client to the solr. through intermediate agents, & he is not bound to write letters through the post, or to go himself personally to see the solr. He may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, & ask him to deliver it to the solr., with a view to his presenting his claim, or of substantiating his defence (JESSEL, M.R.).

(4) The solr. requires further information & says, I will obtain it from a third person. That is confidential. It is obtained by him as solr. for the purpose of the litigation, & it must be protected upon the same ground, otherwise it would be dangerous if not impossible to employ a solr. (JESSEL, M.R.).

(5) Information obtained by the client at the request or under the advice of the solr. is in a sense obtained by the agent of the solr. It is clearly within the rule of privilege (JESSEL, M.R.).

(6) Effect of the Jud. Acts on mode of procedure explained (see No. 3, *ante*).—ANDERSON v. BANK OF BRITISH COLUMBIA (1876), 2 Ch. D. 644; 45 L. J. Ch. 449; 35 L. T. 76; 24 W. R. 624, 724; 3 Ch. Pr. Cas. 212, C. A.

Annotations:—As to (1) *Distd.* Wheeler v. Le Marchant (1881), 17 Ch. D. 675. *Refd.* Bewicke v. Graham (1881), 7 Q. B. D. 400; McLean & Rigg v. Jones (1892), 66 L. T. 653; Collins v. London General Omnibus Co. (1893), 63 L. J. Q. B. 428; Jones v. G. C. Ry., [1910] A. C. 4. As to (2) *Consd.* Southwark & Vauxhall Water Co. v. Quick (1878), 3 Q. B. D. 315. *Refd.* Re Strachan, [1895] 1 Ch. 439; Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry., [1913] 3 K. B. 850. As to (6) *Consd.* Atherley v. Harvey (1877), 2 Q. B. D. 524. *Generally, Refd.* Bullock v. Corrie (1878), 38 L. T. 102; Nordon v. Defries (1882), 8 Q. B. D. 508; Kyshe v. Holt, Childs & Brotherton, [1888] W. N. 128; Re Worswick, Robson v. Worswick (1888), 36 W. R. 685; Learoyd v. Halifax Joint Stock Banking Co., [1893] 1 Ch. 686; Lambert v. Home, [1914] 3 K. B. 86; Feuerheerd v. London General Omnibus Co. (1918), 119 L. T. 711.

824. Privileged—If employment of agent necessary.]—BUNBURY v. BUNBURY, No. 820, *ante*.

825. —.]—The ct. will not compel the production of letters which had been written by a party to the suit residing abroad to his agents here acting under a power of attorney, for the purpose of being communicated to his solrs. in this country, nor will it compel production of letters between the solrs. & such agents.—HOOPER

v. GUMM (1862), 2 John. & H. 602; 6 L. T. 891; 10 W. R. 644; 70 E. R. 1199.

Annotation:—*Refd.* Hamilton v. Nott (1873), L. R. 16 Eq. 112.

826. —.]—MACFARLAN v. ROLT, No. 753, *ante*.

827. Agent must be conduit pipe only.]—CARPMAEL v. POWIS, No. 763, *ante*.

828. —.]—Deft., by his answer, stated that certain documents which he admitted to be in his possession did not belong to him individually, but to him jointly with other parties who acted as his agents, & against whom no equity was in this respect raised by the bill:—*Held*: the ordinary rule of the ct. applied to this case, & pl'tf. had no right to the production of the documents, either on the ground that they were in the actual possession of def't., or on the ground that the parties to whom they in part belonged acted as the agents of def't.

Where communications passed between def't. & his agents for the purpose of being communicated by his agents to his legal adviser:—*Held*: they were privileged from production.—REID v. LANGLOIS (1849), 1 Mac. & G. 627; 2 H. & Tw. 59; 19 L. J. Ch. 337; 14 Jur. 467; 41 E. R. 1408, L. C.

Annotations:—*Consd.* Glyn v. Caulfeild (1851), 3 Mac. & G. 463. *Folld.* Hooper v. Gumm (1862), 2 John. & H. 602. *Apld.* Woolley v. North London Ry. (1869), L. R. 4 C. P. 602. *Consd.* Parr v. L. C. & D. Ry. (1871), 24 L. T. 558; Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644. *Folld.* Kearsley v. Phillips (1883), 48 L. T. 468. *Refd.* Thompson v. Falk (1852), 1 Drew. 21; Ross v. Gibbs, Gibbs v. Ross (1869), L. R. 8 Eq. 522; Cossey v. L. B. & S. C. Ry. (1870), L. R. 5 C. P. 146; Phillips v. Routh (1872), 26 L. T. 845; Hutchinson v. Glover (1875), 45 L. J. Q. B. 120; O'Shea v. Wood, [1891] P. 237; Re Strachan, [1895] 1 Ch. 439.

829. — Not source of information.]—Communications between a solr. & his client, must, to be privileged, come to the solr., directly or indirectly, from the client. Communications made to, or information acquired by, the solr., on account or for the benefit of the client, while the solr. is acting for him, are not privileged from disclosure, if made by or derived from third parties; & that even although the communications may have been made, or the information given to the solr., in his character of solr. for the client, & solely for that reason.

Where a solr. had, while acting as such for a client, obtained from a third person information relating to the interest of his client in the subject-matter of the suit, & afterwards refused to answer, & demurred to a question as to such information on the ground that it was privileged:—*Held*: such demurrer must be overruled.—FORD v. TENNANT (No. 2) (1863), 32 Beav. 162; 1 New Rep. 303; 32 L. J. Ch. 465; 7 L. T. 733; 27 J. P. 211; 9 Jur. N. S. 292; 11 W. R. 324; 55 E. R. 63.

Annotations:—*Refd.* Kennedy v. Lyell (1883), 23 Ch. D. 387; Ainsworth v. Wilding, [1900] 2 Ch. 315.

830. — Not collector of information or evidence.]—Pl'tf., a merchant in Germany, on the ground that he did not understand English, wrote in German, both before & after the issuing of the writ, to his agent in London, in reference to the action "for the purpose of obtaining advice, information or evidence with reference to & for the purpose of such litigation" certain letters, "in order that the contents thereof might be communicated by the agent in English to his solr. who did not understand German":—*Held*: such letters did not establish a case of privilege, & def't. was entitled to inspection.—VETTER v. SCHREIBER (1888), 53 J. P. 39, D. C.

*E. Communication between Legal Adviser and Non-Professional Agent or Third Party.**(a) Where No Litigation contemplated or pending.*

831. No privilege.]—MACKENZIE *v.* YEO, No. 774, *ante*.

832. —.]—Letters written two years before the institution of a suit by a country solr. to one of a firm acting as his London agents are not privileged, though the firm afterwards acted as his solrs. in a suit which involved the subject-matter of the letters.—HAMPSON *v.* HAMPSON (1857), 26 L. J. Ch. 612; 28 L. T. O. S. 352.

833. —.]—A plea of privilege by the answer alleging that deft. has acquired information as solr. of A, acting as such in relation to the matters inquired after, but not alleging that he acquired it from the client, is insufficient.—MARSH *v.* KEITH (1860), 1 Drew. & Sm. 342; 3 L. T. 498; 6 Jur. N. S. 1182; 9 W. R. 115; 62 E. R. 410; *sub nom.* MARCH *v.* KEITH, 30 L. J. Ch. 127.

*Annotations:—*Refd. Kennedy *v.* Lyell (1883), 23 Ch. D. 387. *Mentd.* M'Garel *v.* Moon (1870), L. R. 10 Eq. 22.

834. —.]—Pltf. had in her possession or power letters which had passed between her solr. & an architect, having reference to the questions in the suit, but not written in contemplation of legal proceedings:—*Held*: she was bound to produce them.—PAGE *v.* WARD (1869), 20 L. T. 518; 17 W. R. 435.

835. —.]—Upon the purchase by A. from mtgees. selling under their power of sale, letters passed between the solrs. of A. & of the mtgees., in which reference was made to an anticipated claim by B. to a legacy as charged upon the mortgaged property. B. subsequently filed a bill to establish a charge in respect of her legacy upon the property in the hands of A.:—*Held*: the correspondence between the solrs. of A. & of the mtgees. before the institution of the suit was not privileged from production.—PADDON *v.* WINCH (1870), L. R. 9 Eq. 666; 39 L. J. Ch. 627; 22 L. T. 403.

836. —.]—Letters relating to the subject-matter of a suit written by deft.'s solr. to deft.'s agent are not protected from production, unless they were written with reference to the dispute between the parties to the suit, & with a view to the defence of the suit.—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* MOON (1874), 30 L. T. 585, L. J.

837. —.]—WHEELER *v.* LE MARCHANT, No. 705, *ante*.

838. —.]—SAMMON *v.* BENNETT (1892), 8 T. L. R. 235, D. C.

(b) Where Litigation contemplated or pending.

839. General rule—Privileged.]—A pltf. is not entitled to the production of letters, which have passed between the solr. of deft. & a stranger, relative to the subject of the suit, after the commencement of the litigation.—CURLING *v.* PERRING

(1835), 2 My. & K. 380; 4 L. J. Ch. 80; 39 E. R. 989.

*Annotations:—*Consd. Storey *v.* Lennox (1836), 1 Keen, 341. *Apld.* Holmes *v.* Baddeley (1844), 1 Ph. 476. *Consd.* Lafone *v.* Falkland Islands Co. (No. 1) (1857), 4 K. & J. 34. *Refd.* Llewellyn *v.* Badeley (1842), 1 Hare, 527; Betts *v.* Monzies (1857), 26 L. J. Ch. 528; Colman *v.* Trueman (1858), 3 H. & N. 871; Felkin *v.* Herbert (1861), 30 L. J. Ch. 798; Walsham *v.* Stainton (1863), 2 Hem. & M. 1.

840. —.]—WILLSON *v.* LEONARD (1838), 7 L. J. Ch. 242.

841. —.]—Pltf. had in her possession or power letters which had passed between her solr. & a third party referring to the subject-matter in dispute, some of which had been written in anticipation of, & the rest pending, the proceedings in the suit:—*Held*: she was not bound to produce them.—SIMPSON *v.* BROWN (1864), 33 Beav. 482; 55 E. R. 455.

*Annotation:—**Apld.* M'Corquodale *v.* Bell (1876), 45 L. J. Q. B. 329.

842. —.]—ANDERSON *v.* BANK OF BRITISH COLUMBIA, No. 823, *ante*.

843. —.]—The mere fact that letters are written to pltf.'s solr. "in confidence" & under a pledge not to disclose their contents to anyone but pltf. & his legal advisers, affords no defence to an application for an order to inspect them. But, if they are not merely confidential communications, but are written in answer to inquiries by pltf.'s solr. with a view to & in contemplation of anticipated litigation, they are privileged.—M'CORQUODALE *v.* BELL (1876), 1 C. P. D. 471; 45 L. J. Q. B. 329; 35 L. T. 261; 24 W. R. 399; Bitt. Prac. Cas. 111; 2 Char. Cham. Cas. 48.

*Annotations:—**Apld.* Nordon *v.* Defries (1882), 8 Q. B. D. 508. *Refd.* *Re* Worswick, Robson *v.* Worswick (1888), 36 W. R. 685.

844. Collecting evidence.]—Where the circumstances of the case render it necessary for a party or his solr. to employ an agent to collect evidence in support of legal proceedings, the communications of such agent to his principal relating to such evidence are privileged.—STEELE *v.* STEWART (1844), 1 Ph. 471; 14 L. J. Ch. 34; 4 L. T. O. S. 150; 9 Jur. 121; 41 E. R. 711, L. C.

*Annotations:—**Distd.* Goodall *v.* Little (1851), 1 Sim. N. S. 155. *Consd.* Calley *v.* Richards (1854), 19 Beav. 401. *Foldd.* Lafone *v.* Falkland Islands Co. (No. 1) (1857), 4 K. & J. 34; Hooper *v.* Gunn (1862), 6 L. T. 891. *Apld.* Walsham *v.* Stainton (1863), 2 Hem. & M. 1. *Consd.* Woolley *v.* North London Ry. (1869), L. R. 4 C. P. 602; Fenner *v.* London & South Eastern Ry. (1872), L. R. 7 Q. B. 767. *Foldd.* Hamilton *v.* Nott (1873), L. R. 16 Eq. 112. *Consd.* Anderson *v.* Bank of British Columbia (1876), 2 Ch. D. 644. *Refd.* Glyn *v.* Caulfeild (1851), 3 Mac. & G. 463; Ford *v.* Tennant (No. 2) (1863), 32 Beav. 162; Cossey *v.* L. B. & S. C. Ry. (1870), L. R. 5 C. P. 146.

845. — Report of accountant.]—WALSHAM *v.* STAINTON, No. 808, *ante*.

846. —.]—WHEELER *v.* LE MARCHANT, No. 705, *ante*.

847. Giving advice.]—WHEELER *v.* LE MARCHANT, No. 705, *ante*.

848. — Examination in bankruptcy—Copies

PART III. SECT. 9, SUB-SECT. 1.—
E. (a).

*b. Auditor's reports—Not made in contemplation of litigation.]—*Pltf., a guarantee co., brought an action against the directors of a grain co., alleging that, by false representations, it was induced to issue a guarantee bond to the grain co., under which, upon the default of the grain co., it was compelled to pay a certain sum. It was admitted that pltf. must fail in the action, as then constituted, on all issues, other than the one of false

representations. On an application to compel one of defts. to produce for inspection certain auditor's reports of the grain co.:—*Held*: they did not come into existence for the purpose of instructing counsel in view of contemplated litigation & so were not privileged.—LONDON GUARANTEE *v.* HENDERSON (1915), 32 W. L. R. 546; 9 W. W. R. 268; 23 D. L. R. 38; 25 D. L. R. 754; 25 Man. L. R. 617, 726.—CAN.

c. Correspondence between factor & law-agent—Relating to rights of

*third party.]—*In a sequestration of the estate of a farmer, in which the landlord was a claimant, a question arose whether the landlord was bound to account for the value of a turnip crop included in an assignation by the tenant to the landlord but which the landlord said had been previously assigned to a third party, who refused to pay its value:—*Held*: the trustee was not entitled to recover correspondence between the landlord's factor & law-agent in regard to the rights of the third party.—MUNRO *v.* FRASER (1858), 21 Dunl. (Ct. of Sess.) 103.—SCOT.

Sect. 9.—Resisting production—Grounds of privilege: Sub-sect. 1, E. (b) & F. (a).]

*of.]—*A transcript of the shorthand notes of the evidence given at a private examination of a bkpt. held by the solr. of the trustee in bkpcy. under Bkpcy. Act 1883 (c. 52), s. 27, for the purpose of enabling him in his professional capacity to advise the trustee whether or not an action should be brought is privileged from production.—*LEAROYD v. HALIFAX JOINT STOCK BANKING CO.*, [1893] 1 Ch. 686; 62 L. J. Ch. 509; 68 L. T. 158; 41 W. R. 344; 9 T. L. R. 188; 37 Sol. Jo. 212; 3 R. 252.

*Annotation:—*Reid. *Calcraft v. Guest*, [1898] 1 Q. B. 759.

849. Preparation of defence.]—After the institution of an action four anonymous letters were sent, two to pltf. herself, one to the counsel, & one to the solr. employed on her behalf in the action. The letters were admitted to be relevant to the matters in question in the action:—*Held*: (1) pltf. was bound to produce for inspection the letters written to herself; (2) the letters written to the counsel & solr. employed in the action must be treated as coming within the principle which gives protection to information obtained or procured by the solr. for the purposes of prosecuting or defending an action for his client, & the information could not be said not to have been obtained by the solr. because it had been sent to him voluntarily, & these two letters consequently need not be produced.

A voluntary communication made to a solr. or professional adviser, by reason of his filling that character, does not differ from any other information obtained by him, or by agents employed by him, for the purposes of the action.

(3) In an action to recall probate of a will on the ground of its having been executed under the undue influence of defts., interrogatories asked whether since testator's death any arrangement had been come to between defts. for the division of the property:—*Held*: they were relevant & required to be answered.—*Re HOLLOWAY, YOUNG v. HOLLOWAY* (1887), 12 P. D. 167; 57 L. T. 515; 35 W. R. 751; 3 T. L. R. 616; *sub nom.* *YOUNG v. HOLLOWAY*, 56 L. J. P. 81, C. A.

850. Materials for brief.]—*SOUTHWARK WATER CO. v. QUICK*, No. 714, *ante*.

851. — Deposition of witnesses.]—Depositions of the master & crew of a British ship, the R., in regard to a collision had been taken by the Receiver of Wreck, & the Board of Trade refused to give copies of such depositions to the owners of the P. in an action arising out of the collision between these vessels. Copies had however been obtained for the purpose of the action by the solrs. to the owners of the R., whose master & crew had made the depositions. On motion by the owners of the P. for leave to inspect & take copies of the depositions in the possession of the solrs. of the owners of the R.:—*Held*: these copies were privileged.

Here discovery is sought of copies of certain depositions, & these were obtained for the purposes of this action, & as the phrase is, to form part of the brief. Therefore, I think they are privileged (*BUTT, J.*).—*THE PALERMO* (1883), 9 P. D. 6; 53 L. J. P. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. L. C. 165, C. A.

*Annotations:—*Consd. *Land Corpn. of Canada v. Puleston*,

[1884] W. N. 1. *Reid. Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47.

852. Copies of documents not privileged.]—Where a diary that would not have been protected from production has been lost, extracts made from it since the commencement, & for the purposes of litigation, are not so protected.—*LAND CORPN. OF CANADA v. PULESTON*, [1884] W. N. 1, Bitt. Rep. in Ch. 176.

853. —.]—A correspondence had taken place between deft. in an action & persons other than pltf. which was material to the questions at issue in the action. Deft. had not preserved the letters received by him or copies of the letters written by him in the course of such correspondence, but after action brought his solr., for the purposes of the defence to the action, procured through such third persons copies of the letters so written & received:—*Held*: such copies were not privileged against inspection by pltf.—*CHADWICK v. BOWMAN* (1886), 16 Q. B. D. 561; 54 L. T. 16, D. C.

854. Communication must be specified as confidential.]—The schedule to a deft.'s answer of the documents in his power contained as follows:—“Letters from Messrs. K. & C., deft.'s solrs., to Mr. F., one of the witnesses examined for deft. at the trial of the action, bearing date,” etc., & deft. in the body of his answer, stated that all the documents in the schedule related to & were connected with the matters in question in the suit, & were prepared & written, after the institution of it, for the purpose of deft.'s defence to the suit & for the purpose of the action between the parties to which the suit related:—*Held*: the letters were not sufficiently characterised as being of a confidential nature to protect them from being produced.—*DARTMOUTH CORPN. v. HOLDSWORTH* (1840), 10 Sim. 476; 59 E. R. 700.

855. Litigation may be only probable.]—In a suit against a co. for specific performance of a contract dated in 1863, production was required from the co. of correspondence passing, before the institution of the suit, between the former engineer & solrs. of the co., & between the present solrs. & the secretary & the agents, sub-agents, engineers, surveyors, & directors of the co., & cases & opinions of counsel advising on behalf of the co. in respect of the subject-matter of the suit:—*Held*: the whole of this correspondence relating to the subject-matter of the contract, which might have led to litigation, whether it had done so or might have done so, or whether it was probable or improbable that it would have done so, was privileged & production was refused.—*WILSON v. NORTHAMPTON & BANBURY JUNCTION RY. CO.* (1872), L. R. 14 Eq. 477; 27 L. T. 507; 20 W. R. 938.

*Annotations:—*Appld. *Bullock v. Corrie* (1878), 38 L. T. 102. Consd. *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675.

F. Communication between Client and Non-Professional Agent or Third Party.

(a) General Rule.

856. No privilege — Litigation not contemplated.]—A. had, 45 years ago, enclosed a piece of ground from the waste, & built a cottage on part of it. He died 29 years ago, & after that, his widow & daughter lived on the premises till the death of the former, a month before the trial.

PART III. SECT. 9, SUB-SECT. 1.— **F. (a).**

d. When privileged—Litigation anticipated—Reports of engineers.]—In a suit to restrain the infringement of a

patent, pltf. objected to produce documents, described as professional opinions of engineers as to the validity of the patent, the subject-matter of the suit, claiming that they were privileged communications:—*Held*:

documents of this description are only protected where they have been obtained in view of or in anticipation of litigation which has actually taken place, & in which the discovery is sought.—*TORONTO GRAVEL ROAD CO.*

On ejectment by A.'s oldest son:—*Held*: the declarations of the mother were evidence for the lessor of pltf., although she was not in the sole occupation of the premises, & although she was not on the premises when such declarations were made.

If the mother went to C., who was neither an attorney nor pretended to be one, to ask him to make a conveyance of the property, & C. wrote to a relation of his, who was an attorney, & on receiving his relation's answer, informs the mother that she cannot convey, this is not a privileged communication.—*DOE d. PRITCHARD v. JAUNCEY* (1837), 8 C. & P. 99.

Annotation:—*Mentd.* *Asher v. Whitelock* (1865), 11 Jur. N. S. 925.

857. ———.]—Deft. having made a charter, as "agent for merchant," & then unknown to the owner rechartered to a third party, who was ignorant of the former charter, as "agent for owner," but there being evidence that before loading or signing bills of lading, the owner was told of the second charter, & adopted it, & the bills of lading being in the name of the third party, as charterer & shipper, though in fact the cargo was shipped by deft., & pltf. taking a bill for part of freight from the third party, which was not paid by reason of his insolvency:—*Held*: (1) the question in substance came to this, whether pltf. had loaded & acted on the first charter, as if so, deft. would be liable for the freight, if not, for want of authority; (2) pltf. would be allowed inspection of letters between deft. & the third party relating to the charter.—*HOLTEN v. JONES* (1861), 2 F. & F. 452.

858. ———.]—*Reports of insurance agent to company.*]—In an action on a policy of insurance on household furniture to recover from the insurance office a loss by fire, in which there were issues imputing fraud to pltf., both as to the fire & the account of the articles lost:—(1) the ct. made an order for pltf. to be at liberty to inspect all communications in writing in the possession of the office relating to the property or value of the property insured which had passed between such office and its agent with whom the insurance had been effected, & also between such agent or office & another insurance office with which a similar policy on the same furniture had been effected by pltf.; (2) the ct. refused to allow pltf. inspection of the report made to the office by its surveyor of the salvage recovered from the fire.—*WOOLLEY v. POLE* (1863), 14 C. B. N. S. 538; 143 E. R. 556; *sub nom.* *WOOLLEY v. POLE*, 32 L. J. C. P. 263.

Annotations:—*As to* (1) *Folld.* *Mahoney v. Widows' Life Assce. Fund* (1871), L. R. 6 C. P. 252. *As to* (2) *Expld.* *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602.

v. TAYLOR (1875), 6 P. R. 227.—*CAN.*

e. ———.]—*Report of assessor.*]—An insured made a claim upon a policy of fire insurance & an assessor was appointed by the insurance co. to investigate & advise whether the claim was one which ought to be met. The co. alleged that the report was required for the purpose of submitting the same if necessary to the co.'s solrs. The assessor reported that the claim should be resisted & suggested that his report should be laid before the co.'s solr. Thereafter litigation supervened:—*Held*: the assessor's report was not privileged from disclosure in the course of such litigation.—*GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD. v. GOLDBERG* (1912), T. P. D. 494.—*S. AF.*

f. ———.]—Documents sworn to be called into existence in the *bond*

vide belief that litigation might ensue are not privileged from production for this reason only.—*FEIGENBAUM v. JACKSON & McDONELL* (1900), 7 B. C. R. 171.—*CAN.*

g. ———.]—*Communications relating to evidence to be produced.*]—As a general rule communications between an agent & his principal, relating to the transaction in suit, are not privileged, but where those communications are made when litigation is pending or is anticipated, & relate to the evidence likely to be produced at the trial by the suitor, they are privileged.—*ADAMS v. MOFFAT, HUTCHINS & Co.* (1906), 23 S. C. 343.—*S. AF.*

h. ———.]—*Litigation not anticipated*—*Formal report of employee.*]—Reports of the captain of a steamer in regard to a collision between the steamer & another vessel, furnished to

859. ———.]—*Medical report.*]—A confidential report to an insurance co. by its medical officer as to the state of health of a party whose life is proposed to be insured is not of such a confidential character as to entitle it to the privilege of protection, & its production cannot therefore be demurred to under 15 & 16 Vict. c. 86, s. 33.—*LEE v. HAMMERTON* (1864), 10 L. T. 730; 12 W. R. 975.

860. ———.]—In an action against an insurance co. upon a policy of life insurance, defts. having pleaded that the policy was obtained by fraudulent concealment & misrepresentation of material facts, pltfs. applied for inspection of the following documents: *viz.* two reports made to the co. by private friends of the assured to whom the co. were referred, with relation to the assured's state of health & habits, & a report made by a medical man to whom the assured was referred for examination on behalf of the co. At the head of the printed forms of questions, upon which these reports were made, were statements that the co. would regard the answers given as strictly private & confidential. It appeared from pltfs.' affidavits that the co., on accepting the insurance, after consideration of the proposals for insurance, & of those reports, had charged a special rate of premium on the ground that the life was not a first-class one:—*Held*: (1) inspection of the documents would be allowed, on the ground that they were not privileged from inspection; (2) pltfs. had made out a good *prima facie* case for supposing that they were material to their case.—*MAHONY v. WIDOWS' LIFE ASSURANCE FUND* (1871), L. R. 6 C. P. 252; 40 L. J. C. P. 203; 24 L. T. 548; 19 W. R. 722.

861. ———.]—*PADDON v. WINCH*, No. 835, *ante.*

862. ———.]—*ROSE v. CHESHAM URBAN DISTRICT COUNCIL* (1913), 77 J. P. Jo. 184.

863. ———.]—*Litigation contemplated or commenced.*]—Letters were written by a deft., after the institution of the suit, to an unprofessional agent abroad, confidentially & in reference to the defence of deft. to this suit:—*Held*: they were not privileged.—*KERR v. GILLESPIE* (1844), 7 Beav. 572; 49 E. R. 1188.

Annotation:—*Refd.* *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602.

———.]—Defts. in a suit were shareholders in a co. & had been authorised by the other shareholders to wind up its affairs, & for this purpose, among other things, to send out agents to India. Pltfs. in the suit having brought actions against defts. as shareholders, in respect of certain debentures issued by the co., defts. thereupon filed a bill on behalf of themselves &

the manager & to the superintendent of the co. owning the steamer, according to a practice observed in all such cases, held not to be privileged in an action subsequently arising out of the collision, no action having been commenced or threatened at the time when the reports were sent in.—*COOK v. UNION S.S. Co., LTD.* (1904), 23 N. Z. L. R. 933.—*N.Z.*

k. ———.]—*Confidential communications—Agency terminated.*]—One who had been the agent of a party is not bound to produce confidential correspondence passing between him & his employer, though he had for some time ceased to be his agent, & the correspondence called for took place long before the action was thought of, & though the subject of that correspondence was very remotely connected with the question at issue.—*BATH'S (LADY) EXECUTORS v*

9.—Resisting production—Grounds of privilege: Sub-sect. 1, F. (a) & (b) i.]

the other shareholders to restrain the actions, & to obtain relief in respect of the debentures. Pltfs. then filed a bill against the defts. for discovery in aid of the actions. From the answers of the defts. to this bill it appeared that they had in their actual possession certain letters which had passed between defts. & the directors & shareholders of the co. & the agents in India, after the dispute had arisen, & in contemplation of & pending proceedings in respect of the dispute & for the purpose of assisting the defence of the defts. & the other shareholders. On a motion by pltfs. for the production of these letters the defts. submitted that they were not bound to produce them: first, because they held them on behalf of themselves & also of the other shareholders of the co., who were not parties to the suit; & secondly, because the letters fell within the class of privileged communications:—*Held*: (1) defts. sufficiently represented the whole body of shareholders for the purposes of the litigation, & so far as the parties by or to whom the letters were sent were shareholders of the co., the letters were not privileged; (2) the circumstance, that the letters related to the matters in dispute & arose out of communications between the shareholders themselves with a view to their defence in the suit, formed no ground of protection.

(3) Professional privilege, as a ground of exemption from production of documents, is adopted simply from necessity, & ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety.—*GLYN v. CAULFIELD* (1851), 3 Mac. & G. 463; 18 L. T. O. S. 215; 15 Jur. 807; 42 E. R. 339, L. C.

Annotations:—*As to* (1) *Refd.* Penny v. Goode (1853), 22 L. J. Ch. 371; Woolley v. North London Ry. (1869), L. R. 4 C. P. 602.

865. ———.]—*GLYN v. WILSON, GLYN v. ELLIOTT* (1852), 17 Jur. 916, n.

Annotation:—*Refd.* Scott v. Walker (1853), 17 Jur. 916.

866. ———.]—Communications between a litigant & an unprofessional agent are privileged, if such communications were made in contemplation of & relate to the subject-matter of the litigation.—*ROSS v. GIBBS, GIBBS v. ROSS* (1869), L. R. 8 Eq. 522; 39 L. J. Ch. 61.

Annotations:—*Consd.* Cossey v. L. B. & S. C. Ry. (1870), L. R. 5 C. P. 146. *Expld.* Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644. *Apld.* McCorquodale v. Bell (1876), 1 C. P. D. 471. *Refd.* English v. Tottie (1875), 45 L. J. Q. B. 138.

867. ———.]—An action having been commenced for falsely representing that deft. had

authority to sell certain premises, pltf. obtained a judge's order to inspect the letters which had passed between deft. & his principals in reference to the transaction:—*Held*: inasmuch as, from the nature of the action, the letters might support pltf.'s case, & were possibly the only evidence on which he would be able to rely, there was nothing to warrant the ct. in setting aside the order.—*HANROTT v. SPICE* (1872), 27 L. T. 422.

868. ———.]—In an action for not delivering goods according to contract it appeared that deft. before selling the goods to pltf. had purchased them from the K. co., & that shortly before the action was commenced he had sent to the co.'s agents two letters from pltf.'s solr. relating to the claims made in the action, requesting them to obtain information respecting these claims & that a number of letters thereupon passed between deft. & the co.'s agents upon the subject, some of them after the action was brought, & that ultimately the co. agreed to allow deft. a large deduction from the invoice price:—*Held*: pltf. was entitled to inspection of the letters, as they could not be said to be confidential communications between deft. & any one in the nature of his legal adviser with a view to litigation.

Qu.: whether under Jud. Act, 1875 (c. 77), Sched. Ord. 31, the ct. had a discretion to refuse inspection in cases where a ct. of equity has been in the habit of granting discovery.—*ENGLISH v. TOTTIE* (1875), 1 Q. B. D. 141; 45 L. J. Q. B. 138; 33 L. T. 724; 24 W. R. 393; 3 Char. Pr. Cas. 198.

Annotation:—*Refd.* Bustros v. White (1876), 45 L. J. Q. B. 642.

869. ———.]—*ANDERSON v. BANK OF BRITISH COLUMBIA*, No. 823, *ante*.

870. ———.]—*BUSTROS v. WHITE*, No. 478, *ante*.

871. ———.]—In an action for damages for improperly constructing a steam tug, reports made by persons employed by pltf. to survey the tug for the purposes of the action are liable to inspection.—*MARTIN v. BUTCHARD* (1877), 36 L. T. 732.

872. ———.]—*Threat of litigation.*—In an action to restrain deft. co. from making or using any brake apparatus similar to the continuous brake apparatus of which pltf. was the inventor & patentee, deft. co. sought to withhold from production certain letters which had passed between the officers of the co. & between them & other persons. This correspondence, it was alleged, had arisen in consequence of a claim made by pltf. regarding his patents, in a letter addressed to the secretary of the co. which was taken by them to be an intimation that pltf. intended to proceed against them for infringement of his

JOHNSTON (1811), 16 Fac. Coll. 345.—*SCOT*.

1. ———.]—*Correspondence with local agent.*—Resp. syndicate entered into a written contract with appct. for the lease to him of photo plays or films, which was silent on the question of sub-letting. In an action for breach of contract for failure to supply films resp. pleaded that appct. had sub-let films in breach of the contract. In a discovery affidavit made on behalf of resp., privilege was claimed for correspondence which had passed between resp. & its local agent subsequent to execution of the contract by the latter, but the affidavit did not set out the ground of privilege. Upon an application for disclosure of this correspondence the attorney for the resp. in a replying affidavit deposed that the correspondence was written with a view to litigation:—*Held*: as resp. first took up the position that appct. had no right to sub-let on

Jan. 10, 1913, that should be taken as the date when litigation was contemplated, & resp. should be ordered to disclose correspondence prior to that date.—*KOGAN v. AFRICAN FILM SYNDICATE, LTD.* (1913), C. P. D. 459.—*S. AF.*

m. *Litigation commenced—Photographs.*—Photographs sworn to be part of the materials of defts.' evidence in the action are privileged from production.—*FEIGENBAUM v. JACKSON & McDONELL* (1900), 7 B. C. R. 171.—*CAN.*

n. ———.]—*Confidential communications.*—Confidential communications between principal & agent relating to matters in a suit, are not necessarily privileged.

In a suit for an injunction to restrain deft. from using certain trade marks:—*Held*: telegrams & letters between pltf.'s firm in London & their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged.

—*WALLACE v. JEFFERSON* (1878), L. L. R. 2 Bom. 453.—*IND.*

pltfs. against defts., claiming damages arising from the acts of defts. in causing, during the course of salvage operations, a wrecked vessel to become an obstruction, defts., under an order for discovery of documents, stated, on affidavit, that they had in their possession certain documents, consisting of confidential correspondence, reports, etc., obtained or made by them as agents for an insurance co., in reference to matters arising in litigation then anticipated & afterwards instituted by the owner of the vessel against the co. for the purpose of enabling the latter to be advised upon, & to defend, the claim made against them:—*Held*: defts. were not entitled to exemption from discovery, as the documents would not have been privileged in the earlier action by the ship's owner.—*KERRY COUNTY COUNCIL*

various patents. The letter was handed to the co.'s solrs. with instructions to advise the co. as to the merits of pltf.'s claim, & thereafter the matter had been conducted with the view of getting materials for a contest if necessary:—*Held*: assuming pltf.'s letter to amount to a threat of litigation, the affidavit setting out the above reasons for not producing the documents did not disclose a sufficient ground of privilege.—*WESTINGHOUSE v. MIDLAND RY. CO.* (1883), 48 L. T. 462, C. A.

873. ——— *Anonymous letter.*—*Re HOLLOWAY, YOUNG v. HOLLOWAY*, No. 849, *ante*.

874. ——— *KYSHE v. HOLT, CHILDS & BROTHERTON*, [1888] W. N. 128.

875. ——— *Member & secretary of trade union.*—A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union & with the assistance of their solr. The information comprised the evidence available in support of the action & the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solr. acting as solr. for pltf. Upon a summons for discovery taken out by defts.:—*Held*: the letters containing the information did not fall within the established rule as to the privilege between solr. & client & must be produced.—*JONES v. GREAT CENTRAL RY. CO.*, [1910] A. C. 4; 79 L. J. K. B. 191; 100 L. T. 710; 53 Sol. Jo. 428, H. L.

Annotation:—*Consd. Adam S.S. Co. v. London Assoe. Corpn.*, [1914] 3 K. B. 1256.

(b) *Where Litigation contemplated or pending.*

i. *Document obtained at instance of Legal Adviser.*

876. Privileged.—Answers to inquiries addressed by defts. to their agent in the Falkland Islands by direction of their solrs., for the purpose of procuring evidence in support of defts.' case are within the rule as to protection.

The true test in such cases is not whether the person who is at a distance & transmits the

information is the agent of the solr. & sent out by him, but whether in transmitting that information he was discharging a duty which properly devolved on the solr. & which would have been performed by the solr. had the circumstances of the case admitted of his performing it in person.—*LAFONE v. FALKLAND ISLANDS CO.* (No. 1) (1857), 4 K. & J. 34; 27 L. J. Ch. 25; 30 L. T. O. S. 129; 6 W. R. 4; 70 E. R. 14.

Annotations:—*Fold. Chartered Bank of India, Australia & China v. Rich* (1863), 32 L. J. Q. B. 300; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644. *Refd. Wheeler v. Le Marchant* (1881), 17 Ch. D. 675.

877. ——— *When inspection of documents is asked, the ct. is not bound by the denial of the party in whose possession they are that they relate to the case of the adversary; but if the ct. can collect from the whole of the materials before them that, in fact, the documents, although they may relate to the subject-matter of the suit, are not such as to go to establish the case of the party asking inspection, they will refuse inspection.*

Pltfs., a banking company in London, having dismissed deft. from his post as manager of pltfs.' branch bank in India, contemplated bringing an action against him for breaches of duty while in their employment, & letters were written, both before & after an attorney was employed by pltfs., from their manager in England, to an agent in India, directing him to make inquiries relative to the breaches of duty alleged to have been committed. An action having been afterwards brought for the breaches of duty:—*Held*: deft. was not entitled to the inspection of any of these letters, nor of the replies.—*CHARTERED BANK OF INDIA, ETC. v. RICH* (1863), 4 B. & S. 73; 32 L. J. Q. B. 300; 8 L. T. 454; 11 W. R. 830; 122 E. R. 387; *sub nom. BANK OF INDIA, AUSTRALIA & CHINA v. RICH*, 2 New Rep. 316.

Annotations:—*Distd. Baker v. L. & S. W. Ry.* (1867), L. R. 3 Q. B. 91. *Apld. Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602; *Cossey v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 146; *Phillips v. Routh* (1872), L. R. 7 C. P. 287. *Consd. Fenner v. London & South Eastern Ry.* (1872), L. R. 7 Q. B. 767. *Refd. Woolley v. Pole* (1863), 14 C. B. N. S. 538; *Anderson v. Bank of British Columbia* (1876), 24 W. R. 724; *Bustros v. White* (1876), 1 Q. B. D. 423.

878. ——— *ANDERSON v. BANK OF BRITISH COLUMBIA*, No. 823, *ante*.

v. LIVERPOOL SALVAGE ASSOCN. & ENSOR (T.) & SON, [1905] 2 I. R. 38, 46; 38 I. L. T. 7.—*IR.*

p. ——— *Correspondence relating to the subject-matter of an existing suit between one of the parties & two persons who acted for him in the matter in question, but were not professional agents, held not to be protected against a diligence for the production of such correspondence, although admitted to have been of a confidential character.*—*STUART v. MILLER* (1836), 14 Sh. (Ct. of Sess.) 37.—*SCOT.*

q. ——— *Letters from employees.*—In counter-actions arising out of contract to construct machinery the ct. refused to grant diligence for the recovery of letters between the partners of the contractor's firm, but granted diligence to recover letters written to them by their foreman or other workmen employed in the construction of the machinery.—*TANNETT, WALKER & CO. v. HANNAY & SONS* (1873), 11 Macph. (Ct. of Sess.) 931; 45 Sc. Jur. 577.—*SCOT.*

r. *Litigation not commenced—Confidential communications.*—It is not incompetent to call for production of confidential communication to an agent if not made *in causd.*—*BOWER v. RUSSEL* (1810), 15 Fac. Coll. 675.—*SCOT.*

PART III. SECT. 9, SUB-SECT. 1.—
F. (b) i.

876 i. Privileged.—Letters written by deft. to a third person, who was a principal in the transactions out of which the action arose, & letters written by such third person to deft.:—*Held*: privileged from production in the action, where it appeared they were written after pltf. had threatened litigation, & in consequence of the advice of deft.'s solr., in the endeavour on the part of deft. to obtain information for the purposes of the threatened litigation.—*DONAHUE v. JOHNSTON* (1892), 14 P. R. 476.—*CAN.*

876 ii. ——— *Reports or statements or other communications in writing obtained by a party from his employees or others, by the advice of a solr., or for the purpose of being submitted to a solr. for his advice, regarding an existing action, or in anticipation of legal proceedings, are privileged; but such documents are not privileged where they are furnished by an officer to his employers in the ordinary course of duty & without any special request by his employers.*—*COOK v. UNION S.S. CO., LTD.* (1904), 23 N. Z. L. R. 933.—*N.Z.*

876 iii. ——— *But documents relating to an intended action, prepared at the request of a solr. or otherwise, & whether ultimately laid before a solr.*

or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice, & inspection of such documents cannot be enforced.—*WAIHI GOLD-MINING CO., LTD. v. WAIHI GRAND JUNCTION GOLD CO., LTD.* (1905), 25 N. Z. L. R. 253.—*N.Z.*

876 iv. ——— *A report, made by an architect upon instructions given at the instance of the principal's attorney at a time when such principal contemplated or anticipated litigation on the matter submitted for report, is privileged from disclosure in the course of such litigation, instituted after such instruction had been given, notwithstanding the fact that hopes of a settlement had been subsequently entertained by the principal.*—*MOFFAT v. SOUTH AFRICAN BREWERIES, LTD.* (1912), W. L. D. 104.—*S. AF.*

s. ——— *What amounts to anticipation of litigation.*—In order to establish an objection to the inspection of a document on the ground of legal professional privilege two things must be shown to concur, namely: (a) that when the document came into existence there was an existing action or the anticipation of litigation & (b) that the document came into existence either by the advice of the party's solr. or for the purpose of being submitted to such solr. Where litigation had

Sect. 9.—Resisting production—Grounds of privilege—sect. 1, F. (b) i. & ii. & (c).]

879. —.]—WHEELER v. LE MARCHANT, No. 705, *ante*.

Accident cases—Report of medical & other officers.]—See Sub-sect. 1, F. (c), *post*.

ii. Document obtained Confidentially to be laid before Legal Adviser.

880. Privileged.]—On a motion for the production of documents a survey or valuation of the property to which the question in the cause related, described by deft. as consisting of his evidence, & supporting his case, & not that of pltf. & made with a view to the defence in the suit, was considered as a minute furnished by a witness of the evidence he would give, & as such, pltf. was not entitled to the production of it.

Seemle: on a motion to produce documents the affidavit of deft. is admissible to show that the documents are within any ground upon which deft. is entitled to withhold the production.—LIEWELLYN v. BADELEY (1842), 1 Hare, 527; 11 L. J. Ch. 310; 6 Jur. 705; 66 E. R. 1140.

Annotation:—*Reid*. Felkin v. Herbert (1861), 30 L. J. Ch. 798.

881. —.]—REID v. LANGLOIS, No. 828, *ante*.

882. —.]—CHARTERED BANK OF INDIA, ETC. v. RICH, No. 877, *ante*.

883. —.]—Prior to & in contemplation of a suit for specific performance, pltf., suing as assignee of a deed of trust for creditors, procured the private examination in bkpcy. of the several

parties to the contract with reference to the subject-matter of the suit:—*Held*: office copies of these examinations in pltf.'s possession were privileged.—FENTON v. QUEEN'S FERRY WIRE ROPE CO., LTD. (1869), 38 L. J. Ch. 263; 20 L. T. 298; 17 W. R. 585.

884. —.]—ANDERSON v. BANK OF BRITISH COLUMBIA, No. 823, *ante*.

885. —.]—Although ultimately not laid before legal adviser.]—SOUTHWARK WATER CO. v. QUICK, No. 714, *ante*.

886. —.]—The ct. will not allow surveys made solely for the purpose of the case of one of the parties on a trial or for the opinion of one of the parties' legal advisers to be inspected.—THE THEODOR KORNER (1878), 3 P. D. 162; 47 L. J. P. 85; 38 L. T. 818; 27 W. R. 307; 4 Asp. M. L. C. 17.

887. —.]—LONDON & TILBURY RY. CO. v. KIRK & RANDALL (1884), 28 Sol. Jo. 688, D. C.

Annotation:—*Dbdd*. Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry., [1913] 3 K. B. 850.

888. —.]—HASLAM FOUNDRY & ENGINEERING CO. v. HALL (1887), 3 T. L. R. 776; 5 R. P. C. 1, D. C.

Annotation:—*Mentd*. Acetylene Illuminating Co. v. United Alkali Co., [1902] 1 Ch. 494.

889. —.]—BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO., No. 394, *ante*.

890. —.]—On Oct. 28, 1913, pltf.'s vessel, which was insured with defts., went ashore, & defts. instructed the Salvage Asscn. to protect their interests in the matter. On Oct. 30, pltf's.

not been actually commenced or threatened, there must have been a definite prospect of it, & not merely a vague anticipation; & if the circumstances were such that it might be reasonably inferred that litigation would naturally follow the act which the party anticipated would result in litigation, then, although no action was actually threatened, there was a well-founded, & not merely a vague anticipation of litigation. Although a document may not, perhaps, lose its privileged character because it was not brought into existence solely for the purpose of being laid before the party's solr., that must be the primary reason for its origin.—KAUPOKONUI CO-OPERATIVE DAIRY CO., LTD. v. TRENGHOUSE & CO. (1905), 25 N. Z. L. R. 211.—N.Z.

PART III. SECT. 9, SUB-SECT. 1.— F. (b) ii.

1. Privileged—Report of

Among the grounds of defence set up in an action to recover the amount of the policy of insurance were, that pltf.'s books had been falsified; & that the fire had occurred through the wilful negligence of pltf. Defts. employed two experts to investigate pltf.'s books & his conduct with respect to the fire, & these experts made reports. Deft.'s affidavit on production set out as documents which they objected to produce: "Report of adjuster for Insurance Society for counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report & for information of counsel." It was further stated in the affidavit that these documents were "privileged, being part of defts.' case & prepared for the instruction of counsel, & prepared specially for this litigation & in contemplation thereof":—*Held*: these documents were privileged from production.—MACDONALD v. NORWICH UNION FIRE INSURANCE CO. (1884), 10 P. R. 501.—CAN.

a. —.]—In an application for further discovery & production in

an action on a policy of fire insurance:—*Held*: statements taken by fire assessors as to the origin & cause of a fire on instructions from the insurer's manager with a view to submission to his solr. & if so advised resisting any claim that might eventually be made on the policy, were privileged.—CALDWELL v. WESTERN ASSURANCE CO. (1916), W. L. D. 111.—S. AF.

b. —.]—*Reports of employees*.]—Where reports by officers or servants of a railway co. as to a casualty giving rise to an action are in good faith prepared for the purpose of being communicated to the co.'s solr. with the object of obtaining his advice thereon & enabling him to defend the action, they are to be regarded as privileged communications & exempt from production for inspection by the opposite party, even if they answer the purpose of giving information to other people as well.—HUNTER v. GRAND TRUNK RY. CO. (1895), 16 P. R. 385.—CAN.

c. —.]—In an action for negligence against a railway, the co., in their affidavit of documents, claimed privilege for certain reports made by porters & station-masters on the ground that the same consisted of reports & notes of evidence procured by defts., solely to submit to their legal professional advisers, & communications passing between the officials of defts. with a view to procuring evidence for the purpose of their defence in this action, solely to be submitted to their legal professional advisers & procured after the alleged cause of action herein had taken place, in view of anticipated litigation, but the affidavit did not state in whose view the litigation was anticipated:—*Held*: the affidavit was sufficient.—M'MAHON v. GREAT NORTHERN RY. CO. (1906), 40 I. L. T.—IR.

—.]—In an action for negligence against a tramway co. defts., in their affidavit of documents, claimed privilege for certain reports made by a motorman & inspector, on the ground that the same consisted of reports made for the purpose of & with

the *bonâ fide* intention of being laid before defts.' solr. or counsel in view of & for the purpose of the litigation anticipated, threatened, or commenced against defts. in respect of the matters in question in the action, but the dates on which the reports were made or procured did not appear from the affidavit:—*Held*: since the affidavit stated that the reports for which privilege was claimed were made in view of & for the purpose of the litigation anticipated in respect of the matters complained of in the action then pending, inspection thereof could not be ordered.—MULLEN v. DUBLIN UNITED TRAMWAY CO. (1907), 41 I. L. T. 236.—IR.

e. —.]—Statements or reports relating to a railway accident & obtained by or for the use of the railway solr. from the employees of the railway department for the purpose of defending an action for damages founded on the accident, are privileged from discovery.—DANIEL v. CENTRAL SOUTH AFRICAN RYS. (1904), T. H. 224.—S. AF.

f. —.]—*Statutory declarations*.]—ELMSLEY (TOWNSHIP OF) v. MILLER (1905), 5 O. W. R. 651, 717; 10 O. L. R. 343.—CAN.

885 i. —.]—Although ultimately not laid before legal adviser.]—WAIHI GOLD-MINING CO., LTD. v. WAIHI GRAND JUNCTION GOLD CO., LTD. (1905), 25 N. Z. L. R. 253.—N.Z.

886 i. —.]—KAUPOKONUI CO-OPERATIVE DAIRY CO., LTD. v. TRENGHOUSE & CO. (1905), 25 N. Z. L. R. 241.—N.Z.

g. Not privileged — Letter from branch manager to head office.]—Summons for discovery of letter written by the manager of a branch bank to the head office. The chief inspector of the bank in an affidavit of documents claimed privileged for the letter on the grounds, that it was, as he believed, written by the local manager in accordance with a practice in the bank, of reporting matters to the head office, without delay, in con-

gave notice of abandonment, which defts. refused to accept. On Jan. 26, 1914, pltf. brought an action to recover for a constructive total loss of the vessel & the action was transferred to the commercial list. Defts. agreed that pltf.'s right to give notice of abandonment & claim a total loss should be decided on the footing that the writ was issued on Oct. 30, 1913. In their list of documents defts. claimed privilege for cables & correspondence which passed between the Salvage Asscn. & their agent on the spot & which came into existence on & after Oct. 30, the day on which the notice of abandonment was given, "such cables & correspondence being with regard to the subject-matter of this litigation & expressing or for the purpose of leading to the obtaining of evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable defts.' solrs. properly to conduct the action on their behalf"—*Held*: the documents, though not obtained by defts.' solr., were privileged from production.—*ADAM S.S. Co., LTD. v. LONDON ASSURANCE CORPN.*, [1914] 3 K. B. 1256; 83 L. J. K. B. 1861; 111 L. T. 1031; 59 Sol. Jo. 42; 12 Asp. M. L. C. 559; 20 Com. Cas. 37, C. A.

891. Document expressly stated to be written for legal advisers.]—*Qu.*: whether privilege attaches to the letters of a master of a ship where he is instructed by her owners to state that they are written for the benefit of the solrs.—*POLURRIAN S.S. Co., LTD. v. YOUNG* (1913), 109 L. T. 901; 30 T. L. R. 126; 12 Asp. M. L. C. 449; 19 Com. Cas. 143; *affd.*, [1915] 1 K. B. 922, C. A.

Annotations:—Mentd. *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781; *Wilson, Bobbin v. Green* (1915), 31 T. L. R. 605; *Horlock v. Beal* (1916), 114 L. T. 193; *Moore v. Evans*, [1917] 1 K. B. 458; *Roura & Forgas v. Townend*, [1919] 1 K. B. 189.

Accident cases—Report of medical & other officers.]—*See* Sub-sect. 1, F. (c), *post*.

(c) *Accident Cases—Reports of Medical and Other Officers.*

892. When privileged.]—To an action by exors. to recover damages for the death of the testator,

nection with which there was a probability of litigation pending, with a view to enable the head office to lay the same before their solrs. He believed the letter was written in the belief that it was confidential, & in the belief that the litigation, which had since arisen, was then intended & for the purpose of being laid before the bank's solrs.' if the bank thought fit.—*Held*: the letter was not privileged.—*FRASER v. AUSTRALIAN JOINT STOCK BANK* (1896), 17 N. S. W. Eq. 197.—*AUS.*

h. — Form of affidavit.]—*THOMSON v. MARYLAND CASUALTY Co.* (1906), 11 O. L. R. 44; 7 O. W. R. 15.—*CAN.*

k. ——*In an application for further discovery & production in an action on a policy of fire insurance:—Held*: correspondence between the local & head offices of the co. as to the fire & steps being taken to resist any claim that might be made should be discovered unless the relevancy thereof were denied on affidavit.—*CALDWELL v. WESTERN ASSURANCE Co.* (1916), W. L. D. 111.—*S. AF.*

l. — Report of engineer.]—In an action against a railway co. for work done & materials supplied at their request, deft. co. objected to produce for pltf.'s inspection: (a) their engineer's report with reference to the subject of claim; (b) correspondence between deft.'s servants & agents with reference to the defence of the action; (c) extracts of minutes of private proceedings of the board at meetings with

caused, as alleged, by the negligence of defts., a railway co., defts. pleaded not guilty, & that the deceased had accepted £75 in discharge of all claims connected with the accident from which it was alleged the death had afterwards resulted. Defts. had sent a clerk in their secretary's office & their medical officer to see deceased, & ascertain his state, & to negotiate as to the pecuniary compensation to be made him. The ct. ordered pltf. inspection & copies of the reports made to defts. by these officers of their interviews with the deceased.—*BAKER v. LONDON & SOUTH WESTERN RY. Co.* (1867), L. R. 3 Q. B. 91; 8 B. & S. 645; 37 L. J. Q. B. 53; 32 J. P. 246; 16 W. R. 126.

Annotations:—Distd. *Cossey v. L. B., etc. Ry.* (1870), L. R. 5 C. P. 146. *Refd.* *Fenner v. L. & S. E. Ry.* (1872), L. R. 7 Q. B. 767; *Kennedy v. Lyell* (1883), 23 Ch. D. 387.

893. ——*In an action against a railway co. for a personal injury sustained by a passenger on their railway:—Held*: (1) inspection of the following documents would be allowed: A report of one of defts.' inspectors to the general manager, as to the accident in respect of which the action was brought; a report of the guard of the train to which the accident happened; a report of defts.' locomotive superintendent, to the general manager, as to the accident, upon the ground that they were reports or communications by the agents of the co. in the ordinary course of their duty, for the purpose of conveying to the co. information upon the subject, & were not opinions obtained confidentially with a view to litigation, & this without reference to whether they were made before or after the commencement of litigation; a copy of a letter written by defts.' general manager to the secretary of the Board of Trade, as to the accident; a guarantee, dated seven years before pltf.'s injury occurred, of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine of the train in which pltf. was injured, upon the ground that they might be evidence for pltf., & were not privileged; so much of the entries in the minute-books of the locomotive stores & traffic-committee,

PART III. SECT. 9, SUB-SECT. 1. — F. (c).

o. Privileged—Reports of employees—Made to be laid before solicitor.]

—Pltf. instituted an action for damages, alleging that owing to the negligence of the servants of deft. co. a tramcar collided with a waggon & personal injury & other damage was caused to pltf. Pltf. sought inspection of (1) the reports & statements made by the conductor & motorman who were on the tramcar regarding the accident; (2) a copy of the rules made by deft. co. for observance by motormen; (3) the record of the motorman, who was on the tramcar, during the period he was in the service of deft. co.:—*Held*: in the circumstances, deft. co. was not compellable to produce any of the documents.—*CHATER v. BRISBANE TRAMWAYS Co., LTD.*, [1919] St. R. Qd. 123.—*AUS.*

p. ——*In an action against a railway co. for damages on account of a passenger's death, pursuers moved for a diligence to recover reports from the co.'s servants, regarding the accident, to the co.:—Held*: Diligence would be refused on the ground that such reports were confidential.—*STUART v. GREAT NORTH OF SCOTLAND RY. Co.* (1896), 23 R. (Ct. of Sess.) 1005; 33 Sc. L. R. 730; 4 S. L. T. 80.—*SCOT.*

q. Not privileged—Reports of employees—Made in course of duty.]—K. brought an action against deft. corpn. to recover damages for injuries

reference to the litigation, then contemplated though not actually commenced, & claimed that all these documents were privileged. It was not alleged in the affidavit of discovery that the engineer's report related solely to defts.' case, or that it was prepared for the purpose of being laid before their legal advisers.—*Held*: defts. were bound to produce the reports & the correspondence, save correspondence between them & their solicitors, but were entitled to be excused from producing the minutes.—*WORTHINGTON v. DUBLIN, WICKLOW & WEXFORD RY. Co.* (1888), 22 L. R. Ir. 310.—*IR.*

m. — Reports for use of solicitor.]—The fact that reports sought to be withheld from production are written on forms all headed, "For the information of the solr. of the co. & his advice thereon," is not sufficient of itself to protect them from production.—*SAVAGE v. CANADIAN PACIFIC RY. Co.* (1906), 3 W. L. R. 124; 16 Man. L. R. 381.—*CAN.*

n. — Form of affidavit.]—Resp. in a discovery affidavit claimed privilege for official correspondence, statements & reports obtained for the use of his solrs. for the purpose of the action:—*Held*: though documents obtained for the purpose of obtaining the solr.'s opinion were privileged, the description given by resp. of the documents was not in itself sufficient to render them privileged.—*RUMSEY'S ESTATE v. UNION GOVERNMENT* (1912), C. P. D. 1012.—*S. AF.*

Sect. 9.—Resisting production—Grounds of privilege—Sub-sect. 1, F. (c).]

relating to the accident, as were not entries of communications between defts. & their legal advisers, or the result thereof; (2) inspection of the following documents would be refused: reports to defts.' locomotive superintendent, from scientific men consulted by or on behalf of defts., with reference to the cause of the accident; a report to defts.' attorneys from one of the scientific men consulted on behalf of defts. with reference to the cause of the accident, upon the ground that they were privileged.—**WOOLLEY v. NORTH LONDON RY. CO.** (1869), L. R. 4 C. P. 602; 38 L. J. C. P. 317; 20 L. T. 613; 17 W. R. 650, 797.

Annotations:—As to (1) **Consd.** *Cossey v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 146. **Appld.** *Mahony v. Widows' Life Assce. Fund* (1871), L. R. 6 C. P. 252. **Consd.** *Fenner v. London & South Eastern Ry.* (1872), L. R. 7 Q. B. 767. **Refd.** *Richards v. Gellatly* (1872), L. R. 7 C. P. 127. As to (2) **Appld.** *Cossey v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 146; *Parr v. L. C. & D. Ry.* (1871), 24 L. T. 558. **Refd.** *Fenner v. London & South Eastern Ry.* (1872), L. R. 7 Q. B. 767; *Phillips v. Routh* (1872), 26 L. T. 845; *Richards v. Gellatly* (1872), L. R. 7 C. P. 127; *McCorquodale v. Bell* (1876), 1 C. P. D. 471.

894. —.].—Defts., in order to ascertain whether or not they ought to yield to a claim by pltf's. for damages for personal injuries alleged to have been sustained by pltf's. in an accident on deft.'s line, sent their medical officer before litigation commenced, or was formerly threatened, to report to them upon the nature of pltf's. injuries:—**Held:** the reports of the medical officer were privileged, & pltf's. were therefore not entitled to have inspection of them.—**COSSEY v. LONDON, BRIGHTON, ETC. RY. CO.** (1870), L. R. 5 C. P. 146; 39 L. J. C. P. 174; 32 L. T. 19; 18 W. R. 493.

Annotations:—**Appld.** *Wilson v. Northampton & Banbury Junction Ry.* (1872), L. R. 14 Eq. 477; *Skinner v. G. N. Ry.* (1874), L. R. 9 Exch. 298. **Distd.** *Smith v. Daniell* (1874), L. R. 18 Eq. 649. **Expld. & Appld.** *McCorquodale v. Bell* (1876), 1 C. P. D. 471. **Refd.** *Mahony v. Widows' Life Assce. Fund* (1871), L. R. 6 C. P. 252; *English v. Tottie* (1875), 3 Char. Pr. Cas. 198.

895. —.].—In an action against a railway co. for injuries to a passenger from an accident, the ct. made an order for pltf's. to have liberty to inspect reports as to the accident, made by servants & officers of the co. to their employers shortly after it took place, although defts. stated,

sustained through the negligence of defts.' servants in charge of a tram running on the municipal tramways. Very soon after the accident the driver & conductor furnished in course of duty reports to their superior officer. Pltf. first wrote to the town clerk with respect to her injuries, but without making a claim against deft. corpn. & subsequently commenced her action, in the course of which a summons was taken out for discovery of the above mentioned reports:—**Held:** as the reports were not made for the purpose of resisting anticipated litigation, pltf. was entitled to discovery.—**KNIIGHT v. LAUNCESTON** (1921), 17 Tas. L. R. 68.—**AUS.**

r. —.].—In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the co. as to the accident, made before defts. had any notice of the litigation, & in accordance with the rules of the co., are not privileged from production, although one of the purposes for which they were prepared was for the information of the co.'s solr. in view of possible litigation.—**SAVAGE v. CANADIAN PACIFIC RY. CO.** (1906), 3 W. L. R. 16 Man. L. R. 381.—**CAN.**

s. —.].—In an action for damages sustained by reason of a

railway accident, pltf's. examined for discovery one M., a superintendent of the defts., who admitted that defts. had in their custody or power a number of documents relating to the matters in question, consisting of reports relating to the occurrence in question, made by some officials of defts. to other officials, as a matter of regular custom or routine, as in the case of all similar occurrences:—**Held:** these reports, not having been made for the purpose of the defence of the action, nor with reference to any particular action, though perhaps in anticipation of possible future actions, were not privileged from production or inspection.—**STAPLEY v. CANADIAN PACIFIC RY. CO.** (1912), 22 W. L. R. 85; 6 D. L. R. 97; 2 W. W. R. 1010.—**CAN.**

t. —.].—Reports of the captain of a steamer in regard to a collision between the steamer & another vessel, furnished to the manager & to the superintendent of the co. owning the steamer, according to a practice observed in all such cases, held not to be privileged in an action subsequently arising out of the collision, no action having been commenced or threatened at the time when the reports were sent in.—**COOK v. UNION S.S. CO., LTD.** (1904), 23 N. Z. L. R.

in their affidavit, that the documents contained statements made by various persons for the purpose of giving defts. such information as would enable them to judge whether or not they could be made responsible to pltf's. or any other persons by reason of the matters stated therein, & were made in consequence of a custom requiring such statements to be made in all cases of any accident causing or being likely to cause personal injury to any passenger, & that the same constituted the instructions to defts.' advisers, as to the defending the action, & could not be produced to pltf's. without disclosing the grounds of their defence.—**PARR v. LONDON, CHATHAM & DOVER RY. CO.** (1871), 24 L. T. 558.

896. —.].—Pltf., to whom cattle had been carried by defts.' railway, wrote to the general manager of the line complaining of the late delivery & bad condition of the beasts, without threatening legal proceedings. The manager replied that inquiries would be made. Correspondence ensued between the goods manager of defts., & servants also in their employ, & those of other railway cos. who had assisted to forward the cattle, relating to the times & mode of carriage. An action having been afterwards brought by pltf. for the above-mentioned causes of complaint:—**Held:** the documents & reports of which the correspondence between the officials *inter se* consisted were not privileged communications, & pltf. was entitled to an inspection of them, as they were relevant to his case.—**FENNER v. LONDON & SOUTH EASTERN RY. CO.** (1872), L. R. 7 Q. B. 767; 41 L. J. Q. B. 313; 26 L. T. 971; 37 J. P. 182; 20 W. R. 830.

Annotations:—**Folld.** *Malden v. G. N. Ry.* (1874), L. R. 9 Exch. 300. **Consd.** *Skinner v. G. N. Ry.* (1874), 43 L. J. Ex. 150; *English v. Tottie* (1875), 1 Q. B. D. 141; *McCorquodale v. Bell* (1876), 1 C. P. D. 471. **Refd.** *Hamilton v. Nott* (1873), L. R. 16 Eq. 112.

897. —.].—Where an accident occurs on a railway, & the officials of the co. in the course of their ordinary duty make a report to the co., whether before or after action brought, the report is not privileged. But when a claim has been made, & the co. seek to inform themselves by a medical examination as to the condition of the person making the claim, the report made to them is privileged.—**SKINNER v. GREAT NORTHERN RY.**

933.—N.Z.

the master of a ship to her owner is not admissible as evidence against the owner of the facts contained in it, but in an action to which the owner is a party such reports, if made *de recenti*, may be recovered under diligence.—**ADMIRALTY COMRS. v. ABERDEEN STEAM TRAWLING & FISHING CO.**, [1908] S. C. 335.—**SCOT.**

b. —.].—In an action of damages against a tramway co. in respect of personal injuries resulting from an accident, pursuer moved the ct. for a diligence to recover all reports relating to the accident made at or about its time to defenders by any inspector, driver, conductor or other employees, who had been present at the time of the accident:—**Held:** the diligence must be granted, but confined to reports made at the time for the purpose of informing the employers of the accident, as distinguished from communications made after it had become apparent that there was going to be litigation.—**FINLAY v. GLASGOW CORPN.**, [1915] S. C. 615.—**SCOT.**

c. —.].—An "accident report" made by a station-master on a printed form for use in all similar cases, & for the purpose of

Co. (1874), L. R. 9 Exch. 298 ; 43 L. J. Ex. 150 ; 32 L. T. 233 ; 23 W. R. 7.

Annotation :—*Apld.* M'Corquodale v. Bell (1876), 1 C. P. D. 471.

898. —.]—If a medical man is sent down to examine a patient & to report to a co., & it is done with such a warning to the patient's friends who are acting for him in the matter, or to his attorney if he has one, if it is done under such circumstances that there is a contract actually made that the doctors are to come & see the man, & have a fair examination & report to the co., & that report is to be for their guidance & is confidential, then undoubtedly we should not order them to produce it (BLACKBURN, J.).—MALDEN v. GREAT NORTHERN RY. Co. (1874), L. R. 9 Exch. 300.

Annotation :—*Refd.* M'Corquodale v. Bell (1876), 1 C. P. D. 471.

899. —.]—WAYLAND v. METROPOLITAN RY. Co., [1874] W. N. 96, D. C.

900. —.]—FARQUHAR v. GREAT NORTHERN RY. Co. (1875), 39 J. P. Jo. 85, D. C.

901. —.]—In an action for negligence against a railway co., discovery was granted of pltf.'s business accounts for the last five years, & also, as against the railway co., of documents relating to the lighting of a railway station, this being one of the causes of the accident ; but discovery was refused as against the railway co., of reports of other accidents at the same station, & of documents showing the number of tickets issued at the station.—ANON. (1876), 2 Char. Cham. Cas. 60 ; Bitt. Prac. Cas. 118.

902. —.]—PACEY v. LONDON TRAMWAYS Co. (1876), 2 Ex. D. 440 ; 46 L. J. Q. B. 698 ; 2 Char. Pr. Cas. 86, C. A.

Annotations :—*Folld.* Friend v. L. C. & D. Ry. (1877), 2 Ex. D. 437. *Refd.* Feuerheerd v. London General Omnibus Co., [1918] 2 K. B. 565.

903. —.]—Where in an action against a railway co. to recover damages for injuries sustained by defts.' negligence, pltf. is examined by medical men employed on defts.' behalf, the reports sent by the medical men to defts. are privileged from inspection, provided that the examination & reports were procured by defts.' solr., or at his instance, for the purpose of enabling him to give advice to defts. with reference to the action, & of assisting him generally in the conduct of the legal proceedings.

furnishing the chief traffic manager with the facts of each accident in order that he might judge as to whether a departmental inquiry was necessary, is not privileged from discovery.—DANIEL v. CENTRAL SOUTH AFRICAN RYS. (1904), T. H. 224.—S. AF.

d. —.]—*Except portion containing names of witnesses.*—In an action for damages for personal injuries received by pltf. in a tramway car accident, as to which the conductor of the car had made a report to defts. :—*Held* : the portion of the report containing the names of the eye-witnesses of the accident was privileged from production.—ARMSTRONG v. TORONTO RY. Co. (1893), 15 P. R. 208.—CAN.

e. —.]—*Including list of eye-witnesses.*—Pursuer in an action of damages, against a tramway co. in respect of personal injuries, resulting from a tramway accident, had obtained a diligence for the recovery of reports made to the tramway co. by its servants at the time of the accident :—*Held* : he was entitled to recover thereunder a portion of such report containing a list of names of persons, including members of the public, who had been present at the time of the accident.—MACPHER v. GLASGOW CORPN., [1915] S. C. 990.—SCOT.

f. —.]—Pursuer in an action of damages against the owners of a tramway system, in respect of personal injuries resulting from a tramway accident, obtained a diligence to recover reports made to defenders by their servants as to, or at or about the time of, the accident. A report had been made on a paper divided by a perforated line, on one side of which was written a report of the accident, & on the other a list of the names of persons who had witnessed it. The defenders having objected to producing the portion containing this list :—*Held* : production of both parts of the document must be ordered.—M'CULLOCH v. GLASGOW CORPN. (1918), S. C. 155.—SCOT.

g. —.]—*Stated to be for use of solicitor.*—Pursuer in an action for damages against a corpn., who owned a tramway system, in respect of loss resulting from an accident, obtained a diligence for the recovery of reports made to the corpn. by its tramway servants, at the time of the accident & relating thereto. Defenders refused, on the ground of confidentiality, to produce a report by the driver & conductor, written on a form supplied by defenders & headed "For the use of the corpn. solrs. to enable them to defend should litigation

It is immaterial that the judge's order under which pltf. was examined was drawn up with the words "& by consent" struck out, as a judge has no jurisdiction to make an order in that form except under Regulation of Railways Act, 1868 (c. 119), s. 26, & pltf. must be treated as if he had submitted voluntarily to the examination.—FRIEND v. LONDON, CHATHAM & DOVER RY. Co. (1877), 2 Ex. D. 437 ; 46 L. J. Q. B. 696 ; 36 L. T. 729 ; 42 J. P. 70 ; 25 W. R. 735, C. A.

Annotations :—*Extd.* Southwark & Vauxhall Water Co. v. Quick (1878), 3 Q. B. D. 315. *Refd.* Feuerheerd v. London General Omnibus Co., [1918] 2 K. B. 565.

904. —.]—A document is not protected from inspection on the ground that it was made for the purpose, in the event of litigation, of being laid before defts.' solr. to be used by him for the purposes of the defence to any action, if any action should be brought.—COOK v. NORTH METROPOLITAN TRAMWAY Co. (1889), 54 J. P. 263 ; 6 T. L. R. 22, D. C.

Annotation :—*Consd.* Collins v. London General Omnibus Co. (1893), 63 L. J. Q. B. 428.

905. —.]—Pltf. had suffered personal injury through the alleged negligence of deft. co. At the time of the occurrence nothing was said as to any future claim. On the next day pltf. wrote a complaint to the co. On the same day the co. obtained a report from their conductor, & at a later day, before any writ had been issued obtained another report from their inspector. Pltf., after action brought, having sought inspection of these reports, defts., in their affidavit of documents, claimed those reports to be privileged communications :—*Held* : the reports were entitled to be held as privileged, inasmuch as they had been made for the purpose of obtaining the advice of defts.' solr. with reference to an anticipated action which might reasonably be apprehended.—COLLINS v. LONDON GENERAL OMNIBUS Co. (1893), 63 L. J. Q. B. 428 ; 68 L. T. 831 ; 57 J. P. 678 ; 5 R. 355, D. C.

Annotation :—*Consd.* Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry., [1913] 3 K. B. 850.

906. —.]—A workman met with an accident to his head in 1909. He got apparently perfectly well, & returned to his work. Two years later he died from the effects of an operation for abscess on the brain. The dependants claimed compensation, & the employers offered to pay *ex gratia*

ensue." The report had been made shortly after the accident & before any claim for damages had arisen :—*Held* : defenders were bound to produce the report.—WHITEHILL v. GLASGOW CORPN., [1915] S. C. 1015.—SCOT.

h. —.]—*Report of investigation.*—*Held by officers of defendants.*—Pltf. in an action for damages for injuries sustained in a railway accident, sought to compel defts. to produce a certain report of an investigation held by defts. immediately after the accident, & the notes of evidence taken at the investigation. These documents, according to the evidence of H. an officer of defts., who was examined for discovery in the action, were not obtained for the solr. of defts., nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced : but, "for the purpose of the management of the line ; for our own purposes ; it was not intended for a purpose of this kind" (i.e., for use in legal proceedings). In answer to the question whether defts.' solr. was present at the investigation, H. said, "No, it would be entirely between the officers of the co." The affidavit of the solr. stated that the information was obtained that he might advise defts.

9.—*Resisting production—Grounds of privilege.*
1, F. (c), G., H. & J.]

£10 to settle the claim. This sum was accepted, & thereupon the employers paid £10 into ct. under Workmen's Compensation Rules, 1907-1912, r. 56 (c). The registrar was not satisfied, as two of the children were minors, that this sum was sufficient, & required the employers, before recording the memorandum, to furnish him with the reports of medical evidence which they had. The dependants had no such evidence. The employers objected on the ground that the reports were privileged. The registrar thereupon referred the matter to the judge, who refused to record the memorandum:—*Held*: without deciding whether the medical reports were privileged or not, there was ample evidence on which the registrar could decide the sum offered was inadequate, & the judge refuse to record the memorandum.

The documents are privileged (BUCKLEY, J.).—JOHNSON v. OCEANIC STEAM NAVIGATION CO., LTD. (1912), 5 B. W. C. C. 322, C. A.

G. Communications between Co-Litigants.

907. Whether privileged—Discretion of court.]—The ct. in the exercise of its discretion, will refuse to order the production of private & confidential letters passing between plffs. relative to the projected litigation with defts.—ALLAN v. ROYDEN (1874), 43 L. J. C. P. 206; *sub nom.* ALLEN v. ROYDEN, 30 L. T. 762.

908. —.]—Though a deft. in a suit is not compellable to produce letters, & copies of letters, between himself & his solr., subsequently to the institution of the suit, & in relation thereto, yet, where there are more defts. than one, they are bound to produce letters, & copies of letters, which have passed between them with respect to their defence of the suit.—WHITBREAD v. GURNEY (1832), You. 541; 150 E. R. 1105.

Annotations:—*Refd.* Llewellyn v. Badeley (1842), 1 Hare, 527; Glyn v. Caulefield (1851), 3 Mac. & G. 463.

909. —.]—GLYN v. CAULFEILD, No. 864, ante.

910. —.]—Letters passing between co-defts. are not privileged from production.—BETTS v. MENZIES (1857), 26 L. J. Ch. 528; 29 L. T. O. S. 325; 3 Jur. N. S. 885; 5 W. R. 767. Annotation:—*Apld.* Hamilton v. Nott (1873), L. R. 16 Eq. 112.

as to their liability for damages arising from the accident, & that it had been used for that purpose & no other. Defts.' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts & that these documents were in the possession of defts.:—*Held*: the ct. need not in these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out & privilege claimed for them; & upon the statements of H. & the solr. the documents were not privileged & should be produced.—BETTS v. GRAND TRUNK RY. CO. (1888), 12 P. R. 86, 634.—CAN.

k. — Report of interview with plaintiff.—*Read over to & signed by plaintiff.*—In an action claiming damages for negligence defts., by their affidavit of discovery, claimed privilege in respect of a report drawn up by an agent of defts., who, three days after the occurrence complained of in the

action, called upon plff. & took down his evidence in writing. The document was, as defts. alleged, read over on completion to plff., & was admittedly signed by plff. as a marksman:—*Held*: defts. were not entitled to exemption from discovery in respect of the document.—TOBAKIN v. DUBLIN SOUTHERN DISTRICTS TRAMWAYS, [1905] 2 I. R. 58, 61; 38 I. L. T. 166.—IR.

PART III. SECT. 9, SUB-SECT. 1.—G.

1. Privileged.—Letter of solicitor of one plaintiff.—To solicitor of co-plaintiff.—Though portion read to solicitor of defendant.]—Plffs. sued deft. for specific performance of an agreement to purchase certain premises. Delt.'s solr. prepared a draft assignment which contained a covenant of indemnity by plffs., & sent it to plffs.' solrs., P. & W., for approval. W. called upon B. delt.'s solr., & informed him that M., one of plffs., refused to sign any deed which contained the covenant. At this interview W. read to B. portions of a letter written with reference to the proposed deed by the solrs. for two of plffs. to V. the solr. or M. Delt. called upon plff. to produce this letter

—.]—A solr. & his client were both defts. The solr. admitted documents in his possession belonging to his client, but claimed privilege; the client made no admission as to possession of these documents. Upon an application in the presence of both:—*Held*: the documents must be produced.—GASKELL v. CHAMBERS (No. 2) (1859), 26 Beav. 303; 28 L. J. Ch. 388; 53 E. R. 915.

Annotations:—*Distd.* Edmonds v. Foley (1862), 30 Beav. 282. *Refd.* O'Shea v. Wood, [1891] P. 237.

912. —.]—CARR v. NEW QUEBRADA CO., [1873] W. N. 208.

913. —.]—HEY v. DE LA HEY, [1886] W. N. 101, C. A.

Annotations:—*Refd.* R. Stahlwerk Becker Akt.'s Patent (1917), 34 R. P. C. 332; O'Rourke v. Darbishire, [1920] A. C. 581.

914. — Reference to communication to solicitor.]—GATTY v. PHILLIPSON (1846), 8 L. T. O. S. 273.

915. — Communication to be transmitted to solicitor—Impending litigation.]—Plffs. who were assignees of a bkpt. firm at Teneriffe, filed their bill against defts., three brothers, one of whom managed the business of the Teneriffe firm, for an account of certain remittances forwarded by the manager of the Teneriffe firm to his brother, as agent in London. Delt., the London agent, set up as a defence certain proceedings in the Lord Mayor's Ct., instituted by the third deft. as exor. of his father, under which the money in the hands of the agent of the Teneriffe firm was attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents:—*Held*: (1) letters which had passed between the London agent & his solrs. with reference to the litigation in this suit were privileged; (2) letters which had passed between such solrs. & the attorney acting in the proceedings in the Lord Mayor's Ct. were also privileged; (3) the letters from deft., the manager of the Teneriffe firm, to the co-deft., the agent in London, for the purpose of being communicated to his solrs. with a view to the litigation in this suit, were not privileged.—GOODALL v. LITTLE (1851), 1 Sim. N. S. 155; 20 L. J. Ch. 132; 15 Jur. 309; 61 E. R. 60. Annotations:—1. to (3) *Foldd.* Glyn v. Caulefield (1851), 3 Mac. & G. 463; Betts v. Menzies (1857), 26 L. J. Ch. 528; Hooper v. Gumm (1862), 2 John. & H. 602. *Apld.* Hamilton v. Nott (1873), L. R. 16 Eq. 112. *Refd.* The Don Francisco (1862), 6 L. T. 133; Jenkins v. Bushby (1866), 12 Jur. N. S. 558; M'Corquodale v. Bell (1876), 1 C. P. D. 471.

for inspection:—*Held*: the letter was privileged, & that the fact that portions had been read to deft.'s solr. was no waiver of the privilege as regarded the parts which were not read.—KAY v. POORUNCHAND POONALAL (1880), 1 L. R. 4 Bom. 631.—IND.

m. — Correspondence between co-defendants.—(Giving mutual advice as to defence.)—Communications which passed between two defenders after an action was threatened, in which mutual advice was given & facts stated with a view to the defence:—*Held*: to be confidential, & production of them could not be insisted for by pursuer.—ROSE v. MEDICAL INVALID INSURANCE SOCIETY (1847), 10 Dunl. (Ct. of Sess.) 56; 20 Sc. Jur. 64.—SCOT.

n. — Correspondence between partners.]—In counter-actions arising out of contract to construct machinery the ct. refused to grant diligence for the recovery of letters between the partners of the contractor's firm, but granted diligence to recover letters written to them by their foreman or other workmen employed in the construction of the machinery.—TANNETT, WALKER & CO. v. HANNAY & SONS (1878), 11

916. —.] — *HUTT v. HAILEY-BURY COLLEGE (GOVERNORS)* (1888), 4 T. L. R. 277, C. A.

917. —.] — *JENKYNs v. BUSHBY*, No. 729, ante.

918. —.] — *HAMILTON v. NOTT*, No. 354, ante.

H. Communications with or in Presence of Opposite Party.

919. **Not privileged.**—Privilege was restricted to communications whether oral or written from the client to his attorney & could not extend to adverse proceedings communicated to him as attorney in the cause from the opposite party in the disclosure of which there could be no breach of confidence (*LORD ELLENBOROUGH, C.J.*).—*SPENCELEY v. SCHULENBURGH* (1806), 7 East, 357; 3 Smith, K. B. 325; 103 E. R. 138.

Annotations:—*Consd. Desborough v. Rawlins* (1838), 3 My. & Cr. 515. *Fold. Ford v. Tennant* (No. 2) (1863), 32 Beav. 162. *Consd. Kennedy v. Lyell* (1883), 23 Ch. D. 387. *Refd. Sawyer v. Birchmore* (1835), 3 My. & K. 572.

920. —.] — *DESBOROUGH v. RAWLINS*, No. 369, ante.

921. —.] — (1) Where a document was prepared by B., acting as solr. as well for the person under whom both pltf. & defts. claimed, as also for a third party, a mtgee.:—*Held*: it was a privileged communication, & the interrogatory relating to such document, & the deposition in answer to that interrogatory, were suppressed, except for the purpose of proving handwriting.

(2) Where a document was prepared by B., acting as solr. only for the person under whom both pltf. & defts. claimed:—*Held*: document was not privileged.—*CHANT v. BROWN* (1852), 9 Hare, 790; 19 L. T. O. S. 361; 16 Jur. 606; 68 E. R. 735.

Annotations:—*Generally, Refd. Ainsworth v. Wilding*, [1900] 2 Ch. 315; *Daily Express* (1908), Ltd. v. Mountain, No. 2 (1916), 60 Sol. Jo. 654.

922. —.] — *FORD v. TENNANT* (No. 2), No. 829, ante.

923. —.] — No communication made to a solr. by or on behalf of the opposite party can be confidential (*COTTON, L.J.*).—*KENNEDY v. LYELL* (1883), 23 Ch. D. 387; 48 L. T. 455; 31 W. R. 691, C. A.; on appeal, *sub nom. LYELL v. KENNEDY* (No. 2), 9 App. Cas. 81, H. L.

Annotations:—*Refd. Bursill v. Tanner* (1885), 16 Q. B. D. 1; *Re Holloway, Young v. Holloway* (1887), 12 P. D. 167; *Sammon v. Bennett* (1892), 8 T. L. R. 235; *Calcraft v. Guest*, [1898] 1 Q. B. 759; *Ainsworth v. Wilding*, [1900] 2 Ch. 315. *Mentd. Bidder v. Bridges* (1885), 54 L. J. Ch. 798; *Martin v. Treacher* (1886), 2 T. L. R. 268; *Seal v. Turner* (1913), 30 T. L. R. 227.

924. **Privileged—Communication with view to compromise—Stipulation in event of failure to agree.**—Production refused of letters which passed between the respective solrs., with a view to a compromise, upon an express stipulation that they should not, in any way, be referred to or used to the prejudice of the deft., if an amicable arrangement was not come to.—*WHIFFEN v. HARTWRIGHT* (1848), 11 Beav. 111; 11 L. T. O. S. 197; 50 E. R. 759.

925. — **Misapprehension as to when communication made.**—In an action claiming

Macph. (Ct. of Sess.) 931; 45 Sc. Jur. 577.—*SCOT.*

o. Not privileged—Letters to two defendants from co-defendant—Acting as solicitor to defendants—Unless containing legal advice—Charge of fraud.—In a suit in which the bill charged fraud against all defts., two of them were ordered to produce all letters written to them, in reference to the subject of the suit & before the dispute

arose, by a co-deft., who had been their solr. in the original transaction, save only such letters as they should show by affidavit to contain legal advice or opinions.—*SANKEY v. ALEXANDER* (1874), 8 I. R. Eq. 241.—*IR.*

—.]—*C.* communications between co-defts. in reference to the subject-matter of litigation, or impending litigation, are not

damages for negligence defts. by their affidavit of documents claimed privilege in respect of a certain statement which they said was obtained for the purpose of being laid before their solrs., for the defence of the action. The document in question was a joint statement made & signed by pltf. & her sister-in-law, both of whom, in making it, were under the impression that the person to whom they made it was the representative of pltf.'s solr. In fact the person to whom they made the statement was defts.' claims' inspector, but the misapprehension in the minds of pltf. & her sister-in-law was not induced by any deceit on his part:—*Held*: the statement was privileged from discovery.—*FEUERHEERD v. LONDON GENERAL OMNIBUS CO.*, [1918] 2 K. B. 567; 88 L. J. K. B. 15; 119 L. T. 711; 62 Sol. Jo. 753, C. A.

J. Communications with a View to Fraud.

926. **General rule.**—Confidential communications involving fraud are not privileged from disclosure.

In answer to a bill filed for an injunction to restrain a former clerk of pltf. from disclosing any of their dealings & transactions, deft. stated that pltf. were in the habit of conducting their business in a fraudulent manner, & specified a particular instance. In support of his answer deft. filed interrogatories for the examination of pltf. as to the fraudulent transactions, which pltf. declined to answer. On exception to the answer of pltf.:—*Held*: there was no privilege to protect them from answering, the discovery being material to support deft.'s answer, which, if proved, would be a complete defence to the bill.—*GARTSIDE v. OUTRAM* (1856), 26 L. J. Ch. 113; 28 L. T. O. S. 120; 3 Jur. N. S. 39; 5 W. R. 35.

Annotations:—*Consd. R. v. Cox & Railton* (1884), 14 Q. B. D. 153. *Refd. Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

927. **Not privileged if to effect fraud—Communication between solicitor & client.**—A bill impeached a deed on the ground of fraud, & interrogated deft. as to the contents of certain letters which had passed between her & her solr., & which, it stated, showed that the deed was prepared & executed for the alleged fraudulent purpose. Deft. in her answer declined to set forth the contents of the letters, as being privileged communications:—*Held*: (1) the transaction, according to the account of it given in the bill & answer was not a fraud; (2) deft. was not bound to set forth the contents of the letters.

(3) Communications between a solr. & his client relative to a fraud contrived between them, are not exceptions to the general rule; they do not fall within the rule itself; for the rule applies not to all that passes between a solr. & his client, but only to what passes between them in professional confidence; & no ct. can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solr.—*FOLLETT v. JEFFERYES* (1850), 1 Sim. N. S. 3; 20 L. J. Ch. 65; 15 Jur. 118; 61 E. R. 1.

Annotations:—*As to* (1) *Consd. Mornington v. Mornington* (1861), 2 John. & H. 697. *Distd. Charlton v. Coombes* (1863), 4 Giff. 372. *Refd. R. v. Cox & Railton* (1884), 14 Q. B. D. 153. *As to* (3) *Consd. R. v. Cox & Railton* (1884), 14 Q. B. D. 153. *Apld. Re Postlethwaite, Re*

privileged from inspection by pltf., & it is immaterial that some of the co-defts., are solrs., & acting as such for other co-defts., except that communications between a solr. deft. & another deft., for whom he is acting as solr. with a view to his advising or to his conduct of the case on behalf of his client, are privileged.—*MCGREGOR v. PHARAZYN* (1902), 22 N. Z. L. R. 414.—*N.Z.*

9.—*Resisting production—Grounds of privilege: Sub-sect. 1, J. & K.*

Rickman, Postlethwaite v. Rickman (1887), 35 Ch. D. 722. *Refd.* Thompson v. Falk (1852), 1 Drew. 21; Williams v. Quebrada Rail, Land & Copper Co., [1895] 2 Ch. 751.

928. ———.]—A. purchased an advowson in June 1845 & in Aug. following, mortgaged it to B. In 1850 B. filed a bill against A. & the solr. employed by him in the purchase & the mtge., for a sale of the advowson, alleging that the mtge. was an insufficient security, & that he was induced to lend his money upon it by misrepresentations made to him by A. & his solr. as to the value of the advowson. A., in his answer, denied the alleged fraud; but admitted that he had in his possession letters which had passed between him & his solr. in reference to the purchase & the mtge., & added that they were confidential communications made to him by his solr. in that character, & therefore were privileged; but he did not state that any of them contained legal advice or opinions, or were written *post litem motam*:—*Held*: the letters must be produced.—HAWKINS v. GATHER-COLE (1851), 1 Sim. N. S. 150; 20 L. J. Ch. 303; 15 Jur. 186; 61 E. R. 58.

Annotations:—*Consd.* Wilson v. Northampton & Banbury Junction Ry. (1872), L. R. 14 Eq. 477. *Refd.* Manser v. Dix (1855), 1 K. & J. 451.

929. ———.]—(1) Communications between a testator & his solr. employed to make a will, with reference to illegal trusts intended to be inserted in the will, are not communications privileged for disclosure by reason of professional confidence.

(2) Communications between the same solr. & the exors. of the testator's will with reference to the same trusts & to the will, the same solr. being continued to be employed by the exors., are communications privileged from disclosure by reason of professional confidence.

(3) When a solr. is a party to a fraud, there is no privilege attaching to communications between the client & him upon the subject of the fraud, because to contrive fraud is no part of a solr.'s duty. It is no part of a solr.'s duty to advise his client as to the means of evading the law. The protection which the rule gives is the protection of the client (TURNER, V.C.).—RUSSELL v. JACKSON (1851), 9 Hare, 387; 21 L. J. Ch. 146; 18 L. T. O. S. 166; 15 Jur. 1117; 68 E. R. 558.

Annotations:—*As to* (1) *Expld.* Bullivant v. A.-G. for Victoria, [1901] A. C. 196. *Consd.* O'Rourke v. Darbishire, [1920] A. C. 581. *As to* (2) *Refd.* O'Rourke v. Darbishire [1920], A. C. 581. *As to* (3) *Consd.* R. v. Cox & Railton (1884), 14 Q. B. D. 153. *Apld.* *Re* Postlethwaite, *Re* Rickman, Postlethwaite v. Rickman (1887), 35 Ch. D. 722. *Refd.* Williams v. Quebrada Ry. Land & Copper Co., [1895] 2 Ch. 751.

930. ———.]—Where a bill was filed, charging a solr. with fraud, & where a deceased client, of whom there was no legal personal representative before the ct., was also included in the charge. On a motion for the production of documents:—*Held*: (1) all those bearing on the transaction, whether belonging to the solr. or his client, must be produced; (2) a draft of a proposed bill in Chancery, settled by counsel, was a privileged communication.—FEAVER v. WILLIAMS (1865), 13 L. T. 270; 11 Jur. N. S. 902.

931. ———.]—A suit was instituted to administer to the estate of P., & counsel's opinion was taken, & certain letters passed in relation thereto. Another suit was instituted (*inter alia*) to stay proceedings in the first suit, & charging fraud. A summons was taken out for the production of the cases & opinions of counsel, & the letters which passed on that occasion:—*Held*:

documents must be produced.—PHILLIPS v. HOLMER (1867), 15 W. R. 578.

932. ———.]—O. was indicted for perjury in denying that he was O. & affirming that he was T. He gave H., a solr., instructions to prepare a will disposing of the property to which he said he was entitled; & as part of the evidence against him consisted in the alleged resemblance of his handwriting to that of O. & its alleged difference from that of T., the instructions for the will were tendered for the purpose of enforcing this argument. They were objected to on the ground of professional privilege.

We must assume, *prima facie*, for the purpose of the inquiry, but only for that purpose, that the purpose which deft. had in seeking to obtain these estates, which he proposed here to dispose of by the will for which he gave instructions to H., was a fraudulent purpose, that of obtaining estates to which he was not entitled. Then the principle on which we proceed is this: that where anything is done, any communication made from a client to an attorney, with reference to a fraudulent purpose, the privilege does not exist; the fraudulent character of the communication takes away the privilege (COCKBURN, C.J.).—R. v. ORTON (1873), cited in 14 Q. B. D. 170.

Annotations:—*Apld.* R. v. Cox & Railton (1884), 14 Q. B. D. 153. *Consd.* Williams v. Quebrada Ry. Land & Copper Co., [1895] 2 Ch. 751. *Mentd.* Evans v. Evans, [1904] P. 378; R. v. Watt (1905), 70 J. P. 29.

933. ———.]—All communications between a solr. & his client are not privileged from disclosure, but only those passing between them in professional confidence & in the legitimate course of professional employment of the solr. Communications made to a solr. by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.—R. v. COX & RAILTON (1884), 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 49 J. P. 374; 33 W. R. 396; 1 T. L. R. 181; 15 Cox, C. C. 611, C. C. R.

Annotations:—*Consd.* *Re* Postlethwaite, *Re* Rickman, Postlethwaite v. Rickman (1887), 35 Ch. D. 722. *Distd.* Ward v. Marshall (1887), 3 T. L. R. 578. *Apld.* Williams v. Quebrada Ry. Land & Copper Co., [1895] 2 Ch. 751. *Consd.* Knaresborough & Clare Banking Co. v. Lorrimer (1897), 41 Sol. Jo. 734. *Refd.* Proctor v. Smiles (1886), 2 T. L. R. 845; O'Rourke v. Darbishire, [1920] A. C. 581. *Mentd.* R. v. Smith (1915), 84 L. J. K. B. 2153; Weld Blundell v. Stephens, [1919] 1 K. B. 520.

934. ———.]—*Re* POSTLETHWAITE, *Re* RICKMAN, POSTLETHWAITE v. RICKMAN, No. 958, *post*.

935. ———.]—KNARESBOROUGH & CLARE BANKING CO., LTD. v. LORRIMER (1897), 41 Sol. Jo. 734, C. A.

936. ———.]—*Client concealing address of wards of court.*—A solr. is bound to give to the ct. any information which may lead to the discovery of the residence of a ward of the ct. whose residence is being concealed from the ct., although such information may have been communicated to him by his client in the course of his professional employment. Where the mother of wards of the ct. had absconded with the wards:—*Held*: her solr. must produce the envelopes of letters which he had received from her as her solr., with the object of discovering her residence from the postmarks.—RAMSBOTHAM v. SENIOR (1869), L. R. 8 Eq. 575; 21 L. T. 293; 34 J. P. 85; 17 W. R. 1057.

Annotations:—*Mentd.* Heath v. Crealock (1873), L. R. 15 Eq. 257; Crawcour v. Salter (1881), 18 Ch. D. 30; Rosenberg v. Lindo (1883), 48 L. T. 478.

937. ———.]—*Counsel's opinion.*—ROTHWELL v. KING (1674), 2 Swan. 221, n.; 36 E. R. 599.

938. ———.] — PHILLIPS *v.* HOLMER, No. 931, *ante*.

939. **Bare allegation insufficient.**] — Where deeds are impeached for fraud, the mere allegation of fraud by the bill will not entitle pltf. to an order for their production; on the other hand, in order to obtain a production, it is not necessary that the fraud should be admitted by the answer, the ct. must look at the circumstances of each case.—BASSFORD *v.* BLAKESLEY (1842), 6 Beav. 131; 49 E. R. 775.

Annotation :—**Refd.** Costa Rica Republic *v.* Erlanger (1874), L. R. 19 Eq. 33.

940. ———.] — KNARESBOROUGH & CLARE BANKING CO., LTD. *v.* LORRIMER (1897), 41 Sol. Jo. 734, C. A.

941. ——— **Must be specific.**] — The privilege of a solr. in respect of confidential communications between him & his client regarding the preparation of conveyances & other instruments is not displaced by a bare allegation that such instruments were prepared "with intent to evade" the duties imposed by a taxing statute. There must be a specific allegation of fraud or illegal conduct of some kind.—BULLIVANT *v.* A.-G. FOR VICTORIA [1901] A. C. 196; 70 L. J. K. B. 645; 84 L. T. 737; 50 W. R. 1; 17 T. L. R. 457; 45 Sol. Jo. 483, H. L.; *revsq.* S. C. *sub nom.* R. *v.* BULLIVANT, [1900] 2 Q. B. 163, C. A.

Annotations :—**Consd.** O'Rourke *v.* Darbishire, [1920] A. C. 581. **Mentd.** A.-G. *v.* Richmond, Gordon & Lennox (No. 1) (1908), 99 L. T. 534.

942. ——— **Must show primâ facie case.**] — On a motion for production of documents impeached on account of fraud, it is not sufficient merely to allege the fraud; but to entitle the party to production, he must also allege that, if produced, they would help to substantiate the charge.—DENDY *v.* CROSS (1848), 11 Beav. 91; 11 L. T. O. S. 170; 50 E. R. 751.

Annotation :—**Refd.** Davis *v.* Parry (1857), 6 W. R. 174.

943. ———.] — O'ROURKE *v.* DARBISHIRE, No. 377, *ante*.

944. **Fraud need not be admitted.**] — BASSFORD *v.* BLAKESLEY, No. 939, *ante*.

945. **Solicitor not a party to alleged fraud.**] — (1) A bill averred that deft. procured the execution of a jointure deed under a power by pressure in fraud of the power but there was no allegation that the solr. who prepared the deed was a party to the fraud :—**Held** : the alleged fraud was not such as to exclude the instructions given by deft. to her solr. for the preparation of the deed from privilege.

(2) The bill was framed for the purpose of setting aside this deed; & among the communications as to which privilege was claimed were letters dated a considerable time before the transaction which the bill sought to set aside, but which deft., in her answer, described as having been written for the purpose of obtaining professional assistance as to, & with a view to her defence against any claim that pltf. might make against her. It appeared, however, on the face of the bill & answer that a contest had previously existed as to matters intimately mixed up with the transaction which the bill sought to set aside :—**Held** : the dates were not sufficient to rebut the privilege claimed.—MORNINGTON *v.* MORNINGTON (1861), 2 John. & H. 697; 70 E. R. 1239.

Annotation :—**As to** (1) **Refd.** R. *v.* Cox & Railton (1884), 14 Q. B. D. 153.

946. ———.] — A solr. was examined as a witness touching confidential communications made to him by a deceased client with reference to an alleged fraud committed by her in concert with deft., her surviving husband. The solr. declined

to produce letters written to him by the client about the time of the alleged fraud. The solr. was not a party to the suit, & there was no allegation connecting him with the alleged fraud :—**Held** : that the letters were protected from production by the privilege between solr. & client.—CHARLTON *v.* COOMBES (1863), 4 Giff. 372; 1 New Rep. 547; 32 L. J. Ch. 284; 8 L. T. 81; 27 J. P. 725; 9 Jur. N. S. 534; 11 W. R. 504; 66 E. R. 751.

Annotation :—**Refd.** R. *v.* Cox & Railton (1884), 14 Q. B. D. 153.

947. ——— **Immaterial.**] — WILLIAMS *v.* QUEBRADA RAILWAY LAND & COPPER CO., No. 1308, *post*.

K. Documents publici juris.

948. **Shorthand writer's notes — Of proceedings in court — Not privileged.**] — (1) Pltf. filed his bill to set aside an agreement signed by himself, containing terms to be performed partly by himself & partly by deft. On the motion of pltf., the ct. ordered deft. to produce the agreement, notwithstanding he alleged that he intended to produce the same in evidence against an action at law brought against him by pltf.

(2) The ct. will not order a deft. to produce the transcript of the shorthand writer's notes of proceedings had at a trial at law.—RAPSON *v.* CUBITT (1842), 7 Jur. 77.

949. ———.] — NICHOLL *v.* JONES, No. 402, *ante*.

950. ———.] — Transcript of shorthand notes of proceedings in open ct. are not privileged.—**Re** WORSWICK, ROBSON *v.* WORSWICK (1888), 38 Ch. D. 370; 58 L. J. Ch. 31; 59 L. T. 399; 36 W. R. 685.

Annotations :—**Consd.** Goldstone *v.* Williams, Deacon, [1899] 1 Ch. 47. **Extd.** Ainsworth *v.* Wilding, [1900] 2 Ch. 315. **Folld.** Lambert *v.* Home, [1914] 3 K. B. 86.

951. ———.] — A transcript of the shorthand notes of proceedings in open ct. in previous action, being a mere reproduction in a physical form of material which is *publici juris*, is not privileged from inspection. **Nordon** *v.* DEFRIES, No. 952, *post*, *overd.* — LAMBERT *v.* HOME, [1914] 3 K. B. 86; 83 L. J. K. B. 1091; 111 L. T. 179; 30 T. L. R. 474; 58 Sol. Jo. 471, C. A.

952. ——— **Privileged.**] — An action having been commenced to determine whether deft. had or had not executed a certain agreement, deft., while the action was pending, commenced an action against other persons whom he charged with a conspiracy to defraud him, & to utter the agreement as binding upon him, knowing it to be a forgery. After the commencement of the second action, deft. caused shorthand notes to be taken of the evidence, speeches, & summing-up at the trial of the first action, as he deposed, for the purpose "amongst others" of his case in the second action :—**Held** : the shorthand notes were privileged from inspection in the second action, & the affidavit need not show that the notes came into existence exclusively for the purposes of such action.—NORDON *v.* DEFRIES (1882), 8 Q. B. D. 508; 51 L. J. Q. B. 415; 46 J. P. 566; 30 W. R. 612.

Annotations :—**Distd.** **Re** Worswick, Robson *v.* Worswick (1888), 38 Ch. D. 370. **Overd.** Lambert *v.* Home, [1914] 3 K. B. 86. **Refd.** **Re** Strachan (1895), 12 R. 148; Birmingham & Midland Motor Omnibus Co. *v.* L. & N. W. Ry. (1913), 109 L. T. 64.

953. ——— **Of arbitration proceedings — Not privileged.**] — The corpn. of P. took compulsorily some of R.'s land, & at an arbn. to ascertain the sum to be paid, R. claimed a right of way over other land to the river, & such alleged right had

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to be considered in regard to the sum to be assessed. R. employed a shorthand writer to take notes of the evidence & arguments, & afterwards had them transcribed for his own purposes. Subsequently he brought an action for a mandatory injunction, to compel the corpn. to remove materials which they had put on the land over which he claimed the right of way. The relevancy of the notes was admitted. On motion by the corpn. for the production of the transcript, R. objected on the ground that it was privileged, as the notes were taken at his expense & in anticipation of other proceedings against the corpn.:—*Held*: the transcript of the notes was not privileged & it must be produced.—*RAWSTONE v. PRESTON CORPN.* (1885), 30 Ch. D. 116; 54 L. J. Ch. 1102; 52 L. T. 922; 33 W. R. 795.

Annotations:—*Apld.* *Re Worswick, Robson v. Worswick* (1888), 38 Ch. D. 370. *Consd.* *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47; *Ainsworth v. Wilding*, [1900] 2 Ch. 315; *Lambert v. Home*, [1914] 3 K. B. 86.

954. Depositions.—Officers of a co. & others having been examined under Cos. Act, 1862 (c. 89), s. 115, subsequent to action brought by the liquidator to rescind a contract, one of them, in cross-examination on behalf of the liquidator under commission, was asked whether certain questions had been put to him in the examination under above sect.; he said, "Yes." He was then asked if he made certain answers, when he declined to answer till his deposition was read to him. This was done. He was also told what others said in their depositions & asked whether he contradicted them:—*Held*: defts. were not entitled to inspect the depositions.—*NORTH AUSTRALIAN TERRITORY CO. v. GOLDSBOROUGH, MORT & CO.*, [1893] 2 Ch. 381; 62 L. J. Ch. 603; 69 L. T. 4; 41 W. R. 501; 2 R. 397, C. A.

Annotations:—*Distd.* *Re Standard Gold Mining Co.*, [1895] 2 Ch. 545. *Apld.* *Re Strachan*, [1895] 1 Ch. 439. *Consd.* *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47. *Refd.* *Re Merchants' Fire Office* (1899), 68 L. J. Ch. 211.

955. —.]—*GOLDSTONE v. WILLIAMS, DEACON & CO.*, No. 724, *ante*.

956. Document read in evidence at first trial—Grant of new trial.—A new trial having been granted, the ct. allowed pltf. to have inspection of a deed read in evidence by deft. at the first trial.—*HEWITT v. PIGOTT* (1831), 7 Bing. 400; 1 Dowl. 219; 5 Moo. & P. 253; 9 L. J. O. S. C. P. 120; 131 E. R. 155.

Annotation:—*Distd.* *Pratt v. Goswell* (1861), 9 C. B. N. S. 706.

957. Record of proceedings in chambers.—(1) Mere records of what takes place in chambers in the course of a hostile litigation in the presence of parties on both sides are not privileged from production. There is no distinction, for this purpose, between proceedings in chambers & proceedings in open ct.

(2) Correspondence which is protected on the ground of professional privilege is not rendered liable to discovery merely because it contains statements of fact as to what has taken place in chambers in the course of hostile litigation & in the presence of parties on both sides.

(3) Where privilege was claimed for certain entries in bills of costs relating to litigation on the ground that they were copies of or extracts from notes or memoranda made by the solr. pending the litigation for the purpose of enabling him to conduct the litigation on his client's behalf, & there was nothing in the affidavit by which privilege was claimed inconsistent with the entries being mere notes by the solr. or his clerk of what

had taken place in chambers in the presence of both parties, the ct. exercised its discretion under Ord. 31, r. 19a, to open & inspect the sealed entries.—*AINSWORTH v. WILDING*, [1900] 2 Ch. 315; 69 L. J. Ch. 695; 48 W. R. 539; 44 Sol. Jo. 529.

Annotations:—*As to* (1) *Folld.* *Lambert v. Home*, [1914] 3 K. B. 86. *As to* (3) *Refd.* *Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry.*, [1913] 3 K. B. 850.

Endorsement on counsel's brief.—*See* Nos. 730, 808, 812, 813, *ante*.

L. Trustee and Cestui que Trust.

958. General rule.—Three trustees of a will sold a trust estate to a person who resold it to one of the trustees, who afterwards sold it at an increased price. Some of the beneficiaries brought an action against the surviving trustee, who was a solr., & the exors. of the purchasing trustee, alleging that the sale was a fraudulent sale, & that the fraud was contrived by the purchaser, with the assistance of his co-trustee, the solr., but without the knowledge of the other trustee. The exors. claimed privilege for certain communications which had passed between their testator & the solr. at the time of the sale & for bills of costs then delivered, on the ground that with regard to the matters to which these documents related the solr. was acting as the purchaser's private solr.:—*Held*: the documents must be produced on the following grounds: (1) they had passed between two trustees in relation to a matter with respect to which fraud was alleged; (2) they had passed between two trustees in relation to a matter which affected the trust estate & of which the *cestuis que trust* were entitled to be informed; (3) it being alleged by the exors.' statement of defence that the sale was a *bonâ fide* sale, they could not set up that prior to the sale the solr. was acting as the purchaser's private solr. with respect to the property.—*Re POSTLETHWAITE, Re RICKMAN, POSTLETHWAITE v. RICKMAN* (1887), 35 Ch. D. 722; 56 L. J. Ch. 1077; 56 L. T. 733; 35 W. R. 563; 3 T. L. R. 604.

Annotations:—*As to* (1) *Consd.* *O'Rourke v. Darbishire*, [1920] A. C. 581. *Refd.* *Williams v. Quebrada Ry. Land & Copper Co.*, [1895] 2 Ch. 751. *As to* (3) *Expld.* *O'Rourke v. Darbishire*, [1920] A. C. 581.

959. No privilege.—An annuity deed was prepared by one R. as agent of both grantor & grantee, & there being no counterpart, was left in the hands of R., who received & for several years paid over to the grantee the amount of the annuity R. ultimately absconded, & the deed came into the possession of the grantor on his redeeming the annuity two years after it was granted. In an action by the grantee against the grantor for arrears of the annuity:—*Held*: the former would be permitted to inspect & take a copy of the deed, to enable him to declare thereon, although it was sworn by the latter that R. was the agent of the grantee alone.

This case appears to me to fall within the ordinary rule which entitles a party to the inspection of a deed or instrument placed in the hands of another as trustee for the executing or contracting parties (*TINDAL, C.J.*).—*DEVENOGE v. BOUVERIE* (1831), 8 Bing. 1; 1 Moo. & S. 29; 1 L. J. C. P. 1; 131 E. R. 300.

960. —.]—Certain books of pltf. had come into deft.'s possession as his agent. It became necessary for pltf. to inspect them. The ct. ordered deft. to allow an inspection, but would not order him to deliver them up.

I think this case comes within the rule that where a party holds an agreement as trustee for another, he is bound to allow an inspection

, B.).—JONES v. PALMER (1835), 4 Dowl. 446.

961. — Trust deed for creditors.] — Confidential communications between solr. & client are not privileged in a cause to carry into effect an indenture for the benefit of the client's creditors, the solr. having taken upon himself the office of trustee under such indenture.—PRITCHARD v. FOULKES (1837), Coop. Pr. Cas. 14; 47 E. R. 379.

962. —.]—Where the bill alleged that deft., a trustee, had purchased an estate with testator's money, & deft. gave no satisfactory answer as to the manner in which he had employed that money generally, though he denied the allegation in the bill as to this particular purchase, & he referred, by his answer, to a schedule containing a list of the title-deeds, etc., of the estate, as documents in his possession relating to the matters mentioned in the bill, but relied on them as forming his own title only & not that of deft., & insisted that he was not bound to produce them:—*Held*: he was bound to produce those deeds.—FARRER v. HUTCHINSON (1839), 3 Y. & C. Ex. 692; 9 L. J. Ex. Eq. 10; 3 Jur. 1119; 160 E. R. 880.

963. — Charitable trust.]—On an information filed at the relation of certain parishioners against the churchwardens & overseers of the parish praying the due administration of a charity of which the churchwardens & overseers were trustees the churchwardens' & overseers' books were ordered to be produced, although it was sworn by defts. that they did not relate to the matters in question in the suit.—A.-G. v. BERRY (1845), 2 Coll. 33; 5 L. T. O. S. 35; 9 Jur. 224; 63 E. R. 623.

964. —.]—Although as between a *cestui que trust* & trustee, or a person in the situation of a trustee, the *cestui que trust* is entitled to the production of title deeds & other documents, as of course, yet the moment the trustee acquires the character of a mtgee., the right to production ceases, unless upon the offer to pay off the mtge. debt.—JOHNSTON v. TUCKER (1847), as reported in 11 Jur. 382.

965. — Mortgage securities in possession of trustees.]—The trustees & exors., defts. in an administration suit, admitted by their answer the possession of title-deeds of mtge. securities, in which they had properly invested their testator's assets, but alleged that the mtgors. objected to the production of the deeds, & would prefer to pay off their debts, & they objected to the production of the deeds in the suit in the absence of the mtgors. On a motion for production:—*Held*: the deeds must be produced.—GOUGH v. OFFLEY (1852), 5 De G. & Sm. 653; 19 L. T. O. S. 324; 17 Jur. 61; 64 E. R. 1285.

Annotation:—*Folld. Re Cowin*, Cowin v. Gravett (1886), 33 Ch. D. 179.

966. — Counsel's opinion taken by trustees.]—Cases & opinions of counsel taken by trustees as such merely are not entitled to protection in a suit by the *cestui que trust* against the trustees or their representatives. The same rule applies to cases & opinions taken before the time when deft., the representative of a trustee, admits having first heard of the questions raised by the bill.—DEVAYNES v. ROBINSON (1855), 20 Beav. 42; 52 E. R. 518.

967. —.]—Pltf. filed her bill for production of a voluntary settlement under which she claimed to be a *cestui que trust*. The trustee & the settlor, who had an interest under the deed, by their answers alleged that the settlor had executed an appointment under a power contained in the deed, by which pltf.'s interest had been put an end to.

Inspection had been afforded pltf. of the latter deed:—*Held*: pltf. was entitled to production of the original settlement, in order that she might ascertain the power of the settlor to make such appointment & the due execution of the same.—BUGDEN v. SOUTH (1856), 26 L. J. Ch. 425; 28 L. T. O. S. 227; 3 Jur. N. S. 783; 5 W. R. 128.

968. —.]—One of the defts. in a suit, who had been partner with his father as a solr. for two years before the father's death, & was also his exor., was in possession of documents relating to the estate of testator in the cause of whom the father had been solr. & agent in the management of the property, & of whose will he was trustee & exor. New trustees had been appointed, & there being an index of title deeds in duplicate, one copy, with some other of the deeds & documents, was handed to the trustees, & the other, at the foot of which was written a receipt by the trustees for the deeds therein mentioned, was left with deft.:—*Held*: deft. was bound on the application by summons of the trustees, to make a full discovery of all documents of every kind relating to the estate, & the copy of the index in his possession must also be handed to the trustees, they giving him another receipt.—BOWEN v. PEARSON (1803), 8 L. T. 495; 9 Jur. N. S. 789; 11 W. R. 819.

969. —.]—A mtgee. taking conveyance of an equity of redemption from a trustee thereof, with notice of the trust, cannot withhold production of such conveyance in a suit by the *cestui que trust* for redemption of the mtge. & reconveyance of the property, though one of the trusts was a trust for sale.—SMITH v. BARNES (1865), L. R. 1 Eq. 65; 35 L. J. Ch. 109; 13 L. T. 402; 11 Jur. N. S. 924; 14 W. R. 96.

970. —.]—Trustees took counsel's opinion as to whether they should exercise a discretionary power to advance part of their trust fund for the benefit of some of the *cestuis que trust*, & others of the *cestuis que trust* having filed a bill to restrain them from exercising such discretion they took a second opinion as to their defence in the suit. Upon summons for production by pltf.:—*Held*: the first case & opinion having reference to the dealings with the trust estate, all the *cestuis que trust* had a right to inspection, & the ct. ordered them to be produced; but the second case & opinion being after suit instituted pltf. had no right to production.—TALBOT v. MARSHFIELD (1865), 2 Drew. & Sm. 549; 6 New Rep. 288; 12 L. T. 761; 13 W. R. 885; 62 E. R. 728.

Annotations:—*Apld. Re Mason*, Mason v. Cattley (1883), 22 Ch. D. 609. *Refd. O'Rourke v. Darbishire*, [1920] A. C. 581.

971. —.]—In an action by *cestuis que trust* against their trustees to compel them to make good a breach of trust:—*Held*: the trustees must produce letters & copies of letters from & to their solrs. in relation to matters in question in the action *ante litem motam*.—*Re MASON*, MASON v. CATTLEY (1883), 22 Ch. D. 609; 52 L. J. Ch. 478; 48 L. T. 631.

972. —.]—WHITHAM v. WHITHAM (1884), 28 Sol. Jo. 456.

973. —.]—*Primâ facie*, & in the absence of any special circumstances a *cestui que trust*, even though he be only interested in the proceeds of the sale of land, is entitled to the production & inspection of all title deeds & other documents relating to the trust estate which are in the possession of the trustees. One *cestui que trust* can enforce this right against the trustees, without bringing before the ct. the other persons beneficially interested in the property when they have no higher right than himself.—*Re COWIN*, COWIN

Sect. 9. — Resisting production—Grounds of privilege: Sub-sect. 1, L.; sub-sect. 2, A. & B.]

v. GRAVETT (1886), 33 Ch. D. 179; 56 L. J. Ch. 78; 34 W. R. 735.

974. — Unless defending action by cestuis que trust.]—Held: a case & opinion submitted & taken by trustees in contemplation of the litigation were privileged as against the *cestuis que trust*.—*BROWN v. OAKSHOTT (1849), 12 Beav. 252; 50 E. R. 1058.*

Annotation:—Consd. Woodhouse v. Woodhouse (1914), 30 T. L. R. 559.

975. — —.]—A trustee, taking counsel's opinion to guide himself in the administration of his trust, & not for the purpose of his defence in a litigation against himself, is bound to produce them to his *cestuis que trust*; but the relation of trustee & *cestui que trust* must, for that purpose, be first established. A mere claimant to an estate is not entitled to the production of cases & opinions taken by a trustee.—*WYNNE v. HUMBERSTON (1858), 27 Beav. 421; 28 L. J. Ch. 281; 32 L. T. O. S. 268; 5 Jur. N. S. 5; 54 E. R. 165.*

Annotation:—Apprvd. O'Rourke v. Darbishire, [1920] A. C. 581.

976. — —.]—TALBOT v. MARSHFIELD, No. 970, ante.

977. — —.]—A trustee is not bound to produce to his *cestuis que trust* cases laid before counsel with the view of resisting a claim by such *cestuis que trust*, although the trustee is not personally interested.—*THOMAS v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1870), 18 W. R. 312.*

978. Persons in analogous position—Tenant by the curtesy.]—AMIES v. DAMPIER (1804), cited Cooper's Equity Pleading 59.

979. — Company & shareholder—Where interests common—Communication paid for out of company's funds.]—A pltf. in a shareholder's action against a co. is entitled to discovery of professional communications between the co. & its legal advisers relating to the subject-matter of the action, when such communications are paid for out of the funds of the co.—*GOURAUD v. EDISON GOWER BELL TELEPHONE CO. OF EUROPE (1888), 57 L. J. Ch. 498; 59 L. T. 813.*

Annotations:—Refd. Woodhouse v. Woodhouse (1914), 30 T. L. R. 559. Mentd. Re Severn & Wye & Severn Bridge Ry., [1896] 1 Ch. 559.

980. — — Interests adverse.]—The rule that where a co. takes the opinion of counsel & pays for it out of the funds of the co., a shareholder has a right to see it, does not apply where a co. has brought an action against the shareholder, even although the shareholder has set up a counter-claim alleging the invalidity of the resolution authorising the action.

Where a co. obtained advice in the common interest & paid for it out of the common fund, the shareholder would have a right to see it. But that does not apply where the interests of the co. & shareholders are adverse (*LUSH, J.*).—*WOODHOUSE & CO., LTD. v. WOODHOUSE (1914), 30 T. L. R. 559, C. A.*

981. Opposing cestuis que trust—Trustee acting as solicitor for one.]—Disputes arose between two *cestuis que trust* in respect of the trust matters, & the trustee acted as solr. for one:—Held: the communications between such solr. & *cestui que trust* were not privileged as against the other.—*TUGWELL v. HOOPER (1847), 10 Beav. 348; 2 New Pract. Cas. 142; 16 L. J. Ch. 171; 8 L. T. O. S. 549; 50 E. R. 616.*

982. Co-trustees—One the solicitor to the trust—Extent of privilege.]—O'ROURKE v. DARBISHIRE, No. 377, ante.

SUB-SECT. 2.—DOCUMENTS RELATING SOLELY TO THE CASE OF DEPONENT AND NOT SUPPORTING CASE OF OPPONENT.

A. In General.

983. General rule—Documents privileged.]—BEWICKE v. GRAHAM, No. 362, ante.

984. — —.]—Re STAHLWERK BECKER AKT.'S PATENT, No. 368, ante.

985. Not confined to documents of title—Correspondence.]—In defts.' affidavit of documents, a document was described as a copy of or extract from a confidential letter from a person who was no party to the action, & an affidavit filed in opposing a summons for inspection stated that the document related solely to defts.' case & not to pltf's case, & did not tend to support pltf's claim, or contain anything impeaching defts.' case:—Held: the description was sufficient to show that the document was privileged, & pltf's were not entitled to inspection.—*BULMAN & DIXON v. YOUNG, EHLERS, & CO. & COMMERCIAL S.S. CO., LTD. (1883), 49 L. T. 736, C. A.*

Annotation:—Refd. McLean & Rigg v. Jones (1892), 66 L. T. 653.

986. — Applications from subscribers.]—FRANKENSTEIN v. GAVIN'S CYCLE CLEANING & INSURANCE CO., No. 391, ante.

987. Whether confined to documents admissible in evidence.]—HEY v. DE LA HEY, [1886] W. N. 101, C. A.

Annotations:—N.F. Re Stahlwerk Becker Akt.'s Patent (1917), 34 R. P. C. 332. Consd. O'Rourke v. Darbishire, [1920] A. C. 581.

988. — —.]—O'ROURKE v. DARBISHIRE, No. 377, ante.

PART III. SECT. 9, SUB-SECT. 2.—A.

a. Privileged—Documents not admissible as evidence for deponent.]—Pltf's. in their affidavit of discovery objected to produce certain documents on the grounds that they related solely to the case of pltf's. & not to the case of defts., or any of them, & did not in any way tend to support the claim of defts., or any of them, & did not contain anything impeaching the case of pltf's. The documents were clearly not admissible as evidence for pltf's. On application by defts. for production:—Held: as the documents could not be used by pltf's., & as they swore that they did not support the case of defts., they must be immaterial, & defts. were not entitled to production.—*AUSTRALIAN JOINT STOCK BANK v. STEEL (1890), 11 N. S. W. Eq. 18; 6 N. S. W. W. N. 124.—AUS.*

r. — Sufficiency of affidavit.]—In the affidavit of the defts.' manager, on production of documents, he stated that defts., had in their possession letters that had passed between the managers at B. & W., which he objected to produce on the ground that they were privileged communications relating solely to defts.' case & defence, & did not concern pltf.'s case:—Held: sufficient had been stated to excuse production of the letters between the managers.—*HECTOR v. CANADIAN BANK OF COMMERCE (1896), 11 Man. L. R. 320.—CAN.*

s. — —.]—A party to an action is not entitled to discovery of the evidences in the possession of the opposite party which exclusively relate to the case of the latter, & the truth of a statement to that effect respecting any particular document, made in the

affidavit on production of documents sworn to by one party, cannot be questioned on an application by the opposite party to compel production of that document.—*VON FERBER v. ENRIGHT (1909), 19 Man. L. R. 383.—CAN.*

t. — When power of court to inspect documents exercised.]—In an action for rent under a lease in which the defence was that the estate of the lessor had determined, pltf. in his affidavit of discovery, claimed privilege for certain documents on the ground that they related solely to his own title or case, & did not assist deft.'s case or title. On a motion by deft. for further & better discovery & for inspection of the documents for which privilege was claimed:—Held: the ct. had power to & would inspect such documents for the purpose of seeing

989. Need not say do not impeach deponent's case.]—BUDDEN *v.* WILKINSON, No. 361, *ante*.

990. — Contrary decision.]—Pltfs. sued defts. for money paid to defts.' use as their agents for the sale of goods in Australia. Pltfs.' manager & sole representative in England, in an affidavit made pursuant to R. S. C., Ord. 31, r. 12, stated: "Pltfs. have in their possession or power the documents relating to the matters in question in this action, set forth in the first & second schedules hereto." Certain documents were set forth in the second schedule as follows: "Letters & other communications from pltfs.' house in Melbourne to the London house, & press copy letters & other communications *vice versa*, & I say that such letters & other communications, & press copies, relate exclusively to the case of pltfs., & not to the case of defts., nor do they support or tend to support defts.' case, & they do not to the best of my knowledge, information, & belief, contain anything impeaching, the case of pltfs., wherefore pltfs. object to produce the same, & say they are privileged from inspection by defts."—*Held*: the documents were not privileged from inspection.—MCLEAN BROTHERS & RIGG, LTD. *v.* JONES (F.) & Co. (1892), 66 L. T. 653; 8 T. L. R. 243, D. C.; *affd.* on other grounds, 8 T. L. R. 314, C. A.

Annotation:—N.F. Budden *v.* Wilkinson, [1893] 2 Q. B. 432.
How far affidavit conclusive.]—See Nos. 362, 389–391, *ante*.

Documents relating to land.]—See Sub-sect. 2, C., *post*.

B. Chancery Cases.

991. Documents of title—General rule.]—(1) On a bill of discovery in aid of the defence to an action brought by a corpn. for the recovery of town dues, defts. by their answer admitted that they had in their custody & relating to the matters mentioned in the bill, divers cases which had been prepared & laid before counsel in contemplation of the then pending litigation, as also certain grants & deeds, which were the title deeds & documents evidencing their title to the dues in question:—*Held*: pltfs. in equity were not entitled to an inspection of such cases or deeds.

(2) A party has a right to the production of such deeds only as either sustain his own title affirmatively but not of those which are not immediately connected with the support of his own title & which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims (LORD BROUGHAM, C.).—BOLTON *v.* LIVERPOOL CORPN.

whether the documents were of the character they were represented to be in the affidavit.—POWER *v.* FREEMAN (1908), 42 I. L. T. 115.—IR.

a. — — —.]—Petitioner, a husband, in a suit for a divorce *a mensâ et thoro* from his wife, had obtained the original of one letter & copies of other letters purporting to have been written by resp. to the person with whom she was alleged to have committed adultery. In his affidavit of discovery petitioner claimed privilege for those documents on the ground that they were part of the evidence supporting his case, & that they did not support or tend to support, resp.'s case, & contained nothing impeaching the case of petitioner:—*Held*: (1) resp. was not entitled to discovery of the documents, as they came within the description in the affidavit; (2) the ct. would in a proper case look at the documents,

for which privilege was claimed in an affidavit made in the ordinary form, in order to obtain the best evidence of the contents of the documents to check the affidavit.—BISHOP *v.* BISHOP (1909), 43 I. L. T. 38, 55.—IR.

b. — — —.]—Petitioner, a husband, in a suit for a divorce *a mensâ et thoro* from his wife, had obtained possession of various letters which had passed between her & several of the persons with whom she was alleged to have committed adultery. In his affidavit of discovery the petitioner pleaded that these documents were privileged on the ground that they formed part of the evidence supporting his case, that they did not support resp.'s case, & contained nothing impeaching his own case:—*Held*: (1) resp. was not entitled to discovery of the documents, as they came within the description "privileged" in the affidavit; (2) the ct.

(1833), 1 My. & K. 88; You. 378, n.; Coop. *temp.* Brough. 19; 1 L. J. Ch. 166; 39 E. R. 614, L. C.

Annotations:—As to (1) *Distd.* Burrell *v.* Nicholson (1833), 1 My. & K. 680. *Consd.* *Re* Collier & Collier, *Ex p.* Collier (1834), 4 Deac. & Ch. 364; Bellwood *v.* Wetherell (1835), 1 Y. & C. Ex. 211; Storey *v.* Lennox (1836), 1 Keen, 341. *Foll.* Nias *v.* Northern & Eastern Ry. (1838), 2 Keen, 76. *Distd.* Smith *v.* Beaufort (1843), 1 Ph. 209. *Consd.* Walsingham *v.* Goodricke (1843), 3 Hare, 122; Flight *v.* Robinson (1844), 8 Beav. 22; Holmes *v.* Baddeley (1844), 1 Ph. 476; Combe *v.* London Corpn. (1845), 15 L. J. Ch. 80; Minet *v.* Morgan (1873), 8 Ch. App. 361. *Refd.* Greenhough *v.* Gaskell (1833), Coop. *temp.* Brough. 96; Meath Bp. *v.* Winchester (1836), 4 Cl. & Fin. 445; Llewellyn *v.* Badeley (1842), 1 Hare, 527; A.-G. *v.* Thompson (1849), 8 Hare, 106; Stainton *v.* Chadwick (1851), 15 Jur. 1139; Doe d. Avery *v.* Langford (1852), Bail Ct. Cas. 37; Manser *v.* Dix (1855), 1 K. & J. 451; Chartered Bank of India, Australia & China *v.* Rich (1863), 32 L. J. Q. B. 300; Jenkins *v.* Bushby (1866), 35 L. J. Ch. 400; Taylor *v.* Batten (1878), 39 L. T. 408; Pearce *v.* Foster (1885), 54 L. J. Q. B. 432. As to (2) *Consd.* Smith *v.* Beaufort (1843), 1 Ph. 209; Hunt *v.* Howitt (1852), 7 Exch. 236. *Refd.* Meath Bp. *v.* Winchester (1836), 4 Cl. & Fin. 445; Pepper *v.* Chambers (1852), 21 L. J. Ex. 81; Snelder *v.* Mangino (1852), 7 Exch. 229; Scott *v.* Walker (1853), 17 Jur. 916; Minet *v.* Morgan (1873), 8 Ch. App. 361; Bristol Corpn. *v.* Cox (1884), 26 Ch. D. 678. *Generally, Mentd.* Weeks *v.* Argent (1847), 11 Jur. 525; Wentworth *v.* Lloyd (1864), 10 H. L. Cas. 589; Wilson *v.* Northampton & Banbury Ry. (1872), 20 W. R. 938.

992. — — —.]—MINET *v.* MORGAN, No. 754, *ante*.

993. Matters relating to party's own title—Title deeds privileged.]—An order that deft. might inspect a deed proved in the cause & referred to by the deposition as being part thereof, was discharged, for that deft. before hearing is not to see the strength of the cause, or any deed to pick holes in it.—DAVERS *v.* DAVERS (1727), 2 P. Wms. 410; 2 Stra. 764; 2 Eq. Cas. Abr. 285, pl. 3; 24 E. R. 790, L. C.

994. — — —.]—Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds by her answer, or until the offer is effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, & the premises therein comprised.—LEECH *v.* TROLLOP (1755), 2 Ves. Sen. 662; 28 E. R. 422, L. C.

995. — — —.]—Production of a deed which destroyed deft.'s title was refused.—SAMPSON *v.* SWETTENHAM (1820), 5 Madd. 16; 2 My. & K. 754, n.; 56 E. R. 800.

996. — — —.]—It is not by the practice of this ct. required of a party charged by a bill to have deeds & documents, etc., in his possession, material to the case on the other side, that he should protect himself from producing them by plea. The ct. will take care that he be not called on without good reason to produce his securities, for they watch with jealousy proceedings instituted

would not look at the documents in order to check the affidavit, unless it was led by the circumstances of the case or by a counter-affidavit to the conclusion that they were incorrectly described in the affidavit.—BEAMISH *v.* BEAMISH (1914), 49 I. L. T. 64.—IR.

c. *Not privileged—Agreement executed by both parties.]—*Deft. pleaded one plea, an equitable one, in which he set out the substance of a written agreement executed by both parties, but delivered to deft. Pltf., swearing that he had no duplicate or copy, asked inspection of this document, before pleading in reply. Deft.'s counsel opposed the rule on the ground that this was a matter relating exclusively to deft.'s case:—*Held*: rule must be made absolute.—SHAW *v.* BROWN (No. 1) (1907), 4 E. L. R. 312.—CAN.

9.—*Resisting production—Grounds of privi-*

for that purpose, & will require an unanswerable case to warrant their interference in making an order for their production.—*VANSITTART v. BARBER* (1821), 9 Price, 641; 147 E. R. 208.

997. ———.]—A party, claiming by a title paramount to that of deft., has no right to call for the production of papers, etc., connected with such subsequent title, unless they show the title of pltf., or certain admissions, tending to prove pltf.'s case.

A., before his bkpcy., assigned a legacy to B., who afterwards commenced a suit against the assignee, to obtain the benefit of the assignment. The assignee, by his answer, insisted on the invalidity of the assignment, & admitted that he had in his possession the proceedings in the bkpcy.:—*Held*: pltf. was not entitled to their production without first making out a special case.—*DE TASTET v. SMITH* (1835), 4 L. J. Ch. 126.

998. ———.]—Defts. in their answer admitted the possession of certain deeds, etc., contained in schedule thereto, but said that all & every such deeds, etc., "make out & show the title of defts., & that they did not in any respect make out or assist in making out the title of pltf. thereto, or to any part thereof." Upon motion for production:—*Held*: defts. were protected by the form of their answer.—*COLLS v. STEVENS* (1843), 7 Jur. 54.

999. ———.]—*Held*: deft. was not bound to set forth a list of documents in his possession relating to his own title.—*SUTHERLAND v. SUTHERLAND* (1853), 17 Beav. 209; 51 E. R. 1013.

1000. ———.]—In a suit for redemption by a mtgor. against the transferee of the mtge. only, pltf. confessing deft.'s title, but stating that he was unable to discover, & seeking discovery, by what means deft. made it out:—*Held*: deft. was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, & to be relevant to the matters in question, on the ground that it was privileged as deft.'s title deed.—*LEWIS v. DAVIES* (1853), 17 Jur. 253.

1001. ———.]—*BOYD v. PETRIE*, No. 752, *ante*.

——— Title deeds of land.]—*See* Sub-sect. 2, C., *post*.

1002. ——— Privilege confined to title—Not matters of account.]—The rule in equity, that a party is not bound to disclose his own case, is confined to mere matter of title, & does not extend to matters of account.—*CORBETT v. HAWKINS* (1827), 1 Y. & J. 421; 148 E. R. 735.

1003. ——— Particular evidence only.]—A pltf. in a tithe suit is not entitled to a production of receipts for moduses & compositions, given to defts. by pltf. & his predecessors, some of those receipts relating to tithes not sued for, & the others being evidence for defts., & not for pltf.—*TOMLINSON v. LYMER* (1829), 2 Sim. 489; 57 E. R. 871.

1004. ———.]—A deft. who had pleaded moduses, to a bill for tithes filed by the rector's lessee, was ordered on motion to produce all the documents in his possession which had belonged to a former lessee of the rectory, & also all the other documents in his custody relating to the matters in dispute except those which tended to show the existence of the moduses.—*TOMLINSON v. BOOTH* (1831), 4 Sim. 461; 58 E. R. 172.

1005. ———.]—The Corpn. of London claimed for the Fellowship Porters of that city a

prescriptive right of measuring & carrying for certain fees, all corn landed on either side of the river Thames, between Y. & S., & carried into or out of the city; & they filed their bill against C. & Co., to establish that right. The defence of C. & Co. was, that the claim was of modern origin; & they filed their bill of discovery against the corp., suggesting that the Porters were established in the time of Henry III., for carrying, within the city only, corn landed by persons other than citizens, at Q., which they alleged was then the only place where corn was permitted to be landed; & they claimed the inspection of certain entries in the corp. books, which purported to be copies of ancient public orders & proclamations, inquisitions, & findings, relating to the landing of corn at Q., & to the charges for carrying it to certain persons within the city. Upon motion to produce these documents, which by the answer of the corp. were admitted to be in their possession, but were insisted upon as part of their title & that of their grantees, the Fellowship Porters:—*Held*: they were not part of their title, & must be produced.—*COMBE v. LONDON CITY* (1840), 4 Y. & C. Ex. 139; 160 E. R. 953; *subsequent proceedings* (1845), 15 L. J. Ch. 80, L. C.

Annotations:—*Refd.* *Smith v. Beaufort* (1843), 1 Ph. 209; *Bluck v. Gompertz* (1851), 7 Exch. 67; *Price v. Harrison* (1860), 8 C. B. N. S. 617.

1006. ——— Tithe cases.]—On a bill being filed in the Exch. for tithes, deft. filed a cross bill in the Ct. of Ch., for a discovery of pltf.'s title to the tithes, & whether he had not conveyed them away. On demurrer:—*Held*: deft. was not entitled to a discovery of pltf.'s title to the tithes, but was entitled to a discovery whether he had conveyed them away.—*GLEGG v. LECH* (1819), 4 Madd. 193; 56 E. R. 678.

Annotations:—*Consd.* *Knight v. Waterford* (1836), 2 Y. & C. Ex. 22. *Refd.* *Horton v. Bott* (1857), 2 H. & N. 249.

1007. ———.]—*BLIGH v. BENSON*, No. 579, *ante*.

1008. ———.]—*FIRKINS v. LOWE*, *LOWE v. FIRKINS*, No. 628, *ante*.

1009. ———.]—*COMPTON v. GREY* (EARL) (1826), 1 Y. & J. 154; 148 E. R. 625.

Annotation:—*Refd.* *O'Rourke v. Darbishire*, [1920] A. C. 581.

1010. ———.]—In a suit by a vicar against occupiers for tithes, a motion was made by pltf. for production of deeds, papers, & writings, admitted by the answer of one of the defts. to be in his possession or power. Dft. resisted the application, on the ground that several of such documents related to & showed his title as lay impropriator to some of the tithes in question:—*Held*: pltf. was not entitled to the production of such of them as related to the title of deft. to the tithes in question.—*COLLINS v. GRESLEY* (1828), 2 Y. & J. 490; 148 E. R. 1012.

Annotation:—*Refd.* *Bennett v. Glossop* (1844), 3 Hare, 578.

1011. ———.]—*NEWTON v. BERRSFORD*, No. 784, *ante*.

1012. ———.]—*KNIGHT v. WATERFORD* (MARQUESS), No. 787, *ante*.

1013. Form of claim—*Bellef.*]—If a deft. denies pltf.'s title, & says positively that the documents in his custody, relating to the matters in the bill, will not show pltf.'s title, the ct. will not order him to produce them; but if he says merely that he believes that they will not show pltf.'s title, the ct. will order him to produce them.—*BANNATYNE v. LEADER* (1839), 10 Sim. 230; 59 E. R. 601.

Annotations:—*Apprvd.* *Combe v. London Corp.* (1845), 15 L. J. Ch. 80. *Refd.* *Pelle v. Stoddart* (1849), 13 Jur. 225. *Mentd.* *Stanger v. Wilkins* (1855), 19 Beav. 626.

1014. —.]—Deft. to a bill of discovery in aid of pltf.'s defence to an action at law, cannot be compelled to produce a document as to which the bill contains no allegation that it relates to the matter in issue in the action. Where deft. stated that he was advised, & verily believed, that the document in question did not contain evidence in support of pltf.'s pleas in the action:—*Held*: this protection was sufficiently claimed.—*PEILE v. STODDART* (1849), 1 Mac. & G. 192; 1 H. & Tw. 207; 13 Jur. 373; 41 E. R. 1237, L. C.
Annotations:—*Distd.* Manby v. Bewicke (No. 3) (1856), 8 De G. M. & G. 476. *Follid.* Minet v. Morgan (1873), 8 Ch. App. 361.

1015. — *Relating to plaintiff's title.*—Where a motion for production of documents was resisted on the ground that the answer contained no admission of pltf.'s title, which title depended solely on whether A. had died before or after a certain day, & the answer admitted that the documents in question related to the matters mentioned in the bill, "except the question of the death of A." :—*Held*: this was not a sufficiently distinct denial that they related to pltf.'s title, to protect them from production.—*EDWARDS v. JONES* (1844), 1 Ph. 501; 14 L. J. Ch. 62; 4 L. T. O. S. 429; 9 Jur. 145; 41 E. R. 723, L. C.
Annotations:—*Distd.* Smith v. Dowling (1846), 10 Jur. 63. *Mentd.* Albert (Prince) v. Strange (1849), 1 H. & Tw. 1.

1016. — *Only argumentative.*—To a bill by the representative of A. for an account of a partnership between A. & deft., alleging various circumstances as evidence of the partnership, & that deft. had in his possession documents relating to the concern, by which, if produced, the truth of the matters in the bill mentioned would appear, deft. put in a plea of no partnership; & by his answer in support of the plea, admitted that he had in his possession certain documents relating to the concern, but, save as aforesaid, he denied that he had any documents relating to any of the matters in the bill mentioned, or whereby the truth of these matters would appear, & he insisted that, as such documents related exclusively to his own title, & in no way tended to support pltf.'s claim, he was not bound to produce them. The plea was disallowed, on the ground that the answer did not contain a positive, but only an argumentative, denial that the documents in the possession of deft. would not, if produced, tend to show the truth of the matters in question, & that therefore the allegations in the bill in that respect must be taken to be true.—*HARRIS v. HARRIS* (1844), 3 Hare, 450; 13 L. J. Ch. 349; 8 Jur. 978; 67 E. R. 458; *subsequent proceedings* (1845), 4 Hare, 179.

Annotation:—*Consd.* Mansell v. Feeney (1861), 2 John. & H. 313.

1017. — *Do not support adversary's case.*—*SMITH v. BEAUFORT (DUKE)*, No. 543, *ante*.

1018. — *"Title."*—The usual order having been made in chambers to answer & produce documents, one of the defts. objected to produce documents, on the ground that they had been obtained by him for the defence of himself & the other deft. since the institution of the suit, & did not relate to or evidence the title of pltf. or his predecessors:—*Held*: the word "title" might refer to the property, the subject of the suit, the relief asked, or the designation of pltf.'s character, & deft. was bound to produce the documents.—*FELKIN v. HERBERT (LORD)* (1861), 30 L. J. Ch. 798; 9 W. R. 756.

Annotation:—*Refd.* Kennedy v. Lyell (1883), 23 Ch. D. 387.

1019. *Must disclose documents supporting opponent's title.*—It is necessary in a plea to discovery to deny the possession of documents which

would support pltf.'s title.—*TONGE v. STAKEY* (1838), 2 Jur. 44.

1020. — *Or impeaching deponent's title.*—*COMBE v. LONDON CORPN.*, No. 544, *ante*.

1021. — *When parts disclosed not intelligible without rest.*—Deft. was ordered to produce the whole of an agreement, although in his affidavits as to documents he had set out two clauses of the agreement, & sworn that those clauses alone assisted pltf.'s case, or related to the matters in question in the cause.—*LUSCOMBE v. STEER* (1867), 37 L. J. Ch. 119; 17 L. T. 370.

1022. *Production ordered—When document misrepresented.*—Where a deft. schedules certain documents to his answer, but refuses to produce them, on the ground that they relate exclusively to his title, do not support pltf.'s case, nor tend to defeat his own, if the documents may be important in determining the question at issue in the suit, they must be produced.

If from the nature of the suit or the description of the documents scheduled, or the whole together, the ct. thinks that deft. has wilfully misrepresented the case, it will then order productions notwithstanding any statement in the answer (*KINDERSLEY, V.C.*).—*GREENWOOD v. GREENWOOD* (1857), 6 W. R. 119.

1023. — —.]—*MANSELL v. FEENEY*, No. 480, *ante*.

1024. — —.]—Where the bill alleged a partnership between pltf. & deft., the existence of which was entirely denied by the answer, deft. was ordered to produce books & accounts, which, by his affidavit he stated related exclusively to his own business, that being the business in which the partnership was alleged to exist.—*FARRIER v. ATWOOL* (1866), 14 L. T. 278; *sub nom.* *FERRIER v. ATWOOL*, 12 Jur. N. S. 365; 14 W. R. 597, L. JJ.

1025. — —.]—*PONSONBY v. HARTLEY*, [1883] W. N. 44, C. A.

Annotation:—*N.F.* Leslie v. Cave (1887), 56 L. T. 332.

1026. — *Merely negativing plaintiff's title.*—*A.-G. v. LONDON CORPN.*, No. 50, *ante*.

1027. — *Document not inspected by party called upon to produce.*—Deft. in his answer stated that, to the best of his knowledge, information & belief, the documents which he admitted to be in his possession relating to the matters mentioned in the bill did not, nor did any of them, in any way make out, evidence or tend to support or tend to make out, evidence or support the case or any part of the case made by pltf., nor defeat or impeach, or tend to defeat or impeach the case or defence, or any part of the case or defence of deft., but were evidence in support of deft.'s case. It appeared, however, on the face of the answer, that deft. had not himself inspected the documents:—*Held*: they were not protected from production.—*MANBY v. BEWICKE* (No. 3); (1856), 8 De G. M. & G. 476; 27 L. T. O. S. 285; 2 Jur. N. S. 671; 4 W. R. 757; 44 E. R. 474, L. JJ.

1028. — *Documents necessary to ascertain plaintiff's case.*—In an action for libel, where there is a plea of justification, imputing to pltf. dishonesty while in the employ of deft., pltf. will be allowed inspection, under Common Law Procedure Act, 1854 (c. 125), s. 50, of statements of accounts furnished by himself of money received in the course of such employ, & of letters from himself to deft. relating thereto, & of entries in deft.'s books of money received from him, so far as they may be material to disprove charges contained in the plea or, if the plea is general, so far as they may relate to charges specified in

ct. 9.—Resisting production—Grounds of privilege: Sub-sect. 2, B. & C.]

particulars; & deft. will be compelled to deliver such particulars.—*COLLINS v. YATES* (1858), 27 L. J. Ex. 150; 30 L. T. O. S. 277.

Annotation:—Mentd. M'Creight v. Stevens (1862), 6 L. T. 503.

1029. — Document establishing plaintiff's title.]—A pltf., who has not established his title, has a right to the production of documents in deft.'s custody, by which he alleges that his title will be established.—*MOONS v. BERNALLES* (1823), 1 L. J. O. S. Ch. 185.

1030. When consent disclosed in answer—Entitled to production for verification.]—L. claimed to be lawful owner of divers goods & chattels in the visible user & enjoyment of M. at his family mansion. N., a judgment creditor of M., filed a bill against him & L., charging that bills of sale & assignments of the goods & chattels were executed by M. to L. without consideration, & that they were void as against N., & praying a declaration to that effect, & offering to pay what, if anything, should be found due to L. on the security of the goods. L., by his answer, admitted the bills of sale & assignments to be in his possession, & said they were executed to him for full consideration, & that M. had only the permissive, not the absolute use of the goods; & on a further answer he claimed to have an equitable lien on them for money advanced, & he set forth in a schedule abstracts of the bills of sale, etc.:—*Held: N. was entitled to inspection of the bills of sale & assignments, on the grounds: (1) that these instruments were only a mtge. security; (2) that N. had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay L. in redeeming the mtge.—LATIMER v. NEATE* (1837), 4 Cl. & Fin. 570; 11 Bli. N. S. 112; 7 E. R. 217, 11 L.; *affg. S. C. sub nom. NEATE v. LATIMER* (1836), 2 Y. & C. Ex. 257.

Annotations:—As to (1) Distd. Taylor v. Rundell (1841), Gr. & Ph. 104. *Expld. & Distd. Glover v. Hall* (1848), 2 Ph. 484. *Apld. Hunt v. Elmes* (1859), 27 Beav. 62; *Owen v. Nickson* (1861), 3 E. & E. 602. *Refd. A.-G. v. Thompson* (1849), 8 Hare, 106. *As to (2) Expld. Browne v. Lockhart* (1840), 10 Sim. 420. *Expld. & Distd. Glover v. Hall* (1848), 2 Ph. 481. *Apld. Owen v. Nickson* (1861), 3 E. & E. 602.

Documents relating to land.]—See Sub-sect. 2, C., *post*.

C. Documents relating to Land.

1031. Parties' title deeds—Privileged.]—Bill for discovery, & delivery of a settlement, under which pltf. claimed, & other title deeds, & possession of the estate: demurrer to all the relief, & all the discovery except of the settlement, for want of equity; & answer admitting the settlement & offering to produce it; & denying, that deft. had any other relative to pltf.'s title: the title being legal, the ct. would only order the settlement to be produced at the trial; the demurrer therefore going to all the relief, deft. had leave to amend.—*RENISON v. ASHLEY* (1794), 2 Ves. 459; 30 E. R. 724, L. C.

1032. — — —.]—Upon a disputed title to a lease granted by a corpn., a trust being set up against the lessee, a motion being made to compel

the corpn. to produce surrendered leases, counterparts of renewed leases, etc., no order was made.—*COCK v. ST. BARTHOLOMEW'S HOSPITAL, CHATHAM* (1803), 8 Ves. 138; 32 E. R. 305, L. C.

1033. — — —.]—The ct., will not, on the application of a deft., in an action brought to try the title to land, compel pltf. or his landlord to permit deft. to inspect or take a copy of one of the landlord's title deeds to his estate.—*PICKERING v. NOYES* (1823), 1 B. & C. 262; 1 L. J. O. S. K. B. 110; 107 E. R. 98.

Annotations:—Refd. Ratcliffe v. Bleasby (1825), 10 Moore, C. P. 523; *Doe d. Egremont v. Date* (1842), 11 L. J. Q. B. 220. *Mentd. Hodgson v. Warden* (1843), 1 L. T. O. S. 259.

1034. — — —.]—It does not establish a sufficient interest in a title deed, relating to real estate, to warrant an order for its production, that if its effect be such as is sworn to by the party claiming the estate under it, legatees will lose the benefit of legacies bequeathed to them by that party's ancestor from whom he immediately derives title.—*WILSON v. FORSTER* (1825), M'Cle. & Yo. 274; 148 E. R. 415; *subsequent proceedings* (1831), You. 280.

1035. — — —.]—*TYLER v. DRAYTON*, No. 564, *ante*.

1036. — — —.]—Bill by legatees, whose legacies were charged on real estates, for a discovery & production of a deed, by which, as it was alleged, the real estates were limited to uses, under which testator was tenant in tail only, but from which, as pltf. insisted, it would, if produced, appear that a small portion only of the estates was so settled, & that of the residue testator was seised in fee. Demurrer, on the ground that the deed in question related to deft.'s title, & that pltf. had no interest in it, was allowed.—*WILSON v. FORSTER* (1831), You. 280; 159 E. R. 998; *previous proceedings* (1825), M'Cle. & Yo. 274.

1037. — — —.]—A deft. will not be compelled to produce title deeds, on the simple allegation that they contain recitals which will prove pltf.'s title; pltf. must produce the admission by deft. of that fact.—*CHAPMAN v. SEVERN* (1835), 5 L. J. Ch. 11.

1038. — — —.]—*WELLESLEY v. WELLESLEY* (1840), 4 Jur. 431.

1039. — — —.]—Bill of discovery in aid of an ejectment by a pltf., claiming as heir at law against the devisees of a *feme covert*, alleging the absence of any power of appointment in such *feme covert*, or that it was never duly exercised by her. The only issue raised on the pleadings being on the validity of the appointment by the devise:—*Held: pltf. was not entitled to the production of the deeds, under which defts. alleged that the power of appointment was given to their devisor, although it appeared that by such deeds the estate was limited to her heirs & assigns in default of appointment.—BENNETT v. GLOSSOP* (1844), 3 Hare, 578; 67 E. R. 510.

Annotations:—Consd. Rumbold v. Forteath (1857), 3 K. & J. 748. *Refd. Lyell v. Kennedy* (1883), 8 App. Cas. 217.

1040. — — —.]—A bill filed by a person claiming as son of the tenant for life under a marriage settlement, against certain parties trustees of the settlement. One of the defts.

PART III. SECT. 9, SUB-SECT. 2.—C.

d. General rule.]—A party is not obliged to produce deeds or documents which relate to his own title, & do not tend to establish the case of the party calling for the production.—*STOVEL v. COLES* (1872), 4 Ch. Ch. 9.—**CAN.**

1031 i. Parties' title deeds—Privileged.]—Rival heirs are treated in the same way as heir & devisee with respect to the inspection of documents. Inspection of deeds in the hands of a person claiming as heir, will not be granted to deft. in an ejectment on title, although the affidavit states that they are required solely for the purpose of making

out a pedigree by the recitals, even upon terms not to take advantage of any outstanding terms which the inspection might disclose.—*GRACE v. HUSSEY* (1854), 6 Ir. Jur. 243.—**IR.**

e. — — — Mortgage deed—Title not in dispute.]—A mtgee. is not bound to produce his mtge. deed for the in-

admitted the possession of certain documents relating to the estate of the tenant for life, but did not admit pltf.'s title, but merely stating his ignorance as to whether pltf. was the son of the marriage or not. A motion for the production of the documents was refused with costs.—*SMITH v. DOWLING* (1846), 6 L. T. O. S. 497; 10 Jur. 63.

1041. ———.]—On a bill to enforce an arrangement respecting land entered into by deft.'s father in his life, deft. stated, that "under a deed" of 1789, which was in deft.'s possession, his father was tenant for life, & that from 1789, his father had no greater estate than for his life. He also stated, that he himself was tenant in tail "under" the same deed:—*Held*: pltf. was not entitled to a production.—*WASNEY v. TEMPEST* (1846), 9 Beav. 407; 50 E. R. 400.

1042. ———.]—Pltfs., by their bill, set up a title to an estate, & alleged that deft. had got possession of the estate & the title deeds, & that there were outstanding terms, mtges., incumbrances, & unexpired leases affecting the estate. The bill prayed a discovery of documents, & that pltfs. might have the estate & the outstanding terms conveyed to them. It also prayed an injunction to restrain deft. from setting up any outstanding terms in bar of an action of ejectment. Deft. pleaded that he was sole tenant in fee, & that there was no outstanding estate:—*Held*: the plea was good.

It appears to me this is a case in which the bill is wholly demurrable for want of title in pltfs. (SHADWELL, V.-C.).—*DAWSON v. PILLING* (1848), 16 Sim. 203; 17 L. J. Ch. 393; 12 Jur. 388; 60 E. R. 851.

1043. ———.]—Estates were demised to trustees for a term of 99 years, in trust, to permit the wife of the lessor, or such persons as she should by will appoint, to receive the rents thereof during the term. The fee simple was afterwards purchased, subject to the term, & the purchaser subsequently purchased the term, & took an assignment of it from the wife & the trustees. The wife, as was alleged, by her will bequeathed the estate to pltf.; but the will & the title of pltf. under the will were not admitted by deft.; who, however, acknowledged that he had in his possession the original demise, & also the indenture of assignment, an abstract of which latter deed he set forth in his answer:—*Held*: under the circumstances, pltf. was not entitled to the production of any of the deeds.—*GLOVER v. HALL* (1848), 2 Ph. 484; 17 L. J. Ch. 249; 10 L. T. O. S. 517; 41 E. R. 1030, L. C.

Annotation:—*Reid. A.-G. v. Thompson* (1849), 8 Hare, 106.

1044. ———.]—Where discovery is sought in relation to matters in which pltf. has no interest, but as consequential or resulting from a character or title denied by the answer, & not otherwise appearing on the record, pltf. has no equity entitling him to discovery. If, however, pltf.'s interest in the discovery sought results from a character & title alleged in the bill, & if the bill properly avers that the discovery will establish that character & title, & also establish a case of fraud, by deft. affecting or destroying the pltf.'s remedies, deft. cannot withhold the discovery by

generally denying the character & title claimed by pltf.

Although a litigant party has no right to a discovery of the evidence of his opponent's title, yet he has a right to a discovery of the evidence in support of his own title, & in proof of any fraud which has been committed to his injury, & pltf.'s right to a discovery of material evidence in support of his own case & title, is not repelled, because by exercising that equitable right, deft. may be compelled to disclose the evidence in support of deft.'s case & title.

Pltf. & deft. respectively deduced their title from the heir-at-law of A., who died intestate in 1768, equitably entitled to certain premises, the legal estate of which was outstanding. In 1842, deft. obtained *ex parte* a conveyance of the outstanding legal estate under Sir E. Sugden's Acts. Pltf. then filed his bill, alleging that deft. had obtained the conveyance of the legal estate to himself as the heir-at-law of A. by false & fraudulent evidence. The bill contained interrogatories addressed to the discovery of the alleged false & fraudulent evidence. Deft., having by his answer asserted his own title as heir-at-law of A., & having denied that of the pltf., refused to answer any of the interrogatories relating to the evidence on which he had obtained the conveyance, asserting that the discovery would disclose the evidence of his own title, & denying that the evidence was false or fraudulent, or that it would establish any of the allegations of the bill:—*Held*: he was bound to make the discovery.—*STANTON v. CHADWICK* (1851), 3 Mac. & G. 575; 18 L. T. O. S. 69; 15 Jur. 1139; 42 E. R. 382, L. C.

Annotation:—*Consd. Chadwick v. Chadwick* (1852), 22 L. J. Ch. 329. *Expld. Hambrook v. Smith* (1852), 17 Sim. 209. *Distd. Lyell v. Kennedy* (1882), 20 Ch. D. 484.

1045. ———.]—Deft. had a freehold interest in certain premises, & was also assignee of the lease of other adjoining premises, the reversion of which was in the lessor of pltf. Deft. for some time previous to, & until the end of the term, occupied the freehold & leasehold premises together, & as the lessor of pltf. stated, had obliterated the boundaries between them. On the expiration of the lease, the lessor of pltf. brought ejectment to recover a portion of the land which he claimed as parcel of the leasehold, & alleged that deft. claimed as his freehold; & he prayed to be permitted to inspect the lease, the assignment of the lease to deft., & the conveyance of the freehold to the latter, alleging that he believed that the parcels in the lease & in the conveyance of the freehold would help to make out his case:—*Held*: he was entitled to inspect the lease, if he had no counterpart, & also the assignment, but not the conveyance of the freehold, as that deed did not prove any part of pltf.'s title to the land he sought to recover.—*DOE d. AVERY v. LANGFORD* (1852), Bail Ct. Cas. 37; 21 L. J. Q. B. 217.

Annotation:—*Reid. Price v. Harrison* (1860), 6 Jur. N. S. 1345.

1046. ———.]—The title of the A.-G. in an information rested in part on an agreement executed by an ancestor of deft. Deft. denied the right of the A.-G., & stated that the previous

spection of the mtgor., when there is no question of title in dispute.—*BELL v. CHAMBERLEN* (1871), 3 Ch. Ch. 429.—*CAN.*

i. ——— *Sublease — Mechanic's lien.*—The bill was filed to enforce a mechanic's lien against deft., whose title to the property in question was under a sublease:—

Held: pltf. was not entitled to the production of the sublease, as it was not necessary before decree to establish his case.—*BRYCE v. MCINTYRE* (1877), 7 P. R. 134.—*CAN.*

g. ——— *Deed part of title to be proved by plaintiff.*—To deny the due execution of a deed sought to be protected, or to set up that it is forged,

or to plead *non est factum*, does not give deft. a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by pltf.; for the onus of proving it lies upon him, & if he fails he can go no further.—*GRIFFIN v. FAWKES* (1897), 17 P. R. 540.—*CAN.*

h. ——— *Deed destroying title*

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possessor of the estates in question, who was party to the agreement, was only tenant for life, but set out a settlement in which he appeared to be tenant in tail:—*Held*: as the discrepancy appeared capable of explanation in favour of deft., there was sufficient denial of title to resist production of the documents.—*A.-G. v. RIVERS* (1853), 1 W. R. 240.

1047. ———.] — *RICCARD v. INCLOSURE COMRS.*, No. 688, *ante*.

1048. ———.] — *COSTER v. BARING*, No. 680, *ante*.

1049. ———.] — An injunction had been obtained restraining defts., whose title to the surface land was admitted, from interfering with or working certain mines claimed by plffs. Upon a motion by defts. for production of documents in plff.'s possession, plffs. stated in their affidavit in opposition that the documents in question showed the title of themselves & other defts. in the same interest to the mines & minerals exclusively, & that none of them in any manner showed that defts. applying had or ever had any estate, right, title, or interest, in the mines or minerals:—*Held*: these documents were entitled to be protected from production.—*LLOYD v. PURVES* (1858), 32 L. T. O. S. 28; 6 W. R. 421, 507.

1050. ———.] — Upon a bill of discovery in aid of an action at law plff. is only entitled to a discovery of such matters as make out his own title, & cannot compel a discovery of the particulars of his adversary's title & how he makes it out.

A. brought an ejectment against B., whereupon B. filed a bill of discovery against A. seeking to discover under what title he claimed at law & how he made it out:—*Held*: deft. was not bound to give this discovery.—*INGILBY v. SHAFTO* (1863), 33 Beav. 31; 32 L. J. Ch. 807; 8 L. T. 785; 9 Jur. N. S. 1141; 55 E. R. 277.

Annotations:—*Refd. Massey v. Allen* (1878), 26 W. R. 908; *Bidder v. Bridges* (1885), 29 Ch. D. 29.

1051. ———.] — On the death of a lunatic a bill was filed by one person claiming to be heir, against another, for the appointment of a receiver pending the determination of the title. An order appointing a receiver was discharged on appeal, & deft. had got into possession:—*Held*: the bill having thereupon become a mere ejectment bill, the ct. would not order the production of documents by which plff. hoped to impeach deft.'s title; & the case was not altered by there being in ct. a sum received on account of rents.—*DUNN v. FERRIOR* (1869), 18 W. R. 129.

1052. ———.] — *EGREMONT BURIAL BOARD v. EGREMONT IRON ORE CO.*, No. 225, *ante*.

1053. ———.] — The owners in fee of freehold land commenced an action for the specific performance of an agreement by deft. to accept a lease of the land for a term of years. The agreement contained, *inter alia*, stipulations for the free use by deft. of a certain "drive" as a means of access to the estate. By his defence deft. denied that plffs. had any power to demise the land, & alleged that it was subject to restrictive covenants:—*Held*: (1) by Vendor &

Purchaser Act, 1874 (c. 78), s. 2, deft. was not entitled to discovery & production from plffs. of the documents in their possession relating to the freehold title, though, if he had raised specifically any particular objection to the title, he might have had discovery of the documents bearing upon that point; (2) the contract as to the "drive" was a contract to grant a lease of land, & plffs. were protected from production of their title thereto by Vendor and Purchaser Act, 1874 (c. 78), s. 2.—*JONES v. WATTS* (1890), 43 Ch. D. 574; 62 L. T. 471; 38 W. R. 725; 6 T. L. R. 168, C. A.

Annotation:—*As to (2) Refd. Re Brotherton, Brotherton v. Brotherton, Re Markham's Settlement.* (1907), 77 L. J. Ch. 58.

—— *Dispute as to boundaries.*] — See *BOUNDARIES*, Vol. VII., pp. 323–325, Nos. 427–446.

1054. *At suit of issue in tail—Against devisee.*] — *ANON.* (1679), 2 Cas. in Ch. 4; 22 E. R. 818, L. C.

1055. ——— *Entail alleged to be barred.*] — A remainderman in tail in a voluntary settlement, brings a bill for the discovery of the deed, & it appearing the entail was discontinued, the ct. would not relieve him.—*KELLEY v. BERRY* (1688), 2 Vern. 35; 1 Eq. Cas. Abr. 167, pl. 1; 23 E. R. 632, L. C.

1056. ———.] — *BUNCE v. PHILIPS* (1688), 2 Vern. 50; 1 Eq. Cas. Abr. 167, pl. 2; 23 E. R. 643, L. C.

1057. *At suit of heir-at-law—Documents in possession of jointress.*] — The heir is not entitled to see any deeds in the hands of the jointress, without confirming her jointure, though the jointure was made after marriage.—*TOWERS v. DAVYS* (1687), 1 Vern. 479; 1 Eq. Cas. Abr. 167, pl. 3; 23 E. R. 605, L. C.

Annotation:—*Refd. Re Reay* (1847), 8 L. T. O. S. 476.

1058. ——— *Where disinherited.*] — A bill by a disinherited heir-at-law, to have inspection of deeds, was dismissed without costs.—*LEMAN v. ALIE* (1753), Amb. 163; 27 E. R. 108, L. C.

1059. ——— *Against devisee—No impeachment of will.*] — When the heir-at-law by his answer to a bill brought to establish a will, admits it to be duly executed, & to the purport as set forth, saying, at the close of it, he is the heir at law of testator, this is not sufficient to entitle him to the inspection of the title deeds, & writings belonging to the estate.—*POTTER v. POTTER* (1749), 3 Atk. 719; 1 Ves. Sen. 274; 26 E. R. 1212, L. C.

1060. ——— *Suit by heir in tail distinguished.*] — An heir-at-law has no equity except to remove incumbrances in the way of his legal right. He cannot call for an inspection of deeds in the possession of the devisees.

Bill by heir in tail against devisees. On motion an inspection was ordered of all deeds of settlement, admitted to be in the possession of defts., creating estates in tail general, but no farther.—*SHAFTESBURY (LADY) v. ARROWSMITH* (1798), 4 Ves. 66, 31 E. R. 35, L. C.

Annotations:—*Consd. Wales (Princess) v. Liverpool (Earl)* (1818), 1 Swan. 114; *Rumbold v. Forteach* (1857), 3 K. & J. 748; *Talbot v. Hope Scott* (1858), 4 K. & J. 96. *Refd. Aston v. Exeter* (1801), 6 Ves. 288; *Jones v. Jones* (1817), 3 Mer. 161; *Shaw v. Shaw* (1823), 12 Price, 163; *Bolton v. Liverpool Corp'n.* (1833), 1 My. & K. 88.

1061. ———.] — The right of the heir-at-law, & that of the heir in tail, to production of

of heir-at-law.] — An heir-at-law is not entitled to inspection of the deed which destroys his title as heir-in-law.—*MOUNTNORRIS (LORD) v. DUNGANNON (LORD)* (1808), 2 Mol. 317.—*IR.*

k. ——— *Title deeds of owner in possession.*] — The owner in possession of property cannot be compelled to

produce his title deeds, or give evidence which may put his rights in danger.—*MUSKERRY v. CHINNERY* (1833), 2 Hog. 272; 1 Ir. L. Rec. N. S. 107.—*IR.*

l. ——— *Unless common title.*] — A person in possession is not to be called upon by a claimant to

disclose his title deeds, unless it be shown that there is a common title, or that they will affirmatively establish the claim.—*O'CONNOR v. MALONE* (1837), Sau. & Sc. 516.—*IR.*

m. ——— *Power of attorney.*] — The lessor of the plff. in ejectment on the title, claimed title under a deed

documents upon bill for discovery in aid of an action of ejectment, distinguished.

The principle upon which, in such a suit, the heir in tail is entitled to inspect deeds of settlement creating estates tail has no application to a suit by the heir-at-law. But in a suit of this nature the heir at law is entitled to production of all such parts of deeds & writings admitted by defts. as relate to or tend to show his pedigree.—*RUMBOLD v. FORTEATH* (No. 2) (1857), 3 K. & J. 748; 3 Jur. N. S. 657; 69 E. R. 1311.

1062. At suit of remainderman—Against tenant for life—On cause shown.]—*LEMPSTER (LORD) v. POMFRET (LORD)* (1753), Amb. 154; Dick. 238; 27 E. R. 103, L. C.

Annotation:—Consd. Davis v. Dysart (1855), 20 Beav. 405.

1063. ——— Necessity for specific description.]—The motion of behalf of a party having a vested interest in reversion, remainder, or otherwise, in real property, expectant on a life interest in possession, for the production & depositing in ct. any of the title deeds in the proper custody of the tenant for life, must point out & particularise certain specific deeds, & state, fully & clearly, the object of the required interference of the ct. An application for the title deeds generally, for the purpose of furnishing the remainderman with an opportunity of inspection, in order to enable him to mortgage his interest, will not be entertained by the ct.—*SHAW v. SHAW* (1823), 12 Price, 163; 147 E. R. 686.

1064. ———.]—Any remainderman whose estate is vested may maintain a bill against the tenant for life, for the sole purpose of production & inspection of the muniments of title. If the tenant for life suggests that the purpose for which production is required is improper, the *onus* is on him to show it. This right, however, only exists when the title of the remainderman is undisputed; for, if there be a reasonable cause for litigating his title, he cannot compel production.

The mtgee. of A., an alleged remainderman, instituted a suit against B., the alleged tenant for life, for the mere production of the title deeds. B. set up a *bond fide* objection, that A.'s estate had become forfeited, & also that by the terms of the mtgee. deed the estates in question were not comprised therein. The assignees of A., who had become bkpt., though interested in the latter question, were not parties to the suit. The ct. declined adjudicating, incidentally, on pltf.'s right, & dismissed the bill with costs.—*DAVIS v. DYSART (EARL)* (1855), 20 Beav. 405; 3 Eq. Rep. 599; 24 L. J. Ch. 381; 25 L. T. O. S. 91; 1 Jur. N. S. 743; 3 W. R. 393; 52 E. R. 659.

Annotations:—Folld. Pennell v. Dysart (1859), 27 Beav. 542. *Distd. Chichester v. Donegal* (1869), 4 Ch. App. 416. *Refd. Pryse v. Pryse* (1872), L. R. 15 Eq. 86.

1065. ———.]—When the title of a remainderman is clear, the ct. will, at his instance, compel the tenant for life to produce the title deeds; but if his title be not clear, the ct. will not, incidentally, decide in favour of the remainderman's title to the estate, in a suit merely for the production of the title deeds.—*PENNEL v. DYSART (EARL)* (1859), 27 Beav. 542; 54 E. R. 214.

Annotations:—Refd. Chichester v. Donegal (1869), 4 Ch. App. 416; *Re Cowin, Cowin v. Gravett* (1886), 33 Ch. D. 179.

1066. Where counterpart of deed lost—Eject-

of demise more than thirty years old, which recited that it was executed by the grantor by power of attorney:—*Held: it was not necessary to produce the power of attorney.*—*M'GOULDRICK v. M'GOULDRICK* (1836), 2 Jo. Ex. Ir. 196.—*IR.*

Deed set forth in

*pleading.]—*Deft., before filing an answer to interrogatories, moved for the production & inspection of a deed, which was not a title deed common to both parties, & which was set forth in the bill at such a length as enabled deft. to rely upon it as a release:—*Held: the motion should be refused, as the*

*ment suit by lessor—Mortgagee of lessee possessing only copy of lease.]—*Where a lease is executed by both parties, & the lessee assigns it by way of mtge., the lessor in an action of ejectment for a forfeiture, if he has no counterpart, can compel the mtgee. to allow an inspection.—*DOE d. MORRIS v. ROE* (1836), 1 M. & W. 207; 1 Gale, 367; Tyr. & Gr. 545; 5 L. J. Ex. 105; 150 E. R. 408.

1067. Matters relating to party's own title—Particular evidence only—Tithe cases.]—Deft. in a tithe suit, who denies the rector's title, cannot, by a cross bill, compel the rector to discover the evidence of his title; therefore, where the rector, by his answer to such a cross bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled.—*BELLWOOD v. WETHERELL* (1835), 1 Y. & C. Ex. 211; 4 L. J. Ex. Eq. 23; 160 E. R. 86.

Annotations:—Consd. Storey v. Lennox (1836), 1 Keen, 341; *Horton v. Bott* (1857), 2 H. & N. 249. *Mentd. Stoute v. Rew* (1863), 11 W. R. 595.

1068. ——— Pedigree.]—Bill prayed, that deft. might state the particulars of his pedigree as heir & of the births, baptisms, marriages, deaths or burials: demurrer was allowed.—*IVY v. KEKEWICK* (1795), 2 Ves. 679; 30 E. R. 839, L. C.

Annotations:—Consd. Bidder v. Bridges (1885), 29 Ch. D. 29. *Refd. A.-G. to Prince of Wales v. St. Aubyn* (1811), Wight. 167.

1069. ———.]—A bill alleged pltf. to be entitled, under wills which it set out, as tenant in tail; it alleged that defts. claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged pltf.'s pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession of documents tending to evidence that pedigree:—*Held: pltf. was entitled to production of them.*—*WRIGHT v. VERNON* (1853), 1 Drew. 344; 22 L. J. Ch. 447; 1 W. R. 138; 61 E. R. 483.

Annotation:—Consd. Lyell v. Kennedy (1884), 27 Ch. D. 1.

1070. ———.]—*KETTLEWELL v. BARSTOW*, No. 266, *ante*.

1071. Form of claim—Does not support adversary's case.]—A statement in an answer that certain documents admitted to be in deft.'s possession form part of the evidence of his title, & do not form part of the title of pltf. to the premises in question, is not sufficient to protect them from production on motion, if they be in their nature such as may furnish evidence in support of pltf.'s case, & the answer does not distinctly deny that they do.

Semble: a deft. who has answered cannot resist a motion for production of documents referred to in his answer, on the ground that the bill is open to a general demurrer for want of equity.—*BUTE (MARQUIS) v. GLAMORGANSHIRE CANAL CO.* (1846), 1 Ph. 681; 15 L. J. Ch. 60; 6 L. T. O. S. 253; 9 Jur. 1063; 41 E. R. 791, L. C.

Annotation:—Refd. Lloyd v. Purves (1858), 6 W. R. 421.

1072. ——— Indefinite.]—Pltf. alleged that deft., who was in possession of a certain estate, was not the person intended to be the devisee of such estate; the bill prayed that pltf. might be declared entitled instead of deft., & it prayed an account of the rents & profits of the estate. Deft. pleaded

ct. was not satisfied that the document was necessary to enable deft. to put in a full & sufficient answer.—*PHILIPS v. PENNEFATHER* (1868), 3 I. R. Eq. 12.—*IR.*

*v. ———.]—*to eject deft. from certain pieces of

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to so much of the discovery as prayed an account, refusing production of all documents relating to the rents & profits, & averred that he was the party designated. Deft., by his answer, set forth all documents except those relating exclusively to the rents & profits:—*Held*: deft. was no more protected by the plea from production of documents relating to the rents & profits than those relating to identity, & the plea was overruled.—*RIGBY v. RIGBY* (1846), 15 Sim. 90; 15 L. J. Ch. 199; 7 L. T. O. S. 25; 10 Jur. 126; 60 E. R. 551.

1073. — Further affidavit ordered.—Pltfs., being called upon for an affidavit of documents, filed an affidavit specifying various documents as to which they claimed protection, on the ground that they were evidence of their own title. An order was made for their production. Deft. afterwards obtained an order for a further affidavit, & pltfs. filed an affidavit specifying various documents, including some which had been produced under the former order, & contained matter appearing to support deft.'s case, & claiming protection for them on the ground that they exclusively related to pltfs.' title, & did not evidence or support any part of the case made by deft.:—*Held*: production ought not to be ordered at once, but pltfs. must file a further affidavit.—*HASTINGS CORPN. v. IVALLE* (1873), 8 Ch. App. 1017; 42 L. J. Ch. 883; 21 W. R. 899, L. J.

Annotations:—*Consd.* *Egremont Burial Board v. Egremont Iron Ore Co.* (1880), 14 Ch. D. 158. *Refd.* *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1899] 2 Q. B. 478.

1074. — Need not state do not impeach deponent's case.—An action of ejectment was brought in the Ch. Div. by a devisee to recover possession of land. Defts., by their affidavit of documents, objected to production of certain documents on the ground that they did not prove or tend to prove the case or title of pltfs. Pltfs. applied for production:—*Held*: those documents which were sworn not to prove or tend to prove pltf.'s case were sufficiently protected, though the affidavit did not go on to say that they did not contain anything to impeach the title of defts.—*EMMERSON v. IND, COOPE & Co.* (1886), 33 Ch. D. 323; 55 L. J. Ch. 903; 2 T. L. R. 854; *sub nom.* *EMMERSON v. IND, COOPE & Co.*, *EMMERSON v. RUSSELL*, 55 L. T. 422; 34 W. R. 778, C. A.; *affd. sub nom.* *IND, COOPE & Co. v. EMMERSON* (1887), 12 App. Cas. 300, H. L.

Annotations:—*Folld.* *Morris v. Edwards* (1890), 15 App. Cas. 309; *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1899] 2 Q. B. 478. *Refd.* *McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Budden v. Wilkinson*, [1893] 2 Q. B. 432; *Mexborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111; *Milbank v. Milbank* (1900), 82 L. T. 63.

1075. — — — — ——*MORRIS v. EDWARDS*, No. 363, *ante*.

1076. — — — — ——On an information by the A.-G. claiming on behalf of the Crown a declaration of title to foreshore, it was ordered by a div. ct. that deft. should make a further affidavit of discovery & should produce for inspection by informant all documents therein specified except such as deft. should by his affidavit identify & state to relate solely to the case of deft. & to contain nothing impeaching the case of deft. or supporting the case of informant:—*Held*: the order must be varied by striking out the words "impeaching the case of deft. or," as deft.'s affidavit would be

sufficient to support an objection to produce documents without those words.—*A.-G. v. NEWCASTLE-UPON-TYNE CORPN.*, [1899] 2 Q. B. 478; 66 L. J. Q. B. 1012; 81 L. T. 311; 48 W. R. 38; 15 T. L. R. 495, C. A.

Annotation:—*Consd.* *Johnson v. Whitaker* (1904), 90 L. T. 535.

1077. — — — — ——In an action to enforce the right to profit made upon an alleged joint purchase & resale of land & an account, deft. had counterclaimed for specific performance of an alleged agreement between him & pltf. as to certain properties purchased by deft. & as alleged, by pltf. & deft. jointly & payments to be made, for a sale, & the execution of a proper conveyance. Deft. in an affidavit of documents had sworn that he objected to produce certain documents on the ground that they related only to his own case, & did not tend to prove or support pltf.'s case:—*Held*: the affidavit was technically sufficient, although not containing the statement that the documents for which privilege was claimed contained nothing impeaching his own case.—*JOHNSON v. WHITAKER* (1904), 90 L. T. 535.

1078. Production ordered—Common interest—One title deed for several owners.—*ANON.* (1469), Cary, 15; 21 E. R. 8.

1079. — — — — — Portioners against tenant for life.—Limitations of a term for 500 years to raise portions for younger children, & afterwards estate limited to T. for life, with remainders over, & a decree made to sell the term for raising the portions. T., the tenant for life, refusing to produce the title deeds before the master, & obstructing the decree, an order was made on motion for a receiver of the rents & profits of the estate.—*BRIGSTOCKE v. MANSEL* (1818), 3 Madd. 47; 56 E. R. 427.

1080. — — — — — Documents showing parcels.—*POTTS v. ADAIR* (1793), 3 Swan. 268, n.; 1 Anst. 259; 36 E. R. 857.

1081. — — — — ——(1) Where the respective titles alleged by pltf. & deft. were antagonistic, pltf. claiming the reversion in lands alleged to be in the possession of deft. as lessee, & deft. claiming to be entitled in fee to such lands, but admitting that he derived his title under a person alleged by pltf. to have been lessee only, & that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, corresponded with the parcels described in the demise to such alleged lessee:—*Held*: pltf. was entitled to a discovery of such parcels, & to a production of so much of the purchase deed as described them.

(2) Pltf. is not entitled to discovery of documents, the right to the possession or inspection of which is not necessary to the proof, & is only consequential upon the existence of the title he claims, that title not being admitted; but where the ct. finds upon the answer that, although the title of pltf. is not admitted, the question as to the existence of such title is a question to be tried, pltf. is entitled to the discovery & production of particulars material to establish his case on such trial.—*A.-G. v. THOMPSON* (1849), 8 Hare, 106; 68 E. R. 291.

Annotation:—*As to* (1) *Distd.* *Doe d. Avery v. Langford* (1852), Bail Ct. Cas. 37.

1082. — — — — ——Where the issue is, whether a piece of land called O. is or is not identical with or part of land called F., pltf. averring the negative

land belonging to him, being portions of a passage upon which deft. had encroached. In his written statement deft. denied pltf.'s title, & stated that he would rely on certain deeds set

forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for pltf.'s inspection on the ground that they related solely to his

own title to the land in dispute, & did not in any way tend to prove or support the title of pltf. thereto:—*Held*: deft. was entitled to refuse production of the deeds, & the ct. could not go behind

is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may also evidence deft.'s title. Therefore, in a case of this description, deft. was ordered to produce all maps, plans, & terriers, & all deeds & other documents relating to the matters at issue, but with liberty to seal up such parts of the deeds & other documents as did not describe or relate to parcels.—*EARP v. LLOYD* (1857), 3 K. & J. 549; 69 E. R. 1227; *subsequent proceedings* (1858), 4 K. & J. 58.

1083. — — —.]—Property in London was granted for a lease of 99 years in 1763. At the expiration of the lease the reversioner found difficulty in identifying certain part of the property which had been generally described in the original lease as "seven & a half acres of pasture or meadow land lying dispersedly in the common fields at W., commonly called L." The property had during the lease been underlet & dealt with by instruments, some of which contained particular descriptions, which, as the reversioner contended, would help him to identify the houses & lands now in deft.'s occupation as his property, & he filed this bill for discovery of such underleases & instruments:—*Held*: pltf. was entitled to the discovery.—*BROWN v. WALES* (1872), L. R. 15 Eq. 142; 42 L. J. Ch. 45; 27 L. T. 410; 21 W. R. 157.

Annotation:—*Refd.* *Lyell v. Kennedy* (1883), 8 App. Cas. 217.

1084. Document identifying estates in settlement.]—The object of the suit was to set aside certain long leases granted in 1740, & which became vested in deft., who had made family settlements of them, which he admitted to be in his custody:—*Held*: (1) pltf. was entitled to a production of those settlements.

(2) Pltf. has a direct interest in the deeds in deft.'s possession. They do not relate solely to any separate & independent title of deft. & therefore they must be produced (*SHADWELL, V.-C.*).—*A.-G. v. ELLISON* (1831), 4 Sim. 238; 58 E. R. 90.

Annotations:—*As to* (1) *Consd.* *Jones v. Jones* (1853), Kay, App. vi. *As to* (2) *Distd.* *Colls v. Stevens* (1843), 7 Jur. 54.

1085. — — —.]—Pltf. was entitled to a legacy which testator had charged on his estates, not in settlement. Deft. stated, that testator was tenant in tail of part of the estate, but did not specify it; & he admitted the possession of a copy of a deed creating the entail, but he stated it did not make out pltf.'s case:—*Held*: he was bound to produce it for pltf.'s inspection, as tending to show what estates were in settlement.

Deft., being entitled to an estate, subject to a charge thereon belonging to pltf., mortgaged it, & delivered the title deeds to the mtgees., but he retained copies:—*Held*: he was bound to produce the copies, though the mtgees. were not parties to the suit.—*HERCY v. FERRERS* (1841), 4 Beav. 97; 10 L. J. Ch. 273; 49 E. R. 275.

1086. — — —.]—Where question whether title good or bad.]—A bill was filed by the heir at law of a testator, against a purchaser from his devisees in trust for sale, to set aside the conveyance on the ground that the purchaser had acted as solr. to the devisees, & the consideration was inadequate. Deft., by his answer, insisted that the title was materially defective, & regard being had to that, the consideration was adequate, & he admitted, possession of the title deeds:—*Held*: the title deeds must be produced.—*SHALLCROSS*

v. WEAVER (1850), 2 H. & Tw. 231; 19 L. J. Ch. 450; 47 E. R. 1668, L. C.

1087. — — —.]—Documents necessary to ascertain plaintiff's case.]—Where, in an action, the issue raised was, whether W., pltf., had any right to the soil of L. as lord of the manor of L., the ct. refused to set aside an order of a judge for the inspection of documents which defts. required in order to support their issue, viz. all documents which showed that, in 1800, one J. was lord of the manor; secondly, an agreement by which it was contended that he accepted an allotment in lieu of his interest in the soil as lord of the manor of L., & thirdly, all leases & other documents made by J. & all lords of the manor since his time in respect of such allotment, the ct. thinking that all these documents were material & relevant to the case, & necessary to enable defts. to maintain their issue; & that they sought the inspection to ascertain pltf.'s case, & not to detect any flaw in his title.—*WICKHAM v. ENGLAND & WALES INCLOSURE COMRS.* (1854), 3 W. R. 113.

1088. — — —.]—When title derived from opponent.]—In proceedings to obtain an injunction on behalf of the Crown as *prima facie* entitled to the foreshore, defts. relied upon a title derived by various assurances from persons whose title was traceable to a Royal grant which had been lost. Defts. claimed privilege from inspection for such assurances as relating solely to their own case & not to that of the Crown:—*Held*: as defts. claimed their title through a grant from the Crown, which was *prima facie* entitled to the foreshore, it could not be successfully maintained that the assurances in question did not relate to the case of the Crown, & therefore the same were not privileged from inspection.

Semble: even as between two individuals the same result ought to follow if deft. admitted that he claimed under some title derived from pltf.—*A.-G. v. STOREY* (1912), 107 L. T. 430; 56 Sol. Jo. 735, C. A.

1089. — — —.]—Entitled to production for verification—When consent disclosed in answer.]—If a deft. in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, pltf. is entitled to an order for their production, although the answer positively states that they form part of deft.'s title, & in no way assist or make out the title of pltf.—*HARDMAN v. ELLAMES* (1835), 2 My. & K. 745; 4 L. J. Ch. 181; 39 E. R. 1129; *previous proceedings* (1834), 2 My. & K. 732, L. C.

Annotations:—*Distd.* *Adams v. Fisher* (1838), 3 My. & Cr. 526. *Apld.* *A.-G. v. Lamb* (1838), 3 Y. & C. Ex. 162. *Consd.* *Farrer v. Hutchinson* (1839), 3 Y. & C. Ex. 692. *Distd.* *Edwards v. Jones* (1844), 13 Sim. 632. *Apld.* *Belsham v. Harrison*, *Belsham v. Percival* (1846), 15 L. J. Ch. 438; *M'Intosh v. G. W. Ry.* (1849), 1 Mac. & G. 73. *Distd.* *Howard v. Robinson* (1859), 4 Drew. 522. *Consd.* *Ponarth Harbour Dock & Ry. v. Cardiff Waterworks Co.* (1860), 7 C. B. N. S. 816. *Refd.* *Harland v. Emerson* (1834), 8 Bl. N. S. 62; *Denys v. Locock* (1837), 3 My. & Cr. 205; *Tonge v. Stakey* (1838), 2 Jur. 44; *Re Reay* (1847), 8 L. T. O. S. 476; *Glover v. Hall* (1848), 17 L. J. Ch. 249; *Bllder v. Bridges* (1885), 29 Ch. D. 29. *Mentd.* *Campbell v. Mackay* (1836), 6 L. J. Ch. 73; *Hunter v. Daniell* (1845), 14 L. J. Ch. 194; *Smith v. Fox* (1848), 6 Hare, 386.

1090. — — —.]—Deft. being seised in fee of an ancient freehold tenement, situate within a manor of which C. & T. were tenants in common, took a conveyance, by indenture from T., of all the quit rents payable to him in respect of messuages & hereditaments within the ancient

deft.'s affidavit of documents.—*VINAYAKRAO DHUNDIRAJ v. NAROTAM ANANDJI* (1893), 1 L. R. 17 Bom. 581.—*IND.*

p. — — —.]—Not privileged—Deed establishing title of heir-in-law.]—The heir-in-law is entitled to see the deeds establishing his title, for the title is in

common to him with his adversary.—*MOUNTNORRIS (LORD) v. DUNGANNON (LORD)* (1808), 2 Mol. 317.—*IR.*

9.—*Resisting production—Grounds of privilege: Sub-sect. 2, C.; sub-sect. 3.]*

tenement, T. reserving to himself by the indenture his interest in the tin, & his right of shooting over the premises. Both before & after the execution of the indenture, deft. exercised various acts of ownership on the wastes adjoining the ancient tenement, alleging that they were not manorial wastes, but belonged to the ancient tenement, & that since the execution of the indenture by which he acquired the quit rents, he had an absolute right to the freehold thereof, subject to the reservations in the indenture, & the customary tolls of tin. The information stated that C. & T. were entitled to all wastes within the manor, in equal moieties, as tenants in common; & it charged, first, that the indenture contained general words, purporting to convey the waste lands, & also that it conveyed T.'s interest in the waste lands generally, without stating that they formed any part of the ancient tenement, & without stating the boundaries of the ancient tenement, & that deft. ought to set forth the boundaries; secondly, that by the custom of Cornwall all tin bound lands must have been wastes, & that it would appear by the indenture, if produced, that one moiety of the tin under the lands in question, except what was strictly the ancient tenement, was reserved to T. Deft., by his answer, denied that it would appear from the indenture as was stated in the information, & he submitted whether he ought to be compelled to produce the same; but in his first answer he set forth a considerable portion of the deed, & in his second answer he stated that the boundaries were matters of notoriety, & that, as to them, the effect of the conveyances must be determined by themselves:—*Held*: deft. must produce the indenture executed to him by T.—*A.-G. v. LAMBE* (1838), 3 Y. & C. Ex. 162; 8 L. J. Ex. Eq. 23; 2 Jur. 698; 160 E. R. 656.

Annotation:—*Refd. Smith v. Beaufort* (1842), 1 Hare, 507.

By mortgagees.]—See Sect. 4, sub-sect. 5, ante.

Purchasers for value without notice.]—See Sect. 4, sub-sect. 6, ante.

SUB-SECT. 3.—DOCUMENTS NOT IN SOLE POSSESSION OF PARTY.

1091. General rule—Production not ordered.]—

Deft., by his answer, stated that certain books relating to a concern in which pltf. claimed to be a partner with deft. were in the possession of the treasurer of the concern, on behalf of the several shareholders in it, many of whom were not parties to the suit:—*Held*: deft. could not be ordered to produce the books in question.

When documents are stated, in the answer, to be in the possession of A., B. & C., you cannot order that A. shall produce them; & that for the best possible reason, namely, that he could not produce them. . . . It is perfectly true that if documents are in the hands of an agent, the principle of the ct. is that the possession of deft.'s agent is the possession of deft. against whom the order is made. But here the agent is the agent, not only for deft. against whom the order is prayed, but also for other defts. Deft. against whom the order is prayed has not the possession of the documents,

either personally or through an agent. I have always understood the rule to be, that, under such circumstances, the ct. would not make an order for the production (*LORD COTTENHAM, C.*).—*MURRAY v. WALTER* (1839), Cr. & Ph. 114; 3 Jur. 719; 41 E. R. 433, L. C.

Annotations:—*Folld. Lopez v. Deacon* (1843), 6 Beav. 254; *Reid v. Langlois* (1849), 1 Mac. & G. 627. *Consd. Glyn v. Caulfoild* (1851), 3 Mac. & G. 463. *Distd. Bugden v. South* (1856), 26 L. J. Ch. 425. *Folld. Edmonds v. Foley* (1862), 30 Beav. 282; *Kearley v. Phillips* (1883), 10 Q. B. D. 465. *Apld. Vivian v. Little* (1883), 11 Q. B. D. 370. *Distd. London & Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 7. *Refd. Bute v. Stuart* (1843), 7 Jur. 291; *Steele v. Stewart* (1843), 7 Jur. 640; *Sweet v. Hunter* (1845), 9 Jur. 807; *Clinch v. Financial Corp.* (1866), 12 Jur. N. S. 484; *Vyse v. Foster* (1872), L. R. 13 Eq. 602; *Swanston v. Lishman* (1881), 45 L. T. 360; *Hennessy v. Wright* (1888), 57 L. J. Q. B. 530; *London & Provincial Marine & General Insce. v. Chambers* (1900), 5 Com. Cas. 241.

1092. ———.]—Where documents are admitted by some defts. to be in the joint possession of themselves & other defts., a motion for the production of those documents cannot be made against some of the defts. only.—*ANON.* (1826), 4 L. J. O. S. Ch. 170.

1093. ———.]—Motion for deft. to produce documents belonging to him jointly with another person, not a party to the cause, & whom he stated in his answer to be averse to the production, was refused. But leave was given to inspect the documents on the premises.—*SKEY v. BENNETT* (1842), 6 Jur. 981.

1094. ———.]—Bill by a creditor of a testator for an account of the estate against the surviving executrix & A., who had acted only as agent for deceased exor. in getting in the estate. A., by his answer, admitted pltf.'s title, & that he had in his possession documents relating to testator's estate. Upon motion for production:—*Held*: as the personal representatives of deceased exor., to whom A. was accountable, & who might, therefore, have an interest in the documents, were not made parties to the bill, an order for production would be refused except upon an undertaking to amend by making them parties.—*SWEET v. HUNTER* (1845), 9 Jur. 807.

1095. ———.]—Where exors. & trustees, by their answer, admitted six books to be in the custody or power of their agent in Scotland, where part of testator's property was, & the agent, on a motion for production, deposed that he was agent for many other persons, & that his books related to the affairs of such other persons as well as to those in question in the cause:—*Held*: the exors. had not thereby so mixed testator's accounts with others as to preclude them from insisting that the books were not in their power, & a motion for production was refused as to these books.—*AIREY v. HALL* (1848), 2 De G. & Sm. 489; 12 L. T. O. S. 170; 12 Jur. 1043; 64 E. R. 218.

Annotation:—*Refd. O'Shea v. Wood*, [1891] P. 237.

1096. ———.]—*REID v. LANGLOIS*, No. 828, ante.

1097. ———.]—Upon a bill filed against three directors, who were also treasurers & trustees of a public co., defts. were required to produce documents which, by their answer, they stated to be at the office of the co., but not otherwise in their possession, custody or power. Defts., previously to the motion for production, had ceased to be treasurers & trustees:—*Held*: defts. could not be compelled to produce documents which

PART III. SECT. 9, SUB-SECT. 3.

q. General rule.]—Where a party having joint interest in documents with a stranger to the suit, has the legal possession thereof, production

will not be ordered unless the suit be of such a nature that the ct. can say that the party having the legal custody sufficiently represents the other party interested. But in such a case the party in whose possession the docu-

ments are, will be required to give discovery of their contents, & to furnish the information in his affidavit on production, with as much particularity as was required in answering the interrogatories as to documents

were not in their exclusive possession, but only in their possession jointly with the other directors of the co.—*PENNEY v. GOODE* (1853), 1 Drew. 474; 22 L. J. Ch. 371; 17 Jur. 82; 1 W. R. 120; 61 E. R. 533; *sub nom.* *PENNY v. COOKE*, 20 L. T. O. S. 200.

1098. ———.]—A. settled property on trust for pltf. & others, but he reserved a power of defeating it. Pltf. alleged that the trusts had been partially defeated by a subsequent deed, & called upon the trustee to produce the trust deed. The trustee in his answer stated that pltf.'s interest had been totally defeated by the subsequent deed, which he did not object to produce, but he said that A., who was not a party to the suit, objected to the production:—*Held*: pltf. was entitled to inspect it, but the order could not be made in the absence of A.—*BUGDEN v. TYLEE* (1856), 21 Beav. 545; 52 E. R. 970.

Annotation:—*Consd.* *Re Cowin*, *Cowin v. Gravett* (1886), 33 Ch. D. 179.

Partnership documents.]—*See* Sect. 5, sub-sect. 5, E., *ante*.

1099. Co-defendants.]—One of several defts. by his answer admitted the possession of documents, but by an affidavit subsequently filed stated that since his answer he had deposited them with one of his co-defts. A motion for their production was refused in the absence of the co-deft.—*BURBIDGE v. ROBINSON* (1850), 2 Mac. & G. 244; 15 L. T. O. S. 498; 42 E. R. 94.

1100. ——— **Death of one—Liability of survivor—Representatives of deceased not made parties.**]—Two defts. admitted the possession of documents. One died:—*Held*: a motion for production against the survivor, in the absence of the representatives of deceased deft., could not be maintained.—*ROBERTSON v. SHEWELL* (1851), 15 Beav. 277; 51 E. R. 544.

1101. Possession of solicitor for party & others.]—A deft. admitted that certain documents were in the possession of himself & C., his co-exor., & that others were in the possession of their joint solr. C. not being a party to the suit:—*Held*: an order for production could not be made against deft. on such an admission.—*MORRELL v. WOOTTEN* (1850), 13 Beav. 105; 20 L. J. Ch. 81; 15 Jur. 319; 51 E. R. 41.

1102. ———.]—Title deeds were in the custody of the solr. of two tenants in common, A. & B.:—*Held*: A. could not be ordered to produce the deeds in a suit to which B. was not a party.—*EDMONDS v. FOLEY* (LORD) (1862), 30 Beav. 282; 31 L. J. Ch. 384; 5 L. T. 709; 8 Jur. N. S. 552; 10 W. R. 210; 54 E. R. 897.

Annotation:—*Folld.* *Kearsley v. Philips* (1882), 10 Q. B. D. 36.

1103. ———.]—By a marriage settlement certain houses in A. street & certain other houses in F. street were conveyed to the trustees of the settlement on certain trusts, under which, in the events which happened, pltf. became entitled to the houses in F. street & the heirs of the wife, who were unknown, to the houses in A. street. The title deeds, which related to all the houses, together with the settlement, had been deposited with the solrs. of the trustees:—*Held*: pltf. could not compel the solrs. to hand the deeds to him in the absence of the heirs of the wife. The deeds were, however, ordered to be brought into ct., pltf. to have access to them for the

purpose of inspection & making copies.—*WRIGHT v. ROBOTHAM* (1886), 33 Ch. D. 106; 55 L. J. Ch. 791; 55 L. T. 241; 34 W. R. 668, O. A.

1104. Possession of agent for party & others.]—Where books & papers, the joint property of defts. & of other persons not before the ct., were admitted, by the answer, to be in the custody of a third party, as the common agent of all, an order was made upon such agent to permit an inspection by pltf., against the consent of those owners who were not parties, on the principle that the ct. has a right to give pltf. whatever access deft. himself would be entitled to.—*WALBURN v. INGILBY* (1833), 1 My. & K. 61; *Coop. temp.* Brough. 270; 3 L. J. Ch. 21; 39 E. R. 604, L. C.

Annotations:—*Consd.* *Murray v. Walter* (1839), Cr. & Ph. 114; *Glyn v. Caulfeild* (1851), 3 Mac. & G. 463; *Kearsley v. Philips* (1882), 10 Q. B. D. 36. *Refd.* *Williams v. Ingram* (1900), 16 T. L. R. 451. *Mentd.* *Re City & County Bank* (1825), 32 L. T. 589; *Wallworth v. Holt* (1841), 4 My. & Cr. 619; *Gloucester Corp'n. v. Wood* (1843), 3 Hare, 131; *Houghton v. Reynolds* (1843), 2 Hare, 264; *Suisse v. Lowther* (1843), 7 Jur. 808; *Hunter v. Daniell* (1845), 14 L. J. Ch. 194; *Bagshaw v. Eastern Union Ry.* (1849), 7 Hare, 114; *Swift v. Gazebrook* (1850), 3 Mac. & G. 6; *Bradford v. Young*, *Re Falconar's Trusts* (1884), 28 Ch. D. 18.

1105. ———.]—An admission of the possession by an agent on behalf of deft. & other persons who are not parties to the cause, of documents relating to the matters in question, does not entitle pltf. to an order for their production.—*LOPEZ v. DEACON* (1843), 6 Beav. 254; 12 L. J. Ch. 311; 49 E. R. 823.

Annotations:—*Refd.* *Glyn v. Caulfeild* (1851), 3 Mac. & G. 463; *Swansea Corp'n. v. Quirk* (1879), 41 L. T. 758.

1106. ———.]—Documents in the possession of persons as solrs. for defts. & other parties not before the ct. cannot be ordered to be produced by defts.—*CRIDLAND v. DE MAULEY* (LORD) (1849), 12 L. T. O. S. 397; 13 Jur. 442.

1107. Claim for privilege—Must be raised in affidavit.]—Where, in answer to interrogatories, deft. admits that he has certain documents in his custody, possession or power, it is not competent to him, upon an application for leave to inspect & take copies of them, to urge that others have an interest in them, & therefore he cannot produce them.—*PLANT v. KENDRICK* (1875), L. R. 10 C. P. 692.

1108. Form of affidavit—Must state nature of joint possession.]—*BOVILL v. COWAN*, No. 371, *ante*.

1109. ——— **Consent of other party.**]—(1) A deft. stated in his affidavit of documents that certain documents were in the joint possession of himself & another person not a party to the action. The affidavit further stated that he objected to produce the documents, but did not state that he was unable to do so, or that he could not obtain the consent of the other party to their production:—*Held*: the affidavit was sufficient, & production of the documents ought not to be ordered.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see* No. 13, *ante*).—*KEARSLEY v. PHILIPS* (1883), 10 Q. B. D. 465; 52 L. J. Q. B. 269; 48 L. T. 468; 31 W. R. 467, C. A.

Annotations:—*As to* (1) *Distd.* *London & Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 7; *Hennessy v. Wright* (1888), 21 Q. B. D. 509. *Folld.* *Gowan v. Briggs* (No. 2) (1895), 39 Sol. Jo. 330. *Distd.* *London & Provincial Marine & General Insce. v. Chambers* (1900), 5 Com. Cas. 241. *Consd.* *Rattenberry v. Monro* (1910), 103 L. T. 560. *Folld.* *Coomes v. Hayward*, [1913] 1 K. B. 150. *Distd.* *Forbes v. Samuel*, [1913] 3 K. B. 706. *Generally, Refd.* *Carew v. Carew* (1891), 65 L. T. 167.

under the former practice.—*FRASER v. HOME INSURANCE CO.* (1873), 6 P. R. 45.—*CAN.*

R. Documents transferred to third special purpose—Purpose

fulfilled.]—Defts. objected to produce certain documents, on the ground that they were in the possession of a third party, to whom defts. had assigned all their estate for the benefit of their creditors. The assignee had realised

the estate & distributed the proceeds amongst the creditors:—*Held*: no excuse for the non-production, & a better affidavit was ordered.—*BRITISH AMERICA INSURANCE CO. v. WILKINSON* (1875), 6 P. R. 268.—*CAN.*

Sect. 9.—Resisting production—Grounds of privilege: Sub-sects. 4 & 5.]

SUB-SECT. 4.—DOCUMENTS IN POSSESSION OF PARTY AS AGENT FOR OR ON BEHALF OF OTHERS.

1110. General rule—Trustee—Solicitor.]—Where a deft. has in his possession documents belonging to his client or *cestui que trust*, a production will not be ordered in their absence. But where an action at law is brought by a trustee by the direction & for the benefit of the *cestui que trust*, such trustee is bound to produce all the documents to the same extent as if he had not only the legal but also the beneficial interest.—*FEW v. GUPPY* (1835), 13 Beav. 457; 51 E. R. 176, L. C.; *subsequent proceedings* (1836), 1 My. & Cr. 487, L. C.

Annotations:—Expld. Glyn v. Soares (1835), 1 Y. & C. Ex. 644; Irving v. Thompson (1839), 9 Sim. 17. *Refd.* Kerr v. Rew (1840), 5 My. & Cr. 154; Portugal (Queen) v. Glyn (1840), 7 Cl. & Fin. 466; Richardson v. Hastings (1841), 7 Beav. 354.

1111. Trustees.]—Although persons who have the custody of books & documents are trustees for a public purpose, the ct. will not compel them to produce them, unless they are trustees for, among others, the person who applies for the production.

Where the inhabitants of a county were indicted for not repairing a public bridge, & they pleaded that the inhabitants of a particular parish had immemorially repaired, & were liable to repair; & it appeared, on motion, that certain estates had been left to trustees for the repair of the bridge, & that those trustees had accounted to the parish in question, the ct. refused to order the trustees to produce their books & accounts for the inspection of defts.; inasmuch as the trustees filled that character apparently for the parish in question, & not for the county at large.—*R. v. BUCKINGHAM JJ.* (1828), 8 B. & C. 375; 108 E. R. 1082; *sub nom.* *R. v. BUCKS (INHABITANTS), Re GREAT MARLOW BRIDGE*, 2 Man. & Ry. K. B. 412; 1 Man. & Ry. M. C. 451; 6 L. J. O. S. K. B. 346.

1112. Trustee & executor.]—A. & B. were trustees & exors. A. paid more than he received in the expectation of repayment out of a mtge. forming part of the assets. A. died, & B. refused to act. In an administration suit, a receiver of the mtge. was appointed against the representatives of A.

Deft. admitted that documents were in his solr.'s hands, having come to them as the representatives of the solrs. of deft.'s testator; but he said they were not "in his possession or power or under his control." The ct. refused to order a production.—*PALMER v. WRIGHT* (1846), 10 Beav. 234; 8 L. T. O. S. 358; 50 E. R. 572.

Annotation:—Refd. Liddell v. Norton (1853), Kay, App. xi.

1113. Solicitor.]—Motion to compel an attorney to produce papers of his client refused with costs.—*WRIGHT v. MAYER* (1801), 6 Ves. 280; 31 E. R. 1051, L. C.

1114. —.]—The solr. to defts., to an information, being also clerk to the comrs. under an Inclosure Act, admitted on his examination, that he had in his possession the original award of the comrs., which ought, according to the Act, to have been deposited in the parish chest. Though it was sworn, that the production of the original

award at the hearing would afford material evidence for the relators, the ct. would not make an order on the solr. for the production of the deed at the hearing.—*A.-G. v. BERKELEY* (1822), 1 L. J. O. S. Ch. 33.

1115. —.]—Pltf., as personal representative of a deceased testator, stated by his bill that F., a deft., had acted as his solr., & had in that character received various sums on account of testator's estate, for which he had not accounted to him; & alleged that he had lately discovered, as the fact was, that deft., F., had some time since prevailed upon him, pltf., to execute a power of attorney to P., authorising him, P., to get in testator's estate, & to employ another attorney under him; & pltf. charged, that this power of attorney was a contrivance between F. & P. to enable F. to receive the assets without being liable to account to pltf.; & that fraudulent misrepresentations, on F.'s part, accompanied the execution of the power of attorney; & that defts. had in their possession books & papers relating to the matters mentioned in the bill, & by which the truth of such matters would appear. Deft., F., by his answer, set out a power of attorney from pltf. to P., authorising him, P., to get in testator's estate, & to employ an attorney under him; & stated that he, F., had never been employed by pltf., but had been employed as an attorney & solr., solely by P., acting under the power of attorney; & had, in the course of such employment, received various sums on account of testator's estate, for which he had duly accounted to P. He denied the charges of contrivance & misrepresentation. He admitted the possession of certain documents relating to testator's estate & affairs; but submitted that he was not bound to produce them, & that he was not accountable to pltf.:—*Held*: F. could not be compelled to produce the documents admitted to be in his possession.—*ADAMS v. FISHER* (1838), 3 My. & Cr. 526; 2 Keen, 754; 7 L. J. Ch. 289; 2 Jur. 508; 40 E. R. 1029, L. C.

Annotations:—Expld. A.-G. v. Thompson (1849), 8 Hare, 106. *Distd.* Winchester, Bp. v. Bowker (1861), 29 Beav. 479. *Refd.* Smith v. Beaufort (1842), 1 Hare, 507; Edwards v. Jones (1844), 1 Ph. 501; Lancaster v. Evors (1844), 1 Ph. 349; Bute v. Glamorganshire Canal Co. (1845), 1 Ph. 681; Harris v. Harris (1845), 4 Hare, 179; Hunter v. Nockholds (1846), 7 L. T. O. S. 367; *Re* Reay (1847), 8 L. T. O. S. 476; Ord v. Fawcett (1850), 19 L. J. Ch. 487; Swinborne v. Nelson (1853), 16 Beav. 416; De La Rue v. Dickenson (1857), 3 K. & J. 388; Howard v. Robinson (1859), 28 L. J. Ch. 670; Penarth Harbour, Dock & Ry. v. Cardiff Waterworks Co. (1860), 6 Jur. N. S. 942; Swabey v. Sutton (1863), 1 Hem. & M. 514; Thompson v. Dunn (1870), 5 Ch. App. 573; Minet v. Morgan (1873), 8 Ch. App. 361; *Re* Sutcliffe, Alison v. Alison (1881), 50 L. J. Ch. 574.

1116. Agent.]—*ATTERBURY v. HAWKINS* (1677), 2 Cas. in Ch. 242; 22 E. R. 927.

1117. —.]—*MAKEPEACE v. NEEDLER & A.-G.* (1730), Bunb. 291; 145 E. R. 678.

—.]—An agent made deft. to a bill for a discovery, may demur to it, is not compellable to produce deeds, & may be examined for pltf.—*v. STAPLES* (1754), 3 Keny. 135; 96 E. R. 1335, L. C.

1119. — Colonial documents—In hands of agent-general.]—An action was brought against the agent-general to a colonial govt. by persons who had entered into a contract with that govt.

PART III. SECT. 9, SUB-SECT. 4.

s. Trustee—Who is also one of defendants—& claims interest under deed.]—In a suit instituted to have the right of pltf. under a deed declared, which had been displaced by erasure & alteration, the ct. will not order the altered deed to be lodged by a deft.,

who by his answer has admitted it to be in his possession as trustee for another deft. claiming under it in the absence of the answer of that deft., although the person holding it also claims an interest under it, & although a witness, preparatory to his departure from Ireland, was about to be examined *de bene esse* to the contents of the deed

at the time of its execution.—*NEWTON v. PICKENEL* (1835), 3 Ir. L. Rec. N. S. 201.—*IR.*

1116 i. Agent.]—A land-agent is not bound to produce a deed, the property of his principal, though his title be not questioned.—*FLOOD v. MORIARTY* (1847), Bl. D. & Osb. 165.—*IR.*

& who claimed relief in respect of a sum of money which they alleged had been received by deft. from that govt. as trustee for pltf.s.; & afterwards, in breach of trust, repaid by him to that govt. On an application by pltf.s. for discovery of documents by deft., he made an affidavit specifying certain documents, but objecting to produce some of them on the ground that he had no property in them; that they were the property of the colonial govt., which was not a party to the action, & had been acquired by him merely in his capacity of agent-general, & subject to the directions of that govt.; & that the Prime Minister of the colony had directed him not to produce the documents, except under an order of the ct., & to object to their production on the ground of the interest of the state & of the public service. Pltf.s. then took out a summons to compel production of the documents, which deft. objected to produce:—*Held*: an official was only entitled to take copies for his own protection, & to use them for that purpose & not for ordinary purposes, & it would be a dereliction of duty on the part of deft. to produce documents which he knew his superiors objected to produce, & the ct. had no jurisdiction to order him to do so.—*WRIGHT & CO. v. MILLS* (1890), 62 L. T. 558; 6 T. L. R. 278.

1120. Liquidator of company—Voluntary winding up.]—*LONDON & YORKSHIRE BANK v. COOPER*, No. 494, *ante*.

1121. Directors.]—The ct. refused to compel defts. to produce documents which were in their possession solely as directors of a co. to which the documents belonged.—*WILLIAMS v. INGRAM* (1900), 16 T. L. R. 451, C. A.

1122. Committee of lunatic.]—In an action of trespass to land brought against the committee of a lunatic whose title deeds are in the custody of the ct. having jurisdiction in lunacy, an order on deft. for inspection of the documents ought not to be made, as they are not in his possession or control.—*VIVIAN v. LITTLE* (1883), 11 Q. B. D. 370; 52 L. J. Q. B. 771; 48 L. T. 793; 47 J. P. 566; 31 W. R. 891, D. C.

Annotations:—*Distd.* *London & Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 7. *Refd.* *Re Strachan*, [1895] 1 Ch. 439.

See, also, Part II., Sect. 4, sub-sect. 4, B., *ante*.

1123. Clerk.]—A clerk who has charge for safe custody of his master's documents has not such a possession of them that he can be compelled, under Bankrupt Law Consolidation Act, 1849 (c. 106), s. 100, to produce them to the ct. before adjudication.—*Re LEIGHTON & BENETT* (1866), 1 Ch. App. 331; *sub nom.* *Re LEIGHTON, Ex p. BYRNE*, 35 L. J. Bcy. 43, L. C.

Annotation:—*Refd.* *Re Lutscher, Ex p. Waddell* (1877), 6 Ch. D. 328.

1124. Receiver.]—*GOWAN v. BRIGGS* (No. 2) (1895), 39 Sol. Jo. 330, C. A.

1125. General secretary of trade union.]—Deft. was the general secretary of a trade union, & upon being called upon to give discovery of documents made an affidavit, in which he gave in a schedule a list of documents which he said were in the possession of his union, but that he had no power to produce them, as they belonged to the trade union:—*Held*: although, as general secretary, it was within his power to make copies of the documents, it was well established that a person in the position of a servant could not be required to furnish copies of documents belonging to his master.—*BALFOUR v. TILLET* (1913), 29 T. L. R. 332; 57 Sol. Jo. 556, C. A.

1126. Where agency has ceased—Or become J.—VOL. XVIII.

agency for opponent.]—During a revolution in Sicily the revolutionary govt. sent two of defts., who were natives & inhabitants of Sicily, as envoys to this country, & afterwards remitted to them moneys which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steamship therewith; & defts. applied the moneys accordingly. The lawful sovereign of Sicily, after he had re-established his authority, filed a bill claiming the ship, which still remained in the port of London. Defts., in their answer, admitted the possession of documents relating to the matters in the bill, but said that they held them as the agents & on the behalf of the persons who intrusted them with the moneys, & submitted that, in the absence of such persons, they ought not to be ordered to produce the documents.

The ct., however, made the order, because pltf. represented the contributors of the moneys; & the revolutionary govt. being at an end, defts. had either ceased to be agents or trustees for any one, or had become agents or trustees for pltf.—*TWO SICILIES (KING) v. WILLCOX* (1851), 1 Sim. N. S. 301; 7 State Tr. N. S. 1049; 20 L. J. Ch. 417; 15 Jur. 214; 61 E. R. 116.

Annotations:—*Refd.* *Hennessy v. Wright* (1888), 4 T. L. R. 597. *Mentd.* *Austria (Emperor) v. Day & Kossuth* (1861), 3 De G. F. & J. 217; *U. S. A. v. Prioleau* (1865), 2 Hem. & M. 559; *U. S. A. v. McRae* (1867), 3 Ch. App. 79.

1127. Third party only interested—No privilege.]

—(1) One member of a club, on behalf of himself & the rest, sued two other members, to recover back money belonging to the club. It having been determined that the other individual members were not necessary parties:—*Held*: defts. could not resist the production of documents in their possession, on the ground that the other members had an interest in them.

(2) Pltf. ought not to use for any collateral purpose documents ordered by the ct. to be produced for the purposes of the suit.—*RICHARDSON v. HASTINGS* (1844), 7 Beav. 354; 13 L. J. Ch. 416; 49 E. R. 1102.

Annotations:—*As to* (2) *Consd.* *Reynolds v. Godlee* (1858), 4 K. & J. 88. *Apld.* *Hopkinson v. Burghley* (1867), 2 Ch. App. 447. *Refd.* *Labouchere v. Hess & Sala* (1897), 14 T. L. R. 75.

1128. —.] — *KETTLEWELL v. BARSTOW*, No. 665, *ante*.

—.] — *PLANT v. KENDRICK*, No. 1107, *ante*.

1130. — Confidential letters.]—Deft. cannot refuse to produce private & confidential letters from a stranger on the ground that the writer forbids their production. But pltf. will be put upon an undertaking not to use them for any collateral object.—*HOPKINSON v. BURGHLEY (LORD)* (1867), 2 Ch. App. 447; 36 L. J. Ch. 504; 15 W. R. 543, J. J.

Annotations:—*Apld.* *Labouchere v. Hess* (1897), 77 L. T. 559. *Refd.* *Philip v. Pennell*, [1907] 2 Ch. 577. *Mentd.* *Macmillan v. Dent*, [1907] 1 Ch. 107.

1131. Undertaking to third party not to part with document—No privilege.]—Production ordered of documents admitted by deft. to be in his possession subject to an undertaking to a third party not to part with the possession to any one else.—*PENKETHMAN v. WHITE* (1854), 2 W. R. 380.

Mortgagor & mortgagee.]—*See* Sect. 4, sub-sect. 5, *ante*.

SUB-SECT. 5.—DOCUMENTS TENDING TO INCRIMINATE.

1132. Objection attaches to production not discovery—Must be taken on oath.]—*SPOKES v. GROSVENOR HOTEL CO.*, No. 60, *ante*.

Sect. 9.—Resisting production—Grounds of privilege: Sub-sect. 5.]

1133. ———.]—NATIONAL ASSOCN. OF OPERATIVE PLASTERERS *v.* SMITHIES, No. 62, *ante*.

1134. **Form of objection—Must be sworn to.]—**In order to protect himself from answering, upon the ground that a discovery of the matters inquired after would expose, or tend to expose, him to penalties, deft. must state upon oath his belief that such would be the case.

Exceptions therefore allowed to an answer in the following form:—"I submit that I am not bound to discover" certain matters specified, "because the discovery of such matters would or might show, or tend to show, that, under Solicitors Act, 1843 (c. 73), I am liable to" certain specified penalties; deft. not stating his own belief upon the subject.—SCOTT *v.* MILLER (1859), John. 328; 28 L. J. Ch. 584; 33 L. T. O. S. 270; 5 Jur. N. S. 858; 7 W. R. 561; 70 E. R. 448.

*Annotations:—**Appld.* The Mary or Alexandra (1868), L. R. 2 A. & E. 319. *Refd.* Bartlett *v.* Lewis (1862), 9 Jur. N. S. 202; Lamb *v.* Munster (1882), 10 Q. B. D. 110.

1135. ——— **Sufficient to say might tend to incriminate.]—**LAMB *v.* MUNSTER, No. 1842, *post*.

1136. **Discovery tending to incriminate—Not enforced.]—**MONTAGUE (VICE-COUNTESS) *v.* ——— (1599), Cary, 9; 21 E. R. 5.

1137. ———.]—ANON. (1693), Skin. 404; Holt, K. B. 76; 90 E. R. 179, N. P.

*Annotation:—**Refd.* Greenough *v.* Gaskell (1833), 1 My. & K. 98.

1138. ———.]—R. *v.* MEAD (1703), 2 Ld. Raym. 927; 92 E. R. 119.

*Annotation:—**Refd.* R. *v.* Purnell (1748), 1 Wils. 239.

1139. ———.]—Deft. is not bound to answer what tends to accuse him of maintenance, or of buying pretended rights within 32 Hen. 8, c. 9.—SHARP *v.* CARTER (1735), 3 P. Wms. 375; 24 E. R. 1108, L. C.

1140. ———.]—Deft. demurred to the discovery sought with relation to the perjury in a suit at law charged to be committed by her procurement, & likewise to the discovery sought concerning the proceedings before the delegates:—*Held*: the sentence in the delegates cannot be read, as this is a demand for real estate, & they proceed there by different laws, & in matters too relative to the personal estate only, & allowed the demurrer as to this part.—BAKER *v.* PRITCHARD (*alias* HOSIER) (1742), 2 Atk. 387; 26 E. R. 634, L. C.

1141. ———.]—R. *v.* LEE (1743), cited 1 Wils. 240; 95 E. R. 596.

1142. ———.]—Upon an information by the A.-G. against the V.-C. of Oxford for a misdemeanour in his office, the Crown shall not inspect the statutes, & archives of the university.—R. *v.* PURNELL (1748), 1 Wils. 239; 1 Wm. Bl. 37; 95 E. R. 595.

*Annotations:—**Folld.* R. *v.* Heydon (1762), 1 Wm. Bl. 351.

Distd. A.-G. *v.* Le Merchant (1772), 2 Term Rep. 201, n.

Refd. Entick *v.* Carrington (1765), 2 Wils. 275; R. *v.* Shelley (1789), 3 Term Rep. 141; R. *v.* Holland (1792), 4 Term Rep. 691

—Rule to compel a corp'n. to

furnish evidence from their books in a criminal prosecution denied.—R. *v.* HEYDON (1762), 1 Wm. Bl. 351; 96 E. R. 195.

1144. ———.]—A.-G. *v.* LE MERCHANT (1772), 2 Term Rep. 201, n.; 100 E. R. 109.

*Annotations:—**Mentd.* Cates *v.* Winter (1789), 3 Term Rep. 306; Wilson *v.* Rastall (1792), 4 Term Rep. 753; R. *v.* Downham (1858), 1 F. & F. 386.

1145. ———.]—ANON. (1773), Lofft, 321; 98 E. R. 673.

1146. ———.]—Bill for tithes praying discovery whether defts. had not associated together in their defence; demurrer to the discovery was allowed.

Either the combination is criminal or it is not; if it is, then the discovery cannot be granted, as subjecting defts. to a penalty; if it is not criminal, then the discovery is useless & impertinent; & therefore the demurrer must, on either ground, be allowed (HOTHAM, R.).—OLIVER *v.* HAYWOOD (1792), 1 Anst. 82; 145 E. R. 806; *sub nom.* OLIVER *v.* BAKEWELL, 4 Gwill. 1381.

*Annotation:—**Mentd.* Alabaster *v.* Harness, [1894] 2 Q. B. 897.

1147. ———.]—A debtor of a bkpt., sued at law by the assignees filed a bill for discovery, whether they had not signed his certificate on consideration of his giving evidence in the action; a demurrer was allowed.—SELBY *v.* CREW (1794), 2 Anst. 504; 145 E. R. 949.

1148. ———.]—To a bill against two defts. for a discovery whether pl'tfs. were not employed by one of defts., a peer, as solrs. to present & prosecute a petition to the House of Commons on behalf of the other defts., complaining of an undue election & return, a general demurrer was allowed; principally, because such a transaction amounts to maintenance at the common law; & incidentally on the grounds of public policy, & because the discovery could have no effect to enable pl'tf. to maintain any action.—WALLIS *v.* PORTLAND (DUKE) (1798), 8 Bro. Parl. Cas. 161; 3 E. R. 508, H. L.

*Annotations:—**Mentd.* Stevens *v.* Bagwell (1808), 15 Ves. 139; Findon *v.* Parker (1843), 12 L. J. Ex. 444; Reynell *v.* Sprye (1852), 1 De G. M. & G. 660; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; Harris *v.* Brisco (1886), 17 Q. B. D. 504; Alabaster *v.* Harness, [1895] 1 Q. B. 339; Neville *v.* London Express Newspaper, [1919] A. C. 368.

1149. ———.]—Proof under a Commission of Bkpcy. refused: the party claiming the debt being charged by the examination of the bkpt. with the receipt of money; & refusing a disclosure as to the receipt & application on the ground, that it might tend to criminate him.—*Ex p.* SYMES (1805), 11 Ves. 521; 32 E. R. 1191.

1150. ———.]—Transfer of stock under an agreement to satisfy the deficiency in the accounts of a banker's clerk, though he is not a party, amounts to a composition of felony, to prevent a prosecution. Deft. therefore may protect himself by plea from discovering, not only the broad leading fact, but any fact, the answer to which may form a step in the prosecution. *Qu.*: whether a bill, stating a payment to protect an individual from prosecution for felony, desiring

PART III. SECT. 9, SUB-SECT. 5.

1134 i. **Form of objection—Must be sworn to.]—**To entitle a party to the privilege of non-production of documents the ct. must see from the circumstances of the case & the nature of the documents that there is reasonable ground to apprehend danger to the party from his being compelled to produce them. A party claiming privilege from producing documents under an order for production, must

swear that their production would incriminate him. It is sufficient if he swear that production "might" incriminate him.—A.-G. FOR MANTOBA *v.* KELLY (1915), 33 W. L. R. 233, 963; 9 W. W. R. 863; 10 W. W. R. 131.—CAN.

t. ——— **Necessity to show honest belief.]—**Where separate claims for damages for libel against a newspaper proprietor & other defts. are joined with a joint claim against them for the

same libel & also with a joint claim against them for damages for conspiracy to defame & injure, the proprietor of the newspaper, even where he admits publication of an exact copy of the libel, cannot refuse to produce the manuscript of the libel, either on the ground of privilege, or on the ground that its production might tend to incriminate him, if the ct. comes to the conclusion that he does not honestly believe that its production will have that effect. To

the assistance of the ct., is not open to demurrer on that ground. Plea, that the discovery will subject deft. to penalties, does not require the support of an answer; as a plea of purchase for valuable consideration without notice does, as to facts, from which notice is inferred.—**CLARIDGE v. HOARE** (1807), 14 Ves. 59; 33 E. R. 443, L. C.
Annotation:—**Distd.** *Derby Corpn. v. Derbyshire County Council* (1897), 77 L. T. 107.

1151. ———.]—The ct. in compelling a pltf. to exhibit evidence to which deft. is entitled to have access, will not compel him to lay himself open to a prosecution under the Stamp Acts.—**WHITAKER v. IZOD** (1809), 2 Taunt. 115; 127 E. R. 1020.

.]—A bill sought a discovery of the returns made by deft. to the Comrs. of Property Tax. The object of pltf. being to show that deft. represented that the profits of his business were less than what he had stated to pltf. who had purchased it. A demurrer was allowed.

Qu.: whether a discovery of income tax returns could, under any circumstances, be compelled.—**MITCHELL v. KOECKER** (1849), 11 Beav. 380; 12 L. T. O. S. 550; 13 Jur. 797; 50 E. R. 863.
Annotation:—**Refd.** *Re Hargreaves*, [1900] 1 Ch. 347.

1153. ———.]—**TWO SICILIES (KING) v. WILLCOX**, No. 1126, *ante*.

1154. ———.]—In a suit for an account, & where the cause has been set down for hearing; the ct. will refuse an application, on the part of deft. for the production by pltf. of documents relating to the account.

The ct. will not permit its machinery to be used in aid of a criminal prosecution, & will, therefore, pending a suit, refuse an application for documents necessary to support such prosecution.—**WATERS v. SHAFESBURY (EARL)** (1865), 13 L. T. 558; 12 Jur. N. S. 3; 14 W. R. 259.

1155. ———.]—In an action for libel alleged to be contained in a letter, which, since it had been received by the person to whom it had been addressed, had been returned to & was in the possession of deft. who had written it, pltf. applied to a judge at chambers for inspection of such letter, in order to enable him to declare in the action. The judge made an order for such inspection, upon deft. declining to make an affidavit that the production of the letter would tend to criminate her:—*Held*: the judge had no power to make such order, inasmuch as, although pltf. might have obtained such inspection if he had proceeded under C. L. P. Act, 1854 (c. 125), s. 50, he was not entitled to it under Evidence Act, 1851 (c. 99), s. 6, under which the application must be considered as made, as a ct. of equity would not have granted discovery in this case, & the power of the common law ct. under that sect. is limited to cases in which discovery could have been obtained in equity, & that sect. is not altered or extended by the above sect. of C. L. P. Act.—**HILL v. CAMPBELL** (1875), L. R. 10 C. P. 222; 44 L. J. C. P. 97; 32 L. T. 59; 23 W. R. 336.

Annotations:—**Dbtd.** *Webb v. East* (1880), 44 J. P. 200.
Mentd. *Lethbridge v. Cronk* (1875), 33 L. T. 171.

entitle a deft. to refuse discovery on the last mentioned ground, his affidavit must show that he believes the production of the document will tend to incriminate him.—**KELLY v. COLHOUN**, [1899] 2 I. R. 199; 33 J. L. T. 33.—**IR.**

a. Extent of privilege—No criminal offence involved.—Bill against husband & wife, charging that wife being entitled to dividends of stock vested in pltf., & having obtained a promise of a power of attorney from

him to receive the dividends, substituted a general power to receive & transfer the principal, which pltf. executed, supposing it to be the limited one, & thereunder transferred the stock. Demurrer to discovery by husband & wife on the ground that it might subject the wife to a criminal prosecution:—*Held*: the bill made no charge amounting to a criminal offence.—**M'DANIEL v. FURLONG** (1833), 2 Ir. L. Rec. N. S. 4.—**IR.**

b. ———.]—The statute, R. S. O.,

1156.

1157.
 No. 1842, *post*.

1158. Extends to wife.—A bureau delivered for the purpose of repairs to a person, who discovered money in a secret drawer; which he converted to his own use. This amounts to a felony; & upon that ground a demurrer to a bill of discovery was allowed. A married woman may demur to a discovery, that may subject her husband to a charge of felony.—**CARTWRIGHT v. GREEN** (1803), 8 Ves. 405; 2 Leach, 952; 32 E. R. 412, L. C.

Annotations:—**Refd.** *Hill v. Campbell* (1875), L. R. 10 C. P. 222; *Webb v. East* (1880), 5 Ex. D. 108. **Mentd.** *R. v. Kerr* (1837), 8 C. & P. 176; *Merry v. Green & Dewes* (1841), 10 L. J. M. C. 154; *R. v. Reed* (1842), 6 J. P. 206; *Bridges v. Hawkesworth* (1851), 21 L. J. Q. B. 75; *R. v. Ashwell* (1885), 16 Q. B. D. 190.

1159. Extent of privilege—No indictable offence.—**CHETWYND v. LINDON** (1752), 2 Ves. Sen. 450; 28 E. R. 288, L. C.

Annotation:—**Refd.** *Redfern v. Redfern*, [1891] P. 139.

1160. ———.]—The bill stated that a testator intended to republish his will, but was prevented from so doing by the fraud of the heir-at-law. A demurrer to so much of the bill as required him to discover whether testator did not intend to republish his will, was, under these circumstances overruled.—**DIXON v. OLMUS** (1787), 1 Cox, Eq. Cas. 414; 29 E. R. 1227, L. C.

Annotations:—**Mentd.** *Podmore v. Gunning* (1836), 7 Sim. 644; *Re McCallum*, *McCallum v. McCallum*, [1901] 1 Ch. 143.

1161. ———.]—A. being sued at law by the trustee of a woman to whom he, A., had granted an annuity, in consideration of future illicit cohabitation, pleaded the illegal nature of the contract, & filed his bill against the trustee for discovery in aid of his defence:—*Held*: was entitled to such discovery.—**BENYON v. NETTLEFOLD** (1850), 3 Mac. & G. 94; 20 L. J. Ch. 186; 17 L. T. O. S. 149; 15 Jur. 209; 42 E. R. 196, L. C.

Annotation:—**Mentd.** *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275.

1162. Confined to party liable—Agent cannot object.—The secretary & book-keeper of the East-India Co. were made defts. to a bill for a discovery of some entries & orders of the co.; defts. demurred, for that they might be examined as witnesses; also because their answer cannot be read against the co.; the demurrer overruled, lest there should be a failure of justice, in regard the co. are not liable to a prosecution for perjury, though their answer be never so false.—**WYCH v. MEAL** (1734), 3 P. Wms. 310; 24 E. R. 1078, L. C.

Annotations:—**Consd.** *Dummer v. Chippenham Corpn.* (1807), 14 Ves. 245. **Distd.** *Le Texier v. Anspach* (1808), 15 Ves. 159. **Consd.** *Portugal (Queen) v. Glyn* (1840), 7 Cl. & Fin. 460. **Refd.** *Prioloau v. United States & Johnson* (1866), L. R. 2 Eq. 659; *U. S. A. v. Wagner* (1867), 2 Ch. App. 582; *Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co.* (1900), 83 L. T. 58.

1163. ———.]—A demurrer to a bill, by an annuitant, against an incorporated co., & their clerk, for a discovery of funds not appropriated, overruled on the ground of the clerk joining in the demurrer he having no right to demur.

The clerk of such a co. is without the general

1887, c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery. In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party.—**D'IVRY v. WORLD NEWSPAPER CO. OF TORONTO** (1897), 17 P. R. 387.—**CAN.**

c. ———.]—*Documents examined by court.*—In an action of divorce for

Sect. 9.—Resisting production—Grounds of privilege: Sub-sects. 5, 6 & 7.]

rule, & may be made a deft. although he have no interest, & might be examined as a witness.—*GIBBONS v. WATERLOO BRIDGE CO.* (1818), 5 Price, 491; 1 Coop. temp. Cott. 385; 146 E. R. 673.

1164. Privilege inapplicable—Perjury committed in suit.]—It is no answer to a motion for production of documents in the custody of a deft. that they tend to support an indictment pending against deft. for perjury committed in the cause.

CE v. GORDON (1843), 13 Sim. 580; 13 L. J. Ch. 104; 7 Jur. 1076; 60 E. R. 225; *sub nom.* *PRICE v. GORDON*, 2 L. T. O. S. 115.

1165. — Conspiracy.]—Bill against a corpn., trustees for a charity, for a discovery, & injunction against a resolution, depriving pltf. of his office of schoolmaster; charged to have been procured by five of the members, including the bailiff, from improper motives, with reference to a parliamentary election. Demurrer by those five, on the ground, that no title was shown to discovery against them, & *ore tenus*, that the charge would be the subject of a criminal prosecution, overruled.—*DUMMER v. CHIPPENHAM CORPN.* (1807), 14 Ves. 245; 33 E. R. 515.

Annotations:—Refd. *Kerr v. Rew* (1840), 5 My. & Cr. 154; *Portugal (Queen) v. Glyn* (1840), 7 Cl. Fin. 466; *Prioleau v. United States & Johnson* (1866), L. R. 2 Eq. 659; *U. S. A. v. Wagner* (1867), 2 Ch. App. 582; *Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co.* (1900), 83 L. T. 58. *Mentd.* *Mackintosh v. G. W. Ry.* (1848), 18 L. J. Ch. 94; *A.-G. v. Carrington* (1850), 4 De G. & Sm. 140; *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28.

1166. — Fraud.]—An agent charged with personal fraud cannot, by disclaiming interest, avoid answering fully.—*BULKELEY v. DUNBAR* (1792), 1 Anst. 37; 145 E. R. 793.

Annotation:—Mentd. *A.-G. v. Chesterfield* (1854), 18 Beav. 596.

1167. — When part of bill answered.]—If a deft. answers a bill, he must answer fully; & if he is protected from answering, he must avail himself of his protection by plea or otherwise. The test of materiality of a fact alleged by pltf., is the service it would be in proving his case if admitted or answered in the affirmative by deft. Where the sole gist & object of a suit are to convict deft. in a penalty, a ct. of equity will not grant any incidental discovery; but if such be not the object of the suit, a deft. who answers part of the bill cannot refuse to answer any other material parts on the ground that an admission of the facts interrogated might expose deft. to a criminal prosecution.—*CHADWICK v. CHADWICK* (1852), 22 L. J. Ch. 329; 20 L. T. O. S. 272; 16 Jur. 1060; 1 W. R. 29.

Annotation:—Refd. *Hunnings v. Williamson* (1883), 10 Q. B. D. 459.

1168. Effect of objection—No inference of guilt.]—Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself: no inference to the truth of the fact.—*LLOYD v. PASSINGHAM* (1809), 16 Ves. 59; 33 E. R. 906.

SUB-SECT. 6.—DOCUMENTS EXPOSING PARTY TO PENALTY.

1169. Privileged.]—A man is not bound to discover what may subject him to the penalty of an

adultery, at the instance of a husband against a wife, pursuer called upon the alleged paramour, as a haver to produce any documents or correspondence, between him & defender, or any other person concerned in any way, directly or indirectly, with the matters

at issue between the parties. The compeer objected to the production of these papers on the ground of their tendency to criminate him. This objection was also repelled, & the papers ordered to be produced & exhibited to the Sheriff Commissary,

Act of Parliament.—*BIRD v. HARDWICKE* (1682), 1 Vern. 109; 23 E. R. 349.

1170. —.]—*WYNN v. DOUGHTY* (1710), 2 Eq. Cas. Abr. 77; 22 E. R. 67.

1171. —.]—If an information is filed for the payment of notes given to public uses & defts. file a cross bill against the relators for a discovery of the consideration of those notes they cannot demur though the discovery may subject them to a penalty.—*WILDBORKE v. PARKER* (1729), Mos. 124; 25 E. R. 308, L. C.

1172. —.]—Demurrer to information as subjecting deft. to pains & penalties. A demurrer may be put in after a plea is overruled.—*EAST INDIA CO. v. CAMPBELL* (1749), 1 Ves. Sen. 246; 27 E. R. 1010.

Annotation:—Refd. *Robinson v. Kitchin* (1856), 2 Jur. N. S. 57.

1173. —.]—Bill by an ecclesiastical rector against an occupier for an account of tithes; deft., by his answer, not only insisted on a modus, but alleged that pltf. was simoniacally presented, & stated certain facts as evidence thereof. The occupier afterwards filed his cross bill against the rector, to establish the modus, & for a discovery of various matters with reference to the purchase of the advowson by the rector's father, & calculations made of the value of the tithes & moduses; a lease alleged to have been granted by the preceding incumbent to the rector's father; & the collection of the tithes & moduses by pltf. & his father during the incumbency of the preceding vicar. The rector by his answer stated, that the matters charged by the occupier's bill, & to which he objected to make answer, would, if confessed, furnish evidence, or lead to evidence in support of the charge of simony, or would aid the proof of the charge, & would subject deft. to forfeiture & penalties. Exceptions being taken to the answer for insufficiency, they were, on argument, overruled, on the ground that a party protecting himself from a discovery which may subject him to a penalty, is not bound to answer a single link in the chain of evidence.—*SOUTHALL v. —* (1831), You. 308; 159 E. R. 1010.

1174. —.]—The ct. refused to entertain an application by a deft. in an action on a bill of exchange, to compel pltf., a stock-broker, to produce his book, in order to enable deft. to plead that the bill, which was an accommodation bill, had been indorsed over to pltf. by the drawer, for differences in stock-jobbing transactions, on the ground that deft. had no direct interest in the book. *Semble*: the ct. will not compel a party to produce a document, the production of which might subject him to penalties.—*PRITCHETT v. SMART* (1849), 7 C. B. 625; 6 Dow. & L. 702; 18 L. J. C. P. 211; 13 L. T. O. S. 95; 137 E. R. 247.

1175. —.]—An allegation in an answer to a bill against brokers, partners, for an account of dealings in stock, that discovery would expose defts. to penalties under Stock-jobbing Act, 1733 (c. 8), is sufficient to protect defts. from the discovery.—*ROBINSON v. LAMOND* (1851), 15 Jur. 240.

Annotation:—Distd. *Robinson v. Kitchin* (1856), 21 Beav. 365.

1176. Privilege inapplicable—When liquidated damages only.]—By an indenture, a farm & lands were demised to a tenant at a yearly rent, & also under & subject to certain yearly payments, in

so that he might determine whether or not, all or any of them ought, according to the rule of law applicable to such cases, to be put into process.—*DON v. DON* (1848), 10 Durl. (Ct. of Sess.) 1046; 20 Sc. Jur. 387.—*SCOT.*

case the tenant should not crop, manure, & manage the farm in manner therein specified & covenanted; & also in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of £10 an acre for every acre above seventy acres, for the residue of the term:—*Held*: the additional rents were in the nature of liquidated damages, & not of penalties; & therefore, on a bill filed by the landlord for a discovery of breaches of the covenants in aid of an action at law, a plea that the discovery might subject the tenant to penalties, was overruled.—*JONES v. GREEN* (1829), 3 Y. & J. 298; 148 E. R. 1193, Ex. Ch. in Eq.

Annotation:—*Mentd.* *Denton v. Richmond* (1833), 3 Tyr. 630.

1177. — When no penalty incurred.]—The Stock-jobbing Act, 1733 (c. 8), only applies to “public” stocks & securities, & not to railway & joint stock shares; & therefore, as no penalty is attached to stock-jobbing dealings in such shares, a stockbroker is compellable to make full discoveries respecting them.

When a deft. incurs no penalties, he cannot resist a discovery by alleging the illegality of the transaction.—*WILLIAMS v. TRYE* (1854), 18 Beav. 366; 2 Eq. Rep. 766; 23 L. J. Ch. 860; 23 L. T. O. S. 72; 18 Jur. 442; 2 W. R. 314; 52 E. R. 145.

1178. — No penal offence.]—An application by a sanitary authority to the county ct. for an order under Rivers Pollution Prevention Act, 1876 (c. 75), s. 10, requiring a person to abstain from the commission of an offence under the provisions of that Act, is not a penal proceeding, inasmuch as until the order has been made & has been disobeyed no question of penalty can arise, & the proceeding is therefore one in which discovery & interrogatories may be allowed.—*DERBY CORPN. v. DERBYSHIRE COUNTY COUNCIL*, [1897] A. C. 550; 66 L. J. Q. B. 701; 77 L. T. 107; 62 J. P. 4; 46 W. R. 48, H. L.; *affg.* S. C. *sub nom.* *Re DERBYSHIRE COUNTY COUNCIL & DERBY CORPN.*, [1896] 2 Q. B. 297, C. A.

Annotation:—*Mentd.* *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

1179. Exception—When agreement to give discovery.]—*SOUTH SEA CO. v. BUMPSTEAD* (1728), Mos. 74; 1 Eq. Cas. Abr. 77; 25 E. R. 279.

Annotation:—*Consd.* *Green v. Weaver* (1827), 1 Sim. 404.

1180. — When agreement to pay.]—*African Co.* hires deft.’s ship to freight, deft. covenants not to trade in any of the goods in which the co. deal, & in such case covenants to pay double the value for all goods, with liberty to the co. to deduct the same out of the freight. The co. bring a bill to discover whether deft. did trade in any of the goods. Though this be a penalty, yet it being deft.’s own agreement, deft. is bound to discover.—*AFRICAN CO. v. PARISH* (1691), 2 Vern. 244; 23 E. R. 758.

Annotation:—*Refd.* *Green v. Weaver* (1827), 1 Sim. 404.

1181. — When excluded by position.]—A broker in the City of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corpn., on his admission.—*GREEN v. WEAVER* (1827), 1 Sim. 404; 6 L. J. O. S. Ch. 1; 57 E. R. 630.

Annotations:—*Consd.* *Glynn v. Houston* (1836), 1 Keen, 329. *Fold.* *Robinson v. Kitchin* (1856), 8 De G. M. & G. 88. *Refd.* *Chadwick v. Chadwick* (1852), 22 L. J. Ch. 329; *Re*

Mexican & South American Co., Aston’s Case (1859), 4 De G. & J. 320. *Mentd.* *Pearson v. Knapp* (1833), 1 My. & K. 312; *Moore v. Langford* (1835), 6 Sim. 323.

1182. — —.]—A man who holds himself out to the world as a sworn broker, thereby impliedly asserts that he has taken the steps necessary to qualify himself to act as such, & he will be bound to give discovery, to parties employing him as a broker, respecting his dealings & transactions as such, though he may thereby subject himself to pecuniary penalties, payable to the City of London, for acting as a broker without payment of the fees imposed by 57 Geo. 3, c. 60.—*ROBINSON v. KITCHIN* (1856), 8 De G. M. & G. 88; 25 L. J. Ch. 441; 26 L. T. O. S. 304; 2 Jur. N. S. 294; 4 W. R. 344; 44 E. R. 322, L. JJ.

1183. — When liability admitted.]—If deft. makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it, on the ground that they afford evidence of his being subject to the penalties.—*EWING v. OSBALDISTON* (1834), 6 Sim. 608; 58 E. R. 721.

Annotation:—*Refd.* *Two Scillies (King) v. Willcox* (1851), 1 Sim. N. S. 301.

See, also, Part II., Sect. 3, sub-sect. 2, *ante*.

SUB-SECT. 7.—DOCUMENTS EXPOSING PARTY TO FORFEITURE.

1184. Privileged.]—A deft. cannot be forced to make discovery of a forfeiture.—*CARY & COTTINGTON v. MILDMA* (1590), Toth. 7; 21 E. R. 107.

1185. —.]—*BORRINGTON v. BORRINGTON* (1669), 3 Rep. Ch. 32; 21 E. R. 720.

1186. —.]—*MONNINS v. MONNINS (LADY)* (1672), 2 Rep. Ch. 68; 21 E. R. 618.

Annotations:—*Consd.* *Hambrook v. Smith* (1852), 17 Sim. 209. *Refd.* *A.-G. v. Duplessis* (1752), Park. 144; *Chester v. Wortley* (1856), 17 C. B. 410; *Hurst v. Hurst* (1874), 30 L. T. 698.

1187. —.]—*FANE v. ATLEE* (1700), 1 Eq. Cas. Abr. 77; 21 E. R. 890.

1188. —.]—Prohibition granted to a suit in equity for discovery of matters to make deft. forfeit his freehold.—*FIREBRASS’S CASE* (1700), 2 Salk. 550; 91 E. R. 465.

1189. —.]—*A.-G. v. VINCENT* (1724), Bunb. 192; 2 Eq. Cas. Abr. 378; 145 E. R. 644.

Annotation:—*Refd.* *U. S. A. v. McRae* (1867), L. R. 4 Eq. 327.

1190. —.]—Deft., as to so much of the bill as sought to discover whether after institution, etc., to A., he was not presented to two other livings, & instituted, etc., demurred, as such discovery tends to show an avoidance of A. The demurrer allowed, because he is not obliged by a discovery to subject himself to a forfeiture, or any thing in the nature of a forfeiture.—*BOTELER v. ALLINGTON* (1746), 3 Atk. 453; 26 E. R. 1061, L. C.

Annotations:—*Distd.* *Sloman v. Kelly* (1840), 4 Y. & C. Ex. 169. *Mentd.* *Mutter Chauvel* (1816), 1 Mer. 475.

1191. —.]—Demurrer lies to a bill for discovery of an assignment of a lease without licence, if it does not expressly wave the forfeiture.—*UXBRIDGE (LORD) v. SRAVELAND* (1747), 1 Ves. Sen. 56; 27 E. R. 888, L. C.

Annotation:—*Mentd.* *Keppell v. Bailey* (1834), 2 My. & K. 517.

1192. —.]—Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent would cause a forfeiture of an estate; the bill charging there was such marriage & no consent.—*CHANCEY v. FENHOULET* (1751),

Sect. 9.—Resisting production—Grounds of privilege: Sub-sects. 7 & 8.]

2 Ves. Sen. 265; 28 E. R. 171; *sub nom.* CHAUNCEY v. TAIHOURDEN, 2 Atk. 392, L. C.

Annotations:—Distd. Lucas v. Evans (1745), 3 Atk. 260; *Slooman v. Kelly* (1840), 4 Y. & C. Ex. 169. *Refd.* Hambrook v. Smith (1852), 21 L. J. Ch. 320.

1193. ———.]—SAMPSON v. SWETTENHAM, No. 995, *ante*.

1194. When protection does not apply—*Determination of interest.*]—A. gives his wife the whole surplus of his personal estate, but if she marries again, then she is to deliver up half to his brother, & his heirs. A bill brought to discover whether she is married; she demurred to the discovery, as it would subject her to a forfeiture. This being a conditional limitation over of an estate, she must show she has performed the condition; & the demurrer was overruled.—LUCAS v. EVANS (1745), 3 Atk. 260; 26 E. R. 951, L. C.

Annotations:—Expld. A.-G. v. Lucas (1843), 7 Jur. 1080. *Refd.* A.-G. v. Duplessis (1752), Park. 144; Pyc v. Butterfield (1864), 5 B. & S. 829.

1195. ———.]—Where deeds existed, in which, in the event of the ct. deciding one way, pltf. would have no interest, but if it decided another way he would—deft. cannot protect himself against discovering in whose possession they are; nor can he, because discovery might have the effect of making the estate go over away from him.—HAMBROOK v. SMITH (1852), 17 Sim. 209; 21 L. J. Ch. 320; 19 L. T. O. S. 30; 16 Jur. 144; 60 E. R. 1109.

Annotations:—Apld. Hurst v. Hurst (1874), 30 L. T. 698. *Refd.* Chester v. Wortley (1856), 17 C. B. 410. *Mentd.* Langton v. Waite (1866), 15 L. T. 204.

1196. Privilege inapplicable—13 Eliz. c. 5—*Party to deed.*]—A party cannot refuse to make an affidavit as to documents in his possession, on the ground that he may be liable, as a party to one of such documents, to criminal proceedings under sect. 3 of the above Act.—BUNN v. BUNN (1864), 4 De G. J. & Sm. 316; 3 New Rep. 679; 10 L. T. 211; 12 W. R. 561; 46 E. R. 941, L. JJ.

1197. Extent of privilege—*Purchaser.*]—A bill brought to discover whether A. under whose will deft. claims, was a papist at the time of a purchase made by A. of the estate from pltf.'s ancestor. Deft. pleads, as to the discovery, 11 Will. 3, c. 4, by which, if A. was a papist, she was disabled to take. Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; & as A. would not have been obliged to discover, deft., who claims under the same title, is entitled to the same privileges, & takes the estate under the same circumstances. The plea allowed.—SMITH v. READ (1737), 1 Atk. 526; West temp. Hard. 16; 2 Eq. Cas. Abr. 378; 26 E. R. 332, L. C.

Annotations:—Apld. Jones v. Meredith (1739), 2 Com. 661. *Distd.* Harrison v. Southcote (1751), 1 Atk. 528; *Slooman v. Kelly* (1840), 4 Y. & C. Ex. 169. *Refd.* A.-G. v. Duplessis (1752), Park. 144; Adams v. Batley (1887), 35 W. R. 437.

1198. ——— Extends to executor.]—B. a purchaser, under a decree, of the first presentation to a living of which A. is seised for life of the

advowson, afterwards takes a conveyance from A. of the second presentation to the same living, & sells the first presentation to the present incumbent. To a bill by A. to set aside this transaction on the ground of fraud, praying a discovery, B. puts in an answer, refusing to make the discovery required, as tending to subject him to forfeiture on account of simony. B. having afterwards died, the suit is revived against his exor.:—*Held*: he was entitled to the same protection that was claimed by B.—PARKHURST v. LOWTEN (1816), 1 Mer. 391; 35 E. R. 718, L. C.

Annotations:—Apld. Southall v. — (1831), You. 308. *Refd.* Shackell v. Macaulay (1824), 3 L. J. O. S. Ch. 30; Short v. Mercier (1851), 3 Mac. & G. 205.

1199. ——— Not collateral matters.]—Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, & not extend to matters collateral.—WEAVER v. MEATH (EARL) (1750), 2 Ves. Sen. 108; 28 E. R. 71, L. C.

Annotation:—Refd. Chester v. Wortley (1856), 17 C. B. 410.

1200. Exception—*Secret trust.*]—To a bill of heir against a devisee, alleging, that the devise was upon a secret trust or undertaking for charitable purpose, against Charitable Uses Act, 1736 (c. 36), a plea of Stat. Frauds, was ordered to stand for an answer, with liberty to except.—STICKLAND v. ALDRIDGE (1804), 9 Ves. 516; 32 E. R. 703, L. C.

Annotations:—Refd. Lomax v. Ripley (1855), 3 Sm. & G. 48. *Mentd.* Podmore v. Gunning (1832), 5 Sim. 485; Podmore v. Gunning (1836), 7 Sim. 644; Briggs v. Penny (1849), 3 De G. & Sm. 528; Caton v. Caton (1865), 1 Ch. App. 137; *Re* Boyes, Boyes v. Carritt (1884), 26 Ch. D. 531.

1201. Privilege not avoided—*By amendment withdrawing charges.*]—To a bill to set aside a conveyance as fraudulent, under 13 Eliz., c. 5, deft., by his answer, refused to answer any portion of it, on the ground that the statute imposed a forfeiture & six months' imprisonment. After the time for excepting had expired, pltf. amended his bill, by striking out the allegations of fraud, & by attempting to remove the objection, & he again filed the interrogatories. Deft., by answer, again insisted on the objection, & that the proceeding of pltf. was a mere snare, & he refused to answer any portion of the bill:—*Held*: the two bills were substantially the same, & the answer to the first being deemed sufficient, deft. was not bound to answer the second.—WICH v. PARKER (1856), 22 Beav. 59; 27 L. T. O. S. 163; 2 Jur. N. S. 582; 52 E. R. 1029; *sub nom.* WICK v. PARKER, 4 W. R. 452.

Annotation:—Refd. Clegg v. Edmonson (1856), 22 Beav. 125.

Action for recovery of land.]—*See* Part II., Sect. 3, sub-sect. 4, *ante*.

SUB-SECT. 8.—PUBLIC POLICY.

1202. Grounds of privilege.]—The rule which protects documents from discovery where their disclosure would be injurious to the public interest is not limited to public official documents, but extends to documents of a private character, such as communications which have passed between one

PART III. SECT. 9, SUB-SECT. 8.

e. Head of department—Judge of public interest.]—In an action for libel & slander pltf.'s counsel insisted on the production of a certain anonymous letter by deft. to the Ontario govt., relating to the licensing of pltf.'s hotel. The head of the department attended & declined to produce the letter on the ground that its production would be injurious to the public service, & it was therefore privileged. The judge,

at the trial, on pltf.'s counsel insisting on its production, ordered it to be produced, but stated that if the ct. should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced & read. The judge told the jury that the letter was not evidence of libel as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for pltf.:—*Held*: the question whether the pro-

duction of such a document was injurious to the public service, must be determined not by the judge, but by the head of the department having the custody of the paper, & the production of the document ought not to have been compelled. In the circumstances the ct. ordered a new trial without costs.—BRADLEY v. MCINTOSH (1884), 5 O. R. 227.—CAN.

f. ———.]—Where a head of a public department refuses in his

of the parties to the action & his agent, the foundation of the rule being that the information cannot be disclosed without injury to the public interest, & not that the documents are official or confidential.

By a contract between pltf. co. & deft. co. the latter sold the former a cargo of oil f. o. b. at A., in the Persian Gulf, for shipment before May 1, 1915. Pltf. co. brought an action against deft. co. for an alleged breach of the contract in failing to load the cargo on pltf. co.'s steamer on her due arrival at the port of shipment. Deft. co. pleaded that it was an implied term of the contract that a pipe line which connected their tanks at that port with the oil producing districts of the interior should continue fit to carry oil, & that it had been cut by native tribes incited by the King's enemies, & the supply of oil totally stopped; & further, that on the interruption of the pipe line the British Admty. had requisitioned the whole of the oil in deft. co.'s tanks. Pltf. co. before the trial made an application for discovery of a letter sent by deft. co. to their agents in Persia shortly after the cutting of the pipe line, & three cablegrams sent by these agents to deft. co. shortly after that occurrence & the application was opposed by deft. co. There was evidence to show that these documents had been considered by the Secretary of the Admty., on whose behalf deft. co. had been instructed not to produce them on the grounds that they related to the campaign in Persia, & the policy, views, & intentions of the Admty. in relation thereto, & to the position of the Admty. with regard to their supplies of fuel oil, & that disclosure of the documents would be detrimental to the interests of the State. It also appeared that the Admty., by reason of its interest in the maintenance of a supply of fuel oil to the fleet, & pursuant to powers conferred by statute, had acquired part of the capital of deft. co. & was represented on its board by two directors & was in close & confidential association with that co. :—*Held*: as there was evidence that in the opinion of the proper authority the documents could not be disclosed without prejudice to the public interest, discovery of them should not be ordered, & the application should be refused.—*ASIATIC PETROLEUM CO., LTD. v. ANGLO PERSIAN OIL CO., LTD.*, [1916] 1 K. B. 822; 85 L. J. K. B. 1075; 114 L. T. 645; 32 T. L. R. 367; 60 Sol. Jo. 417, C. A.

1203. Publication against public policy—Objection by head of department.—After a collision between one of Her Majesty's ships & another ship,

it is the duty of the commanding officer of Her Majesty's ship to forward a report of the collision to the Lords Comrs. of the Admty. In a cause of damage against one of Her Majesty's ships, a motion to inspect such report was refused, on affidavit by the Secretary to the Admty., that it would be prejudicial to the public interests to allow such reports to be inspected.—*H.M.S. BELLEROPHON* (1874), 44 L. J. Adm. 5; 31 L. T. 756; 23 W. R. 248; 2 Asp. M. L. C. 449.

Annotations:—*Refd.* *Honnessy v. Wright* (1888), 21 Q. B. D. 509; *Re Hargreaves*, [1900] 1 Ch. 347.

1204. ———.]—*FORD v. BLEST* (1890), 6 T. L. R. 295.

1205. ———.]—*LATTER v. GOOLDEN* (1894), cited, 24 T. L. R. 297, C. A.

1206. ———.]—Where the head of a department of govt. states at the trial of an action that the production of a particular document by the department would be injurious to the public interest the judge ought not to order its production.—*WILLIAMS v. STAR NEWSPAPER CO., LTD.* (1908), 24 T. L. R. 297; 72 J. P. Jo. 65.

1207. ———.]—Where in the opinion of the Secretary of State for War it is not in the public interest that a man's army medical history sheets should be produced, they are privileged from production, & as the privilege is one of the Crown, it cannot be waived by the person to whom the documents relate.—*ANTHONY v. ANTHONY* (1919), 35 T. L. R. 559.

1208. ——— **Or other responsible official.**—Under Cos. Act, 1862 (c. 89), s. 115, the judge has a discretion as to making an order for the production of documents, & the Ct. of Appeal will not readily interfere with the exercise of his discretion, though it has jurisdiction to do so in a proper case.

The liquidator of a co. in order to obtain evidence in support of a misfeasance summons which he had issued against the directors of the co. & the auditors, applied under the above sect. for an order that the surveyor of taxes should attend for examination & produce some balance-sheets of the co. which had been delivered to him for the purpose of assessment of income tax. The surveyor objected to produce these documents, & the Board of Inland Revenue supported his objection by a resolution that their production would be "prejudicial & injurious to the public interests & service." The judge held that an order for production ought not to be made under the above sect. On appeal:—*Held*: the exercise by the judge of his discretion ought not to be interfered with.

affidavit of discovery to disclose certain correspondence & documents on the grounds that they are official communications made in pursuance of a public duty, & that the disclosure would be contrary to public policy or detrimental to the public interest or service, the ct., in the absence of proof that the refusal is frivolous or vexatious, will not go behind it.—*BARNICOTT v. MINISTER OF JUSTICE* (1913), T. P. D. 691.—*S. AF.*

g. Power of court to order production—*Though privilege claimed by public department.*—In an action by pltf. against the Commonwealth of Australia claiming money due for goods sold or delivered & work & labour done in pursuance of a written contract, it appeared that certain officials & others had made reports, given certificates, or written letters in reference to the work done & the goods supplied under the contract. In defts.' affidavit of documents there was disclosed a bundle of State documents & on behalf of defts. objection to produce these was made

on the ground that they consisted solely of departmental memoranda, etc., & in the opinion of the Minister of State their production would be prejudicial to the public service. Production of the documents was called for at the trial & pltf.'s counsel applied for inspection of them. The judge ordered the documents to be produced to him, & after examining them found they were not in the nature of State secrets or documents whose admission would be prejudicial to the public service, he ordered inspection, & they were subsequently admitted as evidence at the trial.—*QUEENSLAND PINE CO. v. AUSTRALIA (COMMONWEALTH OF)*, [1920] St. R. Qd. 121.—*AUS.*

h. ———.]—In an action for damages pursuer, who had been in partnership with defenders, averred that they had accused him of fraudulently understating the profits of the portion of the business of which he was manager. Defenders pleaded *veritas*; & craved a diligence for the recovery of documents, including in-

come tax returns of the profits of the business which had been handed in by pursuer. The Inland Revenue objected to produce these returns, on the ground that they were confidential, & that it was prejudicial to the public interest, that they should be recovered:—*Held*: the ct. had power in the exercise of its discretion to order production of documents in the custody of a public department, even though that department pleaded public interest as an objection to their production, but, in the circumstances, it was unnecessary to order production of the documents in question.—*HENDERSON v. M'GOWN*, [1916] S. C. 821.—*SCOT.*

k. Letter written to Lord Chancellor—*By magistrates—Alleged to contain libel.*—In an action by a barrister against magistrates, for a libel which was contained in a letter written by them to the Lord Chancellor, in justification of their conduct, the Lord Chancellor, in the circumstances in which it came to his hands, refused to produce it at the trial.—*CROKE v.*

Sect. 9.—Resisting production—Grounds of privilege: Sub-sects. 8 & 9. Sect. 10.]

The question for decision was not necessarily the same as that which might arise, on the hearing of the misfeasance summons, with regard to a *subpoena* for the production of the documents in question (ROMER, L.J.).

It is not in every case essential that the principal officer of a govt. department should himself attend in ct. to take such an objection to the production of documents in the possession of the department. In many cases the ct. will be satisfied of the validity of the objection by other evidence—*e.g.*, by the affidavit of a responsible officer (WRIGHT, J.).—*Re HARGREAVES (JOSEPH), LTD.*, [1900] 1 Ch. 347; 69 L. J. Ch. 183; 82 L. T. 132; 48 W. R. 241; 16 T. L. R. 155; 44 Sol. Jo. 210; 7 Mans. 354; 4 Tax, Cas. 173, C. A.

1209. Head of department—Judge of public interest—Provided court satisfied he has had his mind brought to bear on it.—KAIN v. FARRER, No. 372, *ante*.

1210. Subordinate officer — Documents his superior objects to produce.—In an action for libel *pltf.*, in his affidavit of documents, stated that he had in his custody, in his capacity of governor of a colony, copies of communications which had passed either between the Secretary of State for the Colonies & himself as such governor, or between the Royal Comr. appointed to inquire into the affairs of the colony & himself as such governor, or between the Comr. & the Secretary of State; & that the attention of the Secretary of State had been directed to the nature & dates of the documents, & that he had directed *pltf.* not to produce them, & to object to their production, on the ground of the interest of the state & of the public service, & that *pltf.* therefore objected to produce them on those grounds:—*Held*: on motion for liberty to inspect the documents, the motion must be refused.—HENNESSY v. WRIGHT (1888), 21 Q. B. D. 509; 57 L. J. Q. B. 530; 59 L. T. 323; 53 J. P. 52; 4 T. L. R. 597, D. C.

Annotations:—*Appld.* Ford v. Blost (1890), 6 T. L. R. 295. *Consd.* Wright v. Mills (1890), 62 L. T. 558; *Re Hargreaves*, [1900] 1 Ch. 347. *Refd.* Marks v. Beyfus (1890), 54 J. P. 775; Hughes v. Vargas (1893), 9 R. 661; Adam v. Fisher (1914), 110 L. T. 537; Asiatic Petroleum Co. v. Anglo-Persian Oil Co., [1916] 1 K. B. 822; Ronnfeldt v. Phillips (1918), 34 T. L. R. 556.

1211. ———.—WRIGHT & Co. v. MILLS, No. 1119, *ante*.

1212. Judge should intervene—To prevent production.—It is the duty of a judge, if it is sought

O'GRADY (1830), 4 Ir. L. Rec. 1st. ser. 42, 49.—IR.

l. Reports of officials — Made in discharge of duty.—Reports made in the discharge of the duties of their respective offices by Govt. officials to the Crown or its representatives are state documents and their production in ct. cannot be enforced.—M'ELVENEY v. CONNELLAN (1864), 17 I. C. L. R. 55.—IR.

m. application:—Held: public officers are not entitled or compellable to produce written communications made by them officially, relative to the character & conduct of a party applying for a public office, the productions being demanded with a view to an action of damages, against the writer.—EARL v. VASS (1822), 1 Sh. Sc. App. 229.—SCOT.

n. ———.—A motion for diligence to obtain an excerpt from the report of the govt. inspector of schools was refused on the ground that it was a state paper, over which the ct. had no power.—STURROCK v. GREIG (1849),

12 Dunl. (Ct. of Sess.) 166.—SCOT.

o. ———.—When a Govt. department objects to the production of documents on the ground that in their opinion the production would be prejudicial to the public service, the ct. will not consider the question, but will refuse to grant diligence on their recovery even in actions where the Govt. department is pursuer.

In an action at the instance of the Lords Comrs. of the Admty. against the owner of a trawler for damages in respect to injuries caused to one of H.M.'s vessels through a collision, pursuers objected to a diligence being granted for recovery of certain reports as to the collision, because their production would be prejudicial to the public service, & an affidavit to this effect by the Secretary to the Admty. was lodged. An objection was taken that the affidavit was not sworn by the First Lord of the Admty. The ct. repelled the objection & refused to grant diligence for recovery of the reports.—ADMIRALTY COMRS. v. ABERDEEN STEAM TRAWLING & FISHING CO., [1908] S. C. 335.—SCOT.

to produce any official document of state at the trial of an action, to interpose & prevent its being produced or any secondary evidence of it being given.—CHATTERTON v. SECRETARY OF STATE FOR INDIA IN COUNCIL, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596; 11 T. L. R. 462; 14 R. 504, C. A.

1213. Political communications — Independent sovereign prince.—An independent sovereign prince was possessed of two promissory notes of the East India Co. In the course of a war between this sovereign & the co. the notes were taken as spoils of war. The prince filed a bill against the co. for the recovery of the notes, & upon the coming in of the answer moved for the production of documents. The Master of the Rolls decided that when a govt. is properly made a *deft.* to a suit in which its acts can be impeached, it cannot refuse to produce relevant documents on the ground that they are political communications between itself & its agents, or between its agents with one another; but, upon appeal:—*Held*: *pltf.* was not entitled to production, they being political communications, relating to matters of govt. & state affairs, which had passed between the co. & their agents.

The refusal to compel such production is grounded on the reason that such production would be prejudicial to the public interests, & therefore against public policy; & also, that such matters are from their nature exempt from municipal jurisdiction.—WADEER v. EAST INDIA CO. (1856), 8 De G. M. & G. 182; 2 Jur. N. S. 407; 4 W. R. 421; *sub nom.* COORG (RAJAH) v. EAST INDIA CO., 25 L. J. Ch. 345; *sub nom.* VEER RAJUNDUR WADEER (EX-RAJAH OF COORG) v. EAST INDIA CO., 27 L. T. O. S. 30, L. J. J. *Annotation*:—*Refd.* Hennessy v. Wright (1888), 21 Q. B. D. 509.

1214. Books of post office.—CREW v. SAUNDERS (1735), 2 Stra. 1005; 93 E. R. 997.

1215. Records of divorce division.—CROPLEY (OTHERWISE INGERSOLL) v. CROPLEY (1920), 150 L. T. Jo. 281.

1216. East India Company—Report of board of inquiry.—Where an information is filed by the A.-G. against an officer of the East India Co., on charges of delinquency there, founded upon the report of a board of inquiry in India, *deft.* has no right to have an inspection of that report, nor has this ct. any discretionary power to grant it.—R. v. HOLLAND (1792), 4 Term Rep. 691; 100 E. R. 1248.

Annotation:—*Refd.* R. v. Mitchel (1848), 3 Cox, C. C. 1.

p. Precognition—Proceeded upon by procurator-fiscal.—A party who has been apprehended at the instance of the procurator-fiscal on a criminal charge, brought an action of damages against him for wrongous imprisonment, & moved for production of the principal precognition on which the procurator-fiscal had proceeded:—*Held*: the motion must be refused in respect the Crown declined to produce the precognition, & no sufficient cause for its production had been shown to the ct.—DONALD v. HART (1844), 6 Dunl. (Ct. of Sess.) 1255; 16 Sc. Jur. 543.—SCOT.

q. Instructions issued by Inland Revenue—For guidance of excise officers.—In an action at the instance of an excise officer against brewers for damages for injuries sustained by the pursuer while engaged in the performance of his duty in sampling beer on defenders' premises, defenders moved for a diligence to recover the instructions issued by the Inland Revenue as to drawing samples. The Inland Revenue objected on the ground that the recovery sought would be prejudicial to the public service:—*Held*:

1217. Books.]—STEWART v. EAST-INDIA Co. (1742), 9 Mod. Rep. 387; 88 E. R. 524.

1218. — Correspondence.]—A correspondence having passed between the ct. of directors of the East India Co. & the comrs. for the affairs of India relating to a dispute which had arisen with respect to a commercial transaction in which the co. had been engaged with a third party:—*Held*: the correspondence was, on the ground of public policy, a privileged communication, &, consequently, the co. were not bound to produce, or set forth the contents of it in answer to a bill of discovery, filed against them by such third party, in relation to the transaction to which it referred.—SMITH v. EAST INDIA Co. (1841), 1 Ph. 50; 11 L. J. Ch. 71; 6 Jur. 1; 41 E. R. 550, L. C.

Annotations:—*Apld.* Hennessy v. Wright (1888), 21 Q. B. D. 509. *Refd.* H.M.S. Bellerophon (1874), 44 L. J. Adm. 5; Hughes v. Vargas (1893), 9 T. L. R. 551; Asiatic Petroleum Co. v. Anglo-Persian Oil Co., [1916] 1 K. B. 822.

1219. — Authority to dispossess of lease.]—Demurrer to a bill against the East India Co. & their secretary, praying that defts. might discover by what authority pltf. was dispossessed of a lease for supplying Madras with tobacco, pltf. intending to bring an action, overruled.—MOODALAY v. MORTON (1785), 1 Bro. C. C. 469; Dick. 652; 28 E. R. 1245.

Annotations:—*Consd.* Bellwood v. Wetherell (1835), 1 Y. & C. Ex. 211; Glyn v. Soares (1835), 1 Y. & C. Ex. 644. *Refd.* Angell v. Angell (1822), 1 Sim. & St. 83; Glasscott v. Copper-Miners' Co. (1840), 11 Sim. 305; Prioleau v. United States & Johnson (1866), L. R. 2 Eq. 659.

1220. Letter to public officer—By private individual.]—A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication.—BLAKE v. PILFOLD (1832), 1 Mood. & R. 198, N. P.

Annotations:—*Refd.* Henwood v. Harrison (1872), L. R. 7 C. P. 606. *Mentd.* Coxhead v. Richards (1846), 2 C. B. 569.

1221. Reports of medical officer—To governor of prison.]—The reports of the medical officer of a prison in the course of his duty to the governor of the prison are not privileged from production.—LEIGH v. GLADSTONE (1909), 26 T. L. R. 139.

1222. Books of commissioners of army—At suit of officer's widow.]—Access was granted to the

books of the comrs. for stating & determining the debts of the army, at the prayer of deft., being an officer's widow.—MOODY v. THURSTON (1720), 1 Stra. 304; 93 E. R. 536.

1223. Report of inspector—To Local Government Board.]—(1) A properly authenticated order of the Local Govt. Board dismissing an appeal under Housing, Town Planning, etc., Act, 1909 (c. 44), ss. 17 & 39, is not open to objection on the ground that it does not disclose which of the officers of the Board actually decided the appeal.

(2) Applt. to the Board is not entitled as of right, as a condition precedent to the dismissal of his appeal, either (a) to be heard orally before the deciding officer, or (b) to see the report made by the Board's inspector upon the public local inquiry.—LOCAL GOVERNMENT BOARD v. ARLIDGE, [1915] A. C. 120; 84 L. J. K. B. 72; 111 L. T. 905; 79 J. P. 97; 30 T. L. R. 672; 12 L. G. R. 1109, H. L.; *revsq.* S. C. *sub nom.* R. v. LOCAL GOVERNMENT BOARD, *Ex p.* ARLIDGE, [1914] 1 K. B. 160, C. A.

Annotations:—*As to* (2) *Refd.* Hall v. Manchester Corpn. (1915), 84 L. J. Ch. 732; R. v. Amphlett, [1915] 2 K. B. 223; R. v. Central Tribunal, *Ex p.* Parton (1916), 86 L. J. K. B. 799; R. v. London Appeal Tribunal, *Ex p.* Sparrow (1918), 62 Sol. Jo. 383; Dowling v. G. E. Ry. (1919), 88 L. J. K. B. 380; R. v. Housing Appeal Tribunal, [1920] 3 K. B. 334. *Generally, Mentd.* Cassel v. Inglis, [1916] 2 Ch. 211; Clements v. County of Devon Insec. Committee, [1918] 1 K. B. 94; De Verteuil v. Knaggs, [1918] A. C. 557; Everett v. Griffiths, [1921] 1 A. C. 631; Wilson v. Esquimalt & Nanaimo Ry., [1922] 1 A. C. 202.

SUB-SECT. 9.—CORPORATION BOOKS AND DOCUMENTS.

1224. Reports & minutes of committee.]—BRISTOL CORPN. v. COX, No. 366, *ante*.

See, also, CORPORATIONS, Vol. XIII., pp. 421–424.

SECT. 10.—WAIVER OR LOSS OF PRIVILEGE.

1225. Submitting to answer.]—Where a man submits to be examined as to matters which will be penal upon him, equity will not interpose.—

the diligence must be refused.—TIERNEY v. BALLINGALL & SON (1896), 23 Ll. (Ct. of Sess.) 512; 33 Sc. L. R. 379; 3 S. L. T. 281.—SCOT.

r. Document part of correspondence between officials.]—The fact that a document forms part of the correspondence between officials of the public service is not in itself sufficient to render it a privileged document or to establish the fact that it would be prejudicial to the public interest to disclose it.

Semble: in the absence of other special reasons, such correspondence would have to be disclosed.—BARKLY WEST BRIDGE CO., LTD. v. COLONIAL GOVERNMENT (1908), 25 S. C. 49.—AF.

s. Letter addressed to Attorney-General. Relating to criminal charge.]—The production of a letter addressed to the A.-G. which relates solely to a charge of theft & its investigation, is against the public interest & the letter is absolutely privileged. For the same reason the copy of such a letter written by & in the possession of a private person, a party to a suit, or his attorney is similarly privileged.—MARINCOWITZ v. GRUMBLING (1916), C. P. D. 587.—S.

PART III. SECT. 9, SUB-SECT. 9. t. Power of court to order.]—There

is no distinction between a foreign & a domestic corpn., & notwithstanding the rule not to interfere in matters of internal management, the ct. has power to compel the inspection of books in proper cases.—MERRITT v. COPPER CROWN CO. (1902), 36 N. S. R. 383.—CAN.

a. Communications between company & adjuster.]—Communications between an insurance co. & their adjuster, in relation to an investigation concerning a loss by fire, are privileged communications, & the co. will not be compelled to produce them in a suit for the recovery of the insurance for such loss.—KNAPP v. CITY OF LONDON INSURANCE CO. (1885), 29 L. C. J. 233; 8 L. N. 89.—CAN.

b. Reports of officials—Made in course of duty.]—Reports of the various officials & servants of a railway co. upon the occurrence of a fire alleged to have been caused by sparks from a locomotive, & as to the condition of the locomotive, if made in the regular course of duty under the rules of the co., are not privileged from production.—BAIN v. CANADIAN PACIFIC RY. CO. (1905), 15 Man. L. R. 544.—CAN.

c. Books of account—Where accuracy of balance sheet compiled from books admitted.]—In an action for slander with reference to the financial position of a society, deft. pleaded that

so far as matters of fact were stated, they were true in their ordinary sense, &, so far as comments were concerned, they were fair & made *bona fide* on a matter of public interest, & the balance sheets of the society were relied on by deft. in support of his allegations. In one of their affidavits of discovery pltf. set out certain books of account & other documents from which these balance sheets had been compiled. Deft. applied for inspection of these books & documents:—*Held*: inasmuch as the balance sheets were not impeached but their accuracy was in fact admitted, & they were relied on by deft. in support of his case, the books of account & other documents from which these balance sheets were compiled were not relevant to the issue raised, & the ct. would not order inspection to be given.—IRISH AGRICULTURAL WHOLESALE SOCIETY v. M'COWAN (1913), 47 I. L. T. 80.—IR.

PART III. SECT. 10.

d. Whether privilege lost—By making discovery material.]—In measure of damages.]—In an action for libel brought against a newspaper proprietor, deft. will not, as a general rule, & in the absence of special reasons, be ordered to disclose the writer's name of an anonymous letter which appeared in deft.'s newspaper

Sect. 10.—Waiver or loss of privilege. Sects. 11

EAST-INDIA CO. v. ATKYNS (1720), 1 Com. 346 ; 1 Stra. 168 ; 92 E. R. 1105, L. C.

*Annotations:—***Refd.** **South-Sea Co. v. Bumsted** (1728), 1 Eq. Cas. Abr. 77 ; **Green v. Weaver** (1827), 1 Sim. 404.

1226. —.]—**TAYLOR v. MILNER**, No. 563, *ante*.

1227. Setting out part of document—Remainder privileged.]—BELSHAM v. HARRISON, BELSHAM v. PERCIVAL, No. 775, *ante*.

1228. Offering to produce—Privileged documents.]—Defts. stated in the beginning of their answer that they could not answer further than as appeared therein, & in the various documents which were set forth in the schedule, & which they offered to produce. In the latter part of the answer they admitted the possession of various documents, but insisted that some of them were privileged communications, & that they were, therefore, not bound to produce them:—**Held**: after the offer of production in the beginning of the answer, pltf. was entitled to the production of all the documents mentioned in the schedule.—**M'INTOSH v. GREAT WESTERN RY. CO.** (1849), 1 Mac. & G. 73 ; 1 H. & Tw. 41 ; 18 L. J. Ch. 169 ; 13 L. T. O. S. 201 ; 13 Jur. 179 ; 41 E. R. 1190, L. C.

*Annotations:—***Distd.** **Mornington v. Mornington** (1861), 2 John. & H. 697. **Refd.** **Penarth Harbour, Dock & Ry. v. Cardiff Waterworks Co.** (1860), 7 C. B. N. S. 816. **Mentd.** **Waring v. M. S. & L. Ry.** (1850), 14 Jur. 613.

1229. By reference in pleadings.]—ROBERTS v. OPPENHEIM, No. 390, *ante*.

SECT. 11.—PRODUCTION FOR STAMPING.

See Evidence Act, 1851 (c. 90), s. 6.

1230. Party requiring production not an executing party—Interest in deed only alleged.]—The ct. will compel the production by a deft. of an unstamped agreement in his custody, to which pltf. claim to be parties in interest, upon the instance of pltf., in order that they may get it stamped, although pltf. be not an instrumentary party, & although pltf.'s interest no otherwise appears than upon their own declaration, which proves a claim, but not an interest. *Semble*: the ct. would compel a pltf. to produce deeds, by attachment.—**BATEMAN v. PHILLIPS** (1811), 4 Taunt. 157 ; 128 E. R. 288.

*Annotations:—***Consd.** **Ratcliffe v. Bleasby** (1825), 3 Bing. 148 ; **Rankin v. Hamilton** (1850), 15 Q. B. 187. **Refd.**

& contained the libel complained of. In an action for libel contained in an anonymous letter published in deft.'s paper, defts. on discovery refused to disclose the writer's name. They later gave notice of their intention to give in mitigation of damages, evidence that the words complained of were contained in a letter forwarded to the editor by a member of the public, & published in the ordinary course of business & *bona fide*. On pltf.'s application for further discovery:—**Held**: defts. had, by their notice, made the name of the correspondent material to the issue of damages, & it must be disclosed.—**WARR v. SYME & CO.**, [1914] V. L. R. 639.—**AUS.**

e. — *By reading to defendant's solicitor—Portions of privileged letters.]—*Pltf. sued deft. for specific performance of an agreement to purchase certain premises. Deft.'s solr. prepared a draft assignment which contained a covenant of indemnity by pltf., & sent it to pltf.'s solr., P. & W., for approval. W. called upon B., deft.'s solr., & informed him that M.

one of the pltf., refused to sign any deed which contained the covenant. At this interview W. read to B. portions of a letter written with reference to the proposed deed by the solrs. for two of the pltf. to V., the solr. of M., & of another letter written by V. to M. Deft. called upon pltf. to produce these letters for inspection:—**Held**: the letters were privileged, & the fact that portions of them had been read to deft.'s solr. was no waiver of the privilege as regarded the parts which were not read.—**KAY v. POORUNCHAND POONALAL** (1880), 1 L. R. 4 Bom. 631.—**IND.**

f. — *By setting out in schedule documents as material—Order to produce scheduled documents not appealed against.]—*Petitioners filed an affidavit stating that the matters in issue would appear from the documents mentioned in a schedule annexed thereto. Upon this affidavit the case was again referred to the master, who ordered the production of all the documents in petitioner's power relating to the matter, & the order referred to that

Threlfall v. Webster (1823), 7 Moore, C. P. 559 ; **Lawrence v. Hooker** (1828), 2 Moo. & P. 9 ; **Smith v. Winter** (1838), 1 Horn. & H. 45 ; **Hall v. Bainbridge** (1845), 1 New Pract. Cas. 243.

1231. —.]—In an action between A. & B., the ct. refused a rule to compel B. to produce, for the purpose of stamping, an agreement between B. & C., although by an affidavit of C.'s, it appeared that the act complained of by A. arose out of this agreement.—**LAWRENCE v. HOOKER** (1828), 5 Bing. 6 ; 2 Moo. & P. 9 ; 6 L. J. O. S. C. P. 193 ; 130 E. R. 961.

*Annotation:—***Refd.** **Hall v. Bainbridge** (1845), 3 Dow. & L. 92.

1232. —.]—Where defts. were alleged to have been in possession of a letter sent to them by another party, which letter, pltf. contended, operated as an agreement in which he was interested, though no party to it, & which it would be necessary for him to put in evidence as part of his case, the ct. made absolute a rule calling upon defts. to produce it at the stamp office, in order that it might be stamped as an agreement at the expense of pltf.—**HALL v. BAINBRIDGE** (1845), 3 Dow. & L. 92 ; 1 New Pract. Cas. 243 ; 14 L. J. Q. B. 289 ; 5 L. T. O. S. 152 ; 9 Jur. 451.

1233. — Tenancy agreement—Production sought by purchaser of lessor.]—If two parts of an agreement be interchangeably executed between landlord & tenant, in an action upon the agreement by a purchaser of the premises, the ct. will not compel the tenant to produce his part to be stamped, unless such purchaser has applied to the vendor, or used every endeavour, without success, to find him.

Qu.: as to the power of the ct. to restrain a party from taking an objection to evidence at *nisi prius*, e.g., the production of an unstamped agreement.—**TRAVIS v. COLLINS** (1832), 2 Cr. & J. 625 ; 2 Tyr. 726 ; 1 L. J. Ex. 244 ; 149 E. R. 263.

*Annotation:—***Consd.** **Rankin v. Hamilton** (1850), 15 Q. B. 187.

1234. Original alleged to be lost—Production of copy.]—Where deft. surreptitiously obtained possession of an unstamped agreement executed by himself & pltf., thereby preventing pltf. from affixing a stamp as he had intended, in 21 days after execution, & then swore that he had lost the agreement:—**Held**: he must produce a copy in his possession to pltf., & if pltf. produced that copy stamped at the trial, deft. should be precluded from producing the original.—**BOUSFIELD v. GODFREY** (1829), 5 Bing. 418 ; 2 Moo. & P. 771 ; 7 L. J. O. S. C. P. 158 ; 130 E. R. 1122.

*Annotations:—***Distd.** **Trairs v. Collins** (1832), 2 Cr. & J.

affidavit. That order was not appealed against. Petitioners refused to produce some of these documents, the relation of which to the matter in issue they denied by affidavit. The master ordered the production of the withheld documents. Against that order petitioners appealed:—**Held**: their first affidavit, & the order unappealed against, concluded them ; & they must produce those documents.—**REILLY v. REILLY** (1866), 18 Ir. Jur. 166.—**IR.**

g. — *Confidential letter recovered by a diligence—No motion made for withdrawal from process.]—*A letter alleged to be confidential had, in the course of making up the record, been recovered from one of the parties, by a diligence at the instance of the other party, & no motion had been made for its withdrawal from process:—**Held**: an objection to its production at the trial must be repelled.—**HIERCULES INSURANCE CO. v. HUNTER** (1836), 15 Sh. (Ct. of Sess.) 800 ; 12 Fac. Coll. 786.—**SCOT.**

625. *Apld.* Blair v. Ormond (1847), 1 De G. & Sm. 428. *N.F.* Rankin v. Hamilton (1850), 15 Q. B. 187. *Reid.* Goodliff v. Fuller (1843), 14 M. & W. 4; Smith v. Henley (1844), 13 L. J. Ch. 221.

1235. Where one part of document has been lost—Production of counterpart.]—Where one part of a document has been lost, the ct. will compel the party holding the other part, or his attorney if he holds it, to produce it at the stamp office, for the purpose of having it stamped, though it is not held on any trust for the party applying.—NEALE v. SWIND (1832), 2 Cr. & J. 278; 1 Dowl. 314; 2 Tyr. 318; 1 L. J. Ex. 118; 149 E. R. 120. *Annotation:—Reid.* Hall v. Bainbridge (1845), 3 Dow. & L. 92.

1236. ———.]—Where an agreement had been executed in two parts, one of which was lost, the ct. at the instance of pltf. to whom the lost part had belonged, ordered deft. to produce the part in his possession for the purpose of having the same stamped, pltf. paying the stamp duty, penalty & costs.—BRYSON v. WARWICK & BIRMINGHAM CANAL CO. (1852), 20 L. T. O. S. 154.

1237. Document in hands of third party—Agent—Applicant suing principal.]—B. & C. entered into partnership by an unstamped agreement, which was in the hands of S. A. sued B. & C. as partners, for goods sold, & applied to S. to take or send the agreement to the stamp office that A. might get it stamped; S. refused to do so, & a judge at chambers would not order him to do so, as he held the agreement for B. & C. & did not in any way hold it for A.—DYKE v. BREWER (1849), 2 Car. & Kir. 828.

1238. ——— Discharged by applicant from producing.]—JAMES v. ISAACS (1853), 21 L. T. O. S. 62.

1239. In action at assizes—Production compelling attendance of party at Somerset House.]—A judge at the assizes will not compel the production of a document for the purpose of having it stamped, where there is not time to transmit it through the agents, & the granting of the order would compel the attendance of the party or his attorney at Somerset House.

Semble: where a person, liable as a co-deft., although not joined in the action, places a document in the hands of defts.' attorneys, who are also his attorneys, such document may, for the purpose of production to be stamped, be treated as in defts.' possession.—JAMES v. ISAACS (1853), 21 L. T. O. S. 172.

PART III. SECT. 12.

1240 i. Discretion of court.]—The ct. has power to compel the inspection of books in proper cases.—MERRITT v. COPPER CROWN CO. (1902), 36 N. S. R. 383.—CAN.

h. ——— Claim of privilege set up.]—The practice respecting inspection is distinct from the practice in obtaining discovery, & a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive.—STAR MINING & MILLING CO. v. WHITE CO. (1902), 9 B. C. R. 422.—CAN.

k. When granted—After demand for particulars.]—The fact of deft. having demanded particulars of pltf.'s claim prevents pltf. from obtaining an order for inspection of deft.'s books until an application is made to remove the stay of proceedings created by the demand of particulars.—JONES v. MARITIME BANK OF CANADA (1881), 20 N. B. R. 544.—CAN.

l. Form of.]—The usual order for production was varied in this case by directing only that the books & documents be produced to pltf. or their solrs., on demand after twenty-four hours notice at the co.'s general offices,

& that pltf.'s or their solrs. be allowed to take copies of, extracts from, such portions of the contents as related to the matters in question.—MAXWELL v. MANITOBA & N. W. RY. CO. (1896), 11 Man. L. R. 149.—CAN.

m. ——— Against solicitor.]—Where a solr. was the mtgee. under a chattel mtge. from a client an order was obtained against him by an execution creditor of the grantor for production of his books & papers, except those which were privileged as containing anything of a confidential nature as between solr. & client, in order that the *bond fides* of the alleged consideration for the mtge. might be investigated.—SMITH v. MCKAY (1898), 4 Terr. L. R. 202.—CAN.

n. ———.]—The ct. in ordering production should by its order specify the time & place of inspection & give direction as to the manner of inspection.—GOBINDA MOHAN DAS v. KUNJA BEHARY DASS (1909), 14 C. W. N. 147.—IND.

o. Enforcement of.]—It is a proper & convenient practice to apply to the ct. to enforce an order for inspection when the resistance is not contumacious.—STAR MINING & MILLING CO. v. WHITE CO. (1902), 9 B. C. R. 422.—CAN.

SECT. 12.—ORDER FOR INSPECTION.

See R. S. C., Ord. 31, r. 18 (1), (2).

1240. Discretion of court.]—BUSTROS v. WHITE, No. 478, *ante*.

1241. ——— Documents referred to in affidavit.]—*Re* FENNER & LORD, No. 560, *ante*.

1242. ———.]—HOPE v. BRASH, No. 479, *ante*.

1243. ——— Production admitted to be necessary.]—Pltf.'s lightship, while at her station in the Mersey, was run into & sunk by defts.' steamship. Defts. admitted liability, agreed to a reference, & applied for an order to inspect pltf.'s books with a view to ascertain the figures upon which pltf. based the value they set upon their vessel:—*Held:* defts. were entitled to an order for the production of the books forthwith, as the only material question was the value of the lightship at the date of the casualty, & it would assist defts. if, before going to the reference, they were in possession of the figures relating to the original cost, & subsequent depreciation in value, of the lightship.

It is admitted that at the hearing the books must be produced. Why should they not be produced beforehand to enable defts. to be in possession of those facts before going to the reference (FLETCHER MOULTON, L.J.).—THE PACUARE, [1912] P. 179; 81 L. J. P. 143; 107 L. T. 252; 12 Asp. M. L. C. 222, C. A.

1244. ——— Documents not disclosed.]—Where a party applying for inspection of a specific document under R. S. C., Ord. 31, r. 18, makes an affidavit specifying such document, & stating that he believes the document to contain entries which he would be entitled to inspect, & that it is in the possession or power of the other party, the ct. may order inspection of such document, notwithstanding that the other party may have previously made an affidavit of documents under r. 13 omitting to disclose such document, & concluding with the general averment that, save as therein disclosed, he has not in his possession or power "any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in the action."

The proper course is to entertain the application upon an affidavit by appct. as to the other side's

p. ———.]—Where a party has not afforded to his adversary all the information & facilities in his power for the inspection of documents, etc., to be relied on at the trial, the ct. will direct an inspection or copy, or both thereof, to be given, according to the circumstances of the case.—O'NEILL v. DELACHORIS (1857), 9 Ir. Jur. 50.—IR.

q. Order for further inspection—After inspection given by consent.]—Where inspection of documents had been given by consent, an application to the ct. for further inspection was granted, & the ct. declined to give effect, as too technical, to an objection that a demand in writing for inspection had not been made prior to the application to the ct.—CUSHING SULPHITE CO. v. CUSHING (1903), 23 C. L. T. 231; 2 N. B. Eq. Rep. 469, 472.—CAN.

r. Against third party.]—An order obtained by pltf. requiring a co., not a party to the action, to produce documents for inspection by pltf. before the trial was set aside.—MCCURDY v. OAK TYRE & RUBBER CO., LTD. (1919), 44 O. L. R. 235; 15 O. W. N. 193.—CAN.

s. Notice of.]—The ct. will grant an application for the inspection of

Sect. 12.—Order for inspection. Sect. 13: Sub-sects. 1 & 2.]

possession of the documents, & as to their relevancy, & then to allow the other party to make an affidavit in answer (VAUGHAN WILLIAMS, J.).—WIEDEMAN v. WALPOLE (1890), 24 Q. B. D. 537; *reversd.* on other grounds, 24 Q. B. D. 626, C. A.

SECT. 13.—THE INSPECTION.

SUB-SECT. 1.—PLACE OF INSPECTION.

See R. S. C., Ord. 31, r. 17.

1245. General rule.]—LESLIE v. CAVE (1886), 31 Sol. Jo. 11.

1246. ———.]—LLOYDS BANK, LTD. v. LUCK (1901), 45 Sol. Jo. 596.

1247. In discretion of master.]—The ct. leaves it to the discretion of the master to determine, under the usual order for production of books, whether they are to be merely produced from time to time or to be deposited with the master.—HENNA v. DUNN (1822), 6 Madd. 340; 56 E. R. 1121.

1248. ———.]—A party ordered to produce books, etc., before the master, is bound to leave them if the master thinks fit so to direct.—SIDDEN v. LIDDIARD (1827), 1 Sim. 388; 57 E. R. 623.

*Annotation:—*Folld. Shirley v. Fellers (1836), 1 My. & Cr. 304.

1249. Specified place—Evidence Act, 1851 (c. 99).]—Where an application is made for inspection of documents under sect. 6 of the above Act, a place for the inspection should be named.—ROGERS v. TURNER (1851), 21 L. J. Ex. 8; 18 L. T. O. S. 109; *sub nom.* ROGERS v. TURNER, CHRISTIAN v. HORWOOD, 15 Jur. 1064.

1250. Variation of place—Discretion of judge.]—As a general rule, after a judge has made the usual order for the production of documents at any particular place, he or his successor, or his representative on the bench, has jurisdiction at any subsequent period, if circumstances appear to warrant it, to direct that those documents previously directed to be produced at one place, or some of them, shall be produced at another place.

Such an order is an exercise of the judge's discretion, & an appeal therefrom will not be readily entertained.—PRESTNEY v. COLCHESTER CORPN. (1883), 24 Ch. D. 376; 52 L. J. Ch. 877; 48 L. T. 749; 31 W. R. 757, C. A.

*Annotation:—*Refd. Lloyds Bank v. Luck (1901), 45 Sol. Jo. 596.

documents, e.g., bills of exchange; but timely notice must be given to the party having the custody of them, to enable him to permit the inspection at a convenient time.—NERWICH v. GREGORY (1855), 7 Ir. Jur. 152.—IR.

PART III. SECT. 13, SUB-SECT. 1.

1245 i. General rule.]—Upon an application for the production of documents under Chancery (Ireland) Act, 1867, ss. 71, 73, the ct., as a general rule, will order the documents to be deposited in the record & writ office; but it will sanction their production at the office of the party required to produce, either upon the consent of the party requiring their production, or an affidavit by the party required to produce, stating that the documents are in constant & necessary use, & that they cannot be removed without inconvenience.—LITTLE v. KIRKWOOD (1875), 9 I. R. Eq. 325.—IR.

1247 i. Indiscretion of master.]—The discretion of a master in ordering a place for production ought not to be lightly interfered with.—PORT HURON

v. GWIN, [1917] 1 W. W. R. 1310; 10 Sask. L. R. 60.—CAN.

1253 i. In court—When forgery suspected.]—On an application by deft., who was sued as an acceptor of a bill of exchange, the ct. will order the bill to be lodged with the officer, for the personal inspection of the deft. only when it appears upon his affidavit that the cause of his refusal to pay is a reasonable suspicion of the acceptance having been forged.—RICHEY v. ELLIS (1832), Alc. & N. 111.—IR.

t. — Document filed in previous proceedings.]—Pltf., in his affidavit of documents, mentioned "other letters & papers filed herein, the particulars of which I cannot now depose to" & stated that such documents were filed in ct. on the motion made by deft. for his discharge from custody:—*Held:* pltf.'s affidavit was sufficient & deft. must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the ct. at his own place of abode.—LYON v. MCKAY

1251. — Right of appeal.]—PRESTNEY v. COLCHESTER CORPN., No. 1250, *ante*.

1252. Discretion of judge—Right of appeal.]—When a judge of first instance in ordering production of documents directs them to be produced at a particular place, he is exercising a discretion with which the Ct. of Appeal will not interfere.—BUSTROS v. BUSTROS (1882), 30 W. R. 374, C. A.

*Annotation:—*Refd. Prestney v. Colchester Corpn. (1883), 31 W. R. 757.

1253. In court—When forgery suspected.]—Though deft. does not offer by his answer to produce a deed, yet the ct. will order him to leave it with his clerk in ct. to be inspected by the other side, wherever there is a suspicion of its being forged.—HATTON v. MARR (1740), Barn. Ch. 279; 27 E. R. 645, L. C.

1254. ———.]—Under a decree in an administration suit, certain creditors supported their claim in chambers by the production of certain documents. The residuary legatees, believing these documents to be forged, applied, by summons, to have them deposited with the chief clerk, & for liberty to have them examined by experts, to test their genuineness:—*Held:* the documents must be deposited with the chief clerk for one month, & appcts. should have free access to them during that time.—BLAKESLEY v. PEGG (1869), 20 L. T. 57.

1255. ———.]—In an action against deft. as acceptor of a bill of exchange, the ct. will not compel pltf. to deposit it in the hands of the prothonotary, to enable deft. to inspect it, in order to ascertain whether his signature to it has been forged.—HILEYARD v. SMITH (1824), 1 Bing. 451; 2 L. J. O. S. C. P. 74; 130 E. R. 181; *sub nom.* HILLIARD v. SMITH, 8 Moore, C. P. 586.

*Annotation:—*Refd. Curtis v. Curtis (1833), 3 Moo. & S. 819.

1256. — Whether ordered when inconvenient.]—On a motion for the production of documents, deft. was permitted to show, by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs.—GARDNER v. DANGERFIELD (1842), 5 Beav. 389; 49 E. R. 628.

1257. — Minute-book.]—A.-G. v. WHITWOOD LOCAL BOARD, A.-G. v. CASTLEFORD LOCAL BOARD, No. 1272, *post*.

1258. At place of business—Documents in constant use.]—When a deft. by his answer admits the possession of books & papers relating to the matters in question, but states that they are in

(1885), 10 P. R. 557.—CAN.

a. ———.]—Where the ct. has given leave to take out a grant of letters of administration *ad colligenda bona*, & a person, other than the person to whom such leave, has been given, is in possession of papers of the deceased, without an inspection of which the grant cannot be prepared, but of which the person so given leave cannot obtain inspection, then the ct. will order the person in possession of such papers to lodge them in ct.—*In the Goods of*, WILSON (No. 1) (1907), 42 I. L. T. 38.—IR.

b. At place of business.]—Deft. was owner of factories at & near A. & had also a place of business in Bombay. He entered into a contract in Bombay with the pltf. to be performed at the factories. Pltf. brought a suit for damages for the breach of this contract, & demanded inspection in Bombay of all deft.'s books relating to the business of the factories. Deft. was willing to give the inspection asked for, but contended that it should be had at A., where all the books in question

constant use in his business, & necessary for that purpose; the ct. only orders, in the first instance, that they shall be produced to pltf. at the place of business at which they are stated to be in use; leaving it open to pltf., if he does not obtain a satisfactory inspection of them there, to apply to the ct. for a further order.—*GRANE v. COOPER* (1838), 4 My. & Cr. 263; 41 E. R. 103, L. C.

Annotations:—*Consd.* *Prentice v. Phillips* (1843), 2 Hare, 152. *Refd.* *Sweet v. Hunter* (1845), 9 Jur. 807.

1259. Abroad — Constantinople.—One co-partner, who lived at Constantinople, brought his action against the other, who lived in London, for goods consigned to deft., filed a bill for a discovery, account & injunction, & required, that deft. might set forth all books, papers, etc., which belonged to him, or concerned any account between them, *in his verbis, et figuris*. Deft. in his answer set forth a particular of all such books, & papers, & offered to produce them at Constantinople, upon oath, to any person pltf. should appoint, & to let him have copies:—*Held*: pltf.'s demand was unreasonable. & deft.'s offer sufficient.—*HORNBY v. PEMBERTON* (1728), Mos. 57; 25 E. R. 268, L. C.

1260. — Japan.—*WHYTE v. AHRENS*, No. 239, *ante*.

1261. Office of party's solicitor.—Pltf. being a pauper, the ct., instead of ordering the papers relating to the matters of the suit, which were in deft.'s custody, to be deposited with the clerk in ct., directed an inspection at the office of deft.'s solr.—*ROBERTS v. LLOYD* (1838), 7 L. J. Ch. 115.

1262. ——An order was made directing preliminary inquiries, & for the production of the necessary papers. Subsequently, an order was made for an inspection of all papers in deft.'s possession at his solr.'s office:—*Held*: the latter did not supersede the former, & the master might still order a production in the course of the inquiries directed.—*WHICKER v. HUME* (1846), 9 Beav. 418; 7 L. T. O. S. 386; 50 E. R. 404.

1263. ——Deft., by his affidavit, admitted that he had in his possession a certain document. Deft. had, previously to a notice of motion, offered pltf. inspection of this document & to furnish her with a copy of it at her expense. Pltf., by her notice of motion, asked that this document might be deposited with the clerk of records & writs, with liberty to her to inspect, etc. The ct. declined to make an order for the deposit of the document with the clerk of records & writs, but gave liberty to pltf. to inspect it at the office of deft.'s solrs., & to take copies thereof or extracts therefrom.—*JEFFERIES v. BIGGS* (1851), 20 L. J. Ch. 17 L. T. O. S. 162.

were kept, & objected to bringing the books down to Bombay as demanded by pltf.:—*Held*: the contract, though made in Bombay, having been intended to be performed at a considerable distance from Bombay, at & near A., where the business was conducted, & where the books relating to the business were kept, A. was the proper place at which to give inspection.—*KEVALDAS SAKARCHAND v. PESTONJI NASSERVANJI* (1881), 1 L. R. 5 Bom. 467.—*IND.*

c. Office of party's solicitor — Deeds of estate sold in lots.—Purchasers of an estate, sold in several lots under decree, requiring to compare with the original deeds lodged in the master's office, for the purposes of the sale, the copies furnished to them with the abstract of title, the ct. ordered that the deeds should be handed over to pltf.'s solr., he undertaking to relodge them after the comparison should be made; & that pltf.'s solr. should produce them in his office to the

solrs. for the several purchasers, & permit them to compare the said deeds with the copies furnished, or to be furnished to them.—*REYNOLDS v. REYNOLDS* (1843), 6 L. Eq. R. 75.—*IR.*

PART III. SECT. 13, SUB-SECT. 2.

d. General rule.—As a rule only a party or his attorney may inspect the books disclosed by the other party; under special circumstances leave will be granted for a third person to inspect such books for a party, but only when no reasonable objection exists to the particular person suggested. Where pltf., who desired to inspect deft. co.'s books, alleged that they & their attorneys had insufficient knowledge of books to obtain therefrom the necessary information, & applied that S. should be allowed to inspect the books, but deft. co. objected, that S. had formerly been its managing director, whose employment had terminated by payment of salary in

1264. ——Deeds & documents admitted by the answer being very numerous, the usual order for their production may be qualified by a direction that they be inspected, etc., at the office of deft.'s attorney.—*CREASE v. PENPRASE* (1837), 2 Y. & C. Ex. 527; 160 E. R. 505.

SUB-SECT. 2.—BY WHOM MADE.

1265. By witnesses.—A rule *nisi* having been obtained by a deft. for depositing with the master of the ct. a contract declared upon, with liberty for deft., his attorney & witnesses, to inspect, on an affidavit stating that the signature thereto was a forgery, the ct. made the rule absolute to the extent only of directing that deft. & his witnesses should have inspection of the documents in the hands of pltf.'s attorney, upon payment of costs.—*THOMAS v. DUNN* (1843), 6 Man. & G. 274; 6 Scott, N. R. 834; 1 L. T. O. S. 315; 134 E. R. 897.

1266. ——Documents produced at chambers in an administration suit, by a claimant in support of his claim as a creditor of testator, ordered to be produced before the chief clerk for the inspection of witnesses on the part of pltf., in order to test their authenticity, solrs. for both parties being permitted to be present at the production & inspection.—*GROVES v. GROVES* (1853), Kay App. xix; 23 L. J. Ch. 199; 69 E. R. 322; *previous proceedings*, 22 L. T. O. S. 184.

Annotations:—*Consd.* *Swansea Vale Ry. v. Budd* (1866), L. R. 2 Eq. 274. *Expld. & Distd.* *Boyd v. Petrie* (1868), 3 Ch. App. 818. *Refd.* *A.-G. v. Whitwood L. B.* (1871), 19 W. R. 1107.

1267. By agent—Accountant.—Where *STUART, V.-C.*, had decided that a professional accountant was an agent within the common order to inspect documents by pltf., "his solr. & agent," & might, therefore, be employed for that purpose; & had made an order for the commitment of deft. for contempt, who refused to permit the professional accountant (who *STUART, V.-C.*, considered was a proper person to be employed), & had ordered him to pay pltf. £10 for his costs of the motion to commit:—*Held*: without deciding whether an accountant was or was not an "agent" within the order, the order for commitment must be discharged on the ground that the particular accountant was not a proper person to be employed by reason of his personal connection with another railway co.—*DRAPER v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1861), 3 De G. F. & J.

Heu of notice, & who had disposed of all his shares in deft. co., & that he was connected with rival cos.:—*Held*: as a reasonable objection to S. existed, the application should be refused.—*BETHESDORP INSTITUTE (SUPERVISORS) v. PORT ELIZABETH SALTPAN CO.* (1918), E. D. L. 261.—*S. AF.*

1267 i. By agent—Accountant.—A shareholder in a joint-stock co. brought an action to have his name removed from the register on the ground of fraudulent misrepresentation in the prospectus issued by the co., & applied for leave to inspect, by an accountant, books of account disclosed in the affidavit of documents made by the secretary of the co.:—*Held*: under the special circumstances of the case, & to save expense, such an order might be made.—*GIBNEY v. CLAYTON & Co.* (1891), 27 L. R. Ir. 75.—*IR.*

e. Specifically mentioned in affidavit.—When it is sought to have special persons to inspect the books

Sect. 13.—The inspection: Sub-sects. 2 & 3.]

23 ; 30 L. J. Ch. 236 ; 3 L. T. 685 ; 7 Jur. N. S. 86 ; 9 W. R. 215 ; 45 E. R. 786, L. JJ.

Annotations:—Consd. Bonnardet v. Taylor (1861), 1 John. & H. 383. *Apld.* A.-G. v. Whitwood L. B. (1871), 19 W. R. 1107 ; Dadswell v. Jacobs (1886), 55 L. T. 751.

1268. ———.] — Where it is not made to appear that a party is not competent to make the inspection by himself or his agents in the usual way, an accountant will not be appointed as a special agent for that purpose.—*COLEMAN v. WEST HARTLEPOOL HARBOUR & RY. CO.* (1861), 4 L. T. 467 ; *subsequent proceedings*, 5 L. T. 266.

1269. ———.] — Under the common order for production of documents the ct. will, upon a proper case being made out, direct inspection by an agent other than a solr. In the present case the ct. directed books of account to be inspected by an accountant.—*BONNARDET v. TAYLOR* (1861), 1 John. & H. 383 ; 30 L. J. Ch. 523 ; 3 L. T. 884 ; 7 Jur. N. S. 328 ; 9 W. R. 452 ; 70 E. R. 795.

Annotations:—Refd. Prestney v. Colchester Corpn. (1883), 24 Ch. D. 376 ; Ormerod, Grierson v. St. George's Ironworks, [1905] 1 Ch. 505.

1270. ——— **Not if also co-defendant.]** — Under an order that one of defts. should allow pltf's., their solrs. or agents, to inspect certain documents : — *Held* : deft. was justified in refusing to allow the inspection to take place in the presence of a co-deft., although employed as an agent of pltf's.—*BARTLEY v. BARTLEY* (1852), 1 Drew. 233 ; 22 L. J. Ch. 47 ; 20 L. T. O. S. 140 ; 16 Jur. 1062 ; 1 W. R. 48 ; 61 E. R. 440.

Annotations:—Consd. Draper v. M. S. & L. Ry. (1860), 30 L. J. Ch. 95. *Refd.* Bonnardet v. Taylor (1861), 1 John. & H. 383.

1271. ——— **Surveyor.]** — Where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans & documents, & deft. deposed that he was not possessed of any engineering knowledge, & that an inspection of the documents would be useless to him without the aid & assistance of an engineer : — *Held* : the order for production & inspection of documents was to extend to deft.'s surveyor.—*SWANSEA VALE RY. CO. v. BUDD* (1866), L. R. 2 Eq. 274 ; 35 L. J. Ch. 631 ; 12 Jur. N. S. 561 ; 14 W. R. 668.

1272. ——— **Land agent.]** — (1) Under the common order for the inspection of documents made in a suit for restraining a nuisance, pltf. has a right to have the documents inspected by his land agent, although he is a witness in the suit.

(2) The minute-book of a local board will, in a proper case, be ordered to be deposited in the record & writ clerk's office for inspection, notwithstanding that it is in constant use by the board.—*A.-G. v. WHITWOOD LOCAL BOARD, A.-G. v.*

of the adverse party there must be special circumstances & the person to be allowed to inspect should be named in the affidavit & his qualifications shown.—*CANADIAN BANK OF COMMERCE v. WILSON* (1908), 8 W. L. R. 266.—*CAN.*

1. ——— **Not by person formerly employed by opposite party.]** — When under an order giving liberty to a party to a suit, his attorneys & agents, to inspect & peruse the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the ct. some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of the suit. The ct. ought not to permit a person

formerly in the service of the deft. to inspect as pltf.'s agent deft.'s books which had been in his charge.—*ENAMUL HUQ v. EKRAMUL HUQ* (1897), 1 L. R. 25 Calc. 284.—*IND.*

g. ——— **Solicitors of purchasers—Estate sold in lots.]** — Purchasers of an estate, sold in several lots under decree, requiring to compare with the original deeds lodged in the master's office, for the purposes of the sale, the copies furnished to them with the abstract of title, the ct. ordered that the deeds should be handed over to pltf.'s solr., he undertaking to relodge them after the comparison should be made ; & that pltf.'s solr. should produce them in his office to the solrs. for the several purchasers, & permit them to compare the deeds with the copies furnished, or to be furnished to them.—*REYNOLDS*

CASTLEFORD LOCAL BOARD (1871), 40 L. J. Ch. 592 ; 19 W. R. 1107.

1273. ——— **Duly authorised solicitor's clerk.]** — (1) L., a partner in an Indian firm now dissolved, had, in a suit against his former partners, obtained an order for production of the books, with leave to inspect. L. became bkpt., & B., his assignee, revived the suit. Upon application by B. to have the benefit of the order, it appearing that the books were very voluminous, & that the accounts were kept in Indian currency : — *Held* : B. was entitled to the benefit of the order to inspect ; & to take in an accountant.

(2) An order having been made that B., his solrs. or agents, be at liberty to inspect documents, with the assistance of L. as his accountant : — *Held* : L., if accompanied by a duly authorised clerk of B.'s solrs.' firm was at liberty to inspect.—*LINDSAY v. GLADSTONE, BROOKE v. GLADSTONE* (1869), L. R. 9 Eq. 132.

1274. ——— **Specifically mentioned in affidavit—Different from person named in the bill.]** — Under the usual order for production of documents to pltf's., their solrs. or agents, pltf's., a foreign republic, required defts. to produce the documents to S., who was stated in an affidavit made by pltf's. solr. to be the duly appointed agent of pltf's., & the person from whom he received his instructions in the suit, though Y. was the person named in the bill as the agent in this country of the republic. Defts. having refused to produce the documents to S. : — *Held* : S. was the duly authorised agent of pltf's. within the meaning of the order.—*COSTA RICA REPUBLIC v. ERLANGER* (No. 2) (1875), 44 L. J. Ch. 402 ; 23 W. R. 462, L. JJ.

1275. ——— **Not by relative of party.]** — An order gave liberty to "pltf., his solrs. or agents," to inspect documents in deft.'s possession : — *Held* : this did not authorise the inspection by a non-professional relative of pltf., though alleged to be the only person conversant with the accounts. The ct. also refused to make a special order permitting the inspection by such party.—*SUMMERFIELD v. PRITCHARD* (1853), 17 Beav. 9 ; 10 Hare, App. lxviii. ; 22 L. J. Ch. 528 ; 17 Jur. 361 ; 1 W. R. 270 ; 51 E. R. 934 ; *sub nom.* *SOMERFIELD v. PRITCHARD*, 21 L. T. O. S. 41.

Annotations:—Consd. Draper v. M. S. & L. Ry. (1860), 30 L. J. Ch. 95. *Refd.* Bonnardet v. Taylor (1861), 1 John. & H. 383.

1276. ——— **Not by officer of stamp duties.]** — The ct. will not make a rule on a pltf. who brings an action on a bond, to allow an officer of the stamp duties to inspect the bond, because deft. suspects it to be forged.—*CHETWIND v. MARNELL* (1798), 1 Bos. & P. 271 ; 126 E. R. 900.

1277. ——— **By person agreed between parties—Or appointed by master.]** — *HEAD v. WILLEY* (1881), 25 Sol. Jo. 943.

REYNOLDS (1843), 6 I. Eq. R. 75.—*IR.*

h. ——— **To be named in notice of motion.]** — On an application on behalf of deft., that he & certain other persons not named, might be at liberty to inspect the bills of exchange in the summons & plaint mentioned ; the ct. made the order, directing, however, the notice of motion to be amended by specifying by name the other persons who were to inspect the bills ; but gave no costs, by reason of the notice being too wide.—*RICHARDSON v. GREGORY* (1855), 4 I. C. L. R. 432.—*IR.*

k. ——— **Counsel.]** — Order made for inspection & perusal by pltf.'s counsel of documents produced by deft.—*BLAIR v. MASSEY* (1871), 5 I. R. Eq. 623.—*IR.*

1278. Not by engineer—In action for recovery of highway expenses.]—BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN, No. 540, ante.

SUB-SECT. 3.—SEALING UP.

1279. Irrelevant material—Portion of map.]—A party was ordered to produce so much of a map in his possession as related to certain property; & allowed to withhold such parts of the same map as related to other property.—FAZAKERLY v. GILLIBRAND (1839), 8 L. J. Ch. 248.

1280. —.]—ORD v. FAWCETT, No. 262, ante.

1281. —.]—Upon a motion for an inspection of pltf's. books, which deft. alleged to be necessary for the purpose of establishing a set off in respect of commission which he claimed on sales effected by pltf's. through his introduction:—Held: (1) although pltf's. swore that there was no agreement to allow deft. any commission, the order must be granted; (2) pltf's. were entitled to seal up all those parts of the books which they pledged their oath that deft. had no interest in.—BULL v. CLARKE (1864), 15 C. B. N. S. 851; 143 E. R. 1020.

1282. — Pedigree.]—KETTLEWELL v. BARSTOW, No. 266, ante.

1283. — Infringement of patent—Names of customers.]—In an action for infringement of a patent the Ct. of Appeal granted an injunction & an inquiry as to damages. On the application of pltf's. an order was made in chambers that defts. should make an affidavit disclosing all documents in their possession relating to such inquiry, & should produce such documents except such as they objected to produce by such affidavit, the appcts. to be at liberty to make further application as to any of such documents. Defts. objected to produce such parts of certain documents mentioned in their affidavit as disclosed the names of the customers of the firm of T. & Co. or the prices for which any bustles mentioned in the said documents were respectively sold, on the ground that such names & prices were not material for the purpose of such inquiry as to damages. Pltf's. applied by summons that defts. might be ordered to produce for the inspection of pltf's. all such parts of the documents as disclosed the names of the customers of the firm of T. & Co. to whom any articles made in infringement of pltf.'s patent had been sold by defts., & also the prices for which any such articles were respectively sold. The order was granted with costs.—AMERICAN BRAIDED WIRE CO. v. THOMPSON & CO. (2) (1888), 5 R. P. C. 375.

Annotation:—Apld. Saccharin Corp'n. v. Chemicals & Drugs Co., [1900] 2 Ch. 556.

1284. —.]—PARDY'S MOZAMBIQUE SYNDICATE, LTD. v. ALEXANDER, No. 157, ante.

1285. — Opposite party cannot verify claim.]—Where a discovery is sought of a correspondence, if defts. set forth extracts of letters, & swear that those are the only parts of the correspondence upon that subject, this is sufficient.

Defts. swear to have produced extracts of everything relating to those bills; the other parts of the letters are not relating to them, they have sworn at their peril, but very fully; & we cannot order a production of the other correspondence, as we have no inquisitorial authority to investigate all the other transactions of these merchants.

So when a party refers to extracts from books of accounts, those parts which he states to be immaterial are left sealed up (*per CUR.*).—CAMPBELL v. FRENCH (1792), 1 Anst. 58; 2 Cox, Eq. Cas. 286; 145 E. R. 799.

1286. — — —.]—Where deft. swears that certain parts of a book, etc., admitted by his answer to be in his possession, & which he is required to produce, do not relate to the matters in question in the suit, he is entitled to seal up such parts, & pltf. had no right to inspect any part of such books, etc., for the purpose of showing that deft.'s statement is untrue.—CROW v. COLUMBINE (1843), 2 L. T. O. S. 454, L. C.

1287. — — —.]—Under the usual order for the production of books, etc., with liberty to seal up on affidavit such parts as did not relate to the matters in question, defts. had produced a book with certain pages sealed up, & had made the required affidavit. Pltf's. afterwards, on an affidavit of facts leading strongly to the inference that one of the pages sealed up did relate to the question in dispute, moved that defts. might produce the book unsealed; but the motion was refused, although defts. declined to answer the affidavit.—SHEFFIELD CANAL CO. v. SHEFFIELD & ROTHERAM RY. CO. (1843), 1 Ph. 484; 12 L. J. Ch. 376; 41 E. R. 716, L. C.

1288. — — —.]—A deft. admitted the possession of certain documents set forth in two schedules to his answer, for one of which he claimed privilege, but submitted to produce the other. Two of the letters, however, in this schedule when produced had two passages sealed up, which deft. in an affidavit stated were irrelevant to the matters in issue, & had relation to private family matters only. On motion to commit for contempt, the ct., having inspected the concealed passages, asked counsel for deft. to examine them, & say whether he could resist production; & on his intimating that he could not, the ct. refused to commit deft., but ordered production of the concealed passages, deft. to pay the costs of the motion.—EATON v. LEWIS (1853), 20 L. T. O. S. 243.

1289. — Plaintiff cestui que trust of defendant.]—Deft. & P. were partners. P. died & appointed deft. his exor. In an action by a person interested under P.'s will against deft. a decree was made for administration of P.'s estate, & for taking accounts of the partnership as between deft. as surviving partner & P.'s estate. An order having been made for the production of the partnership books by deft. he claimed to seal up such entries as related to his own private affairs:—Held: inasmuch as pltf. & deft. were both interested in the partnership property, deft. was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order.—RE PICKERING, PICKERING v. PICKERING (1883), 25 Ch. D. 247; 53 L. J. Ch. 550; 50 L. T. 131; 32 W. R. 511, C. A.

Annotations:—Refd. JONES v. Andrews (1887), 57 L. T. 843; Ehrmann v. Ehrmann (No. 2) (1896), 65 L. J. Ch. 889.

1290. Privileged matter—Mixed up with non-privileged matter—Whether whole document privileged.]—Memoranda, the production of which pltf. was entitled to, were entered in the same book with other matters, to a discovery of which

PART III. SECT. 13, SUB-SECT. 3.

1290 i. Privileged matter—Mixed up with non-privileged matter—Whether

whole document privileged.]—Where a deft. mixes up accounts which are disputed in a cause, with his own private

account at a bankers, he is only obliged to show so much of his account with his banker, as he himself swears

Sect. 13.—The inspection: Sub-sects. 3, 4 & 5. Sects. 14 & 15.]

pltf. was not entitled, & they could not be separated or sealed up:—*Held*: deft. must suffer the inconvenience of his own act, & produce the whole.—*CAREW v. WHITE* (1842), 5 Beav. 172; 49 E. R. 542.

1291. — — — — —.] — Where production was sought of so much as consisted of copies of, or extracts from, or references to, documents or records in a public registry, of a report made by a third person at the instance of deft.'s solr., for the purpose of his advising deft., & which report itself, it was admitted, was protected, the ct. refused to order production, on the ground that the extracts or copies were so mixed up with the protected parts of the report that it would be difficult, & almost impossible, to exhibit the one portion without disclosing the other.—*CHURTON v. FREWEN* (1865), 2 Drew. & Sm. 390; 12 L. T. 105; 13 W. R. 490; 62 E. R. 669.

1292. — — — — — *Not to be mutilated or removed.*]—Where a party is ordered to produce documents, & claims privilege as to some, forming parts of others although he is entitled to seal up those portions, with the sanction of the ct., he must produce all in their integrity, & cannot remove or mutilate them; if he does he must pay the costs of a motion to produce.—*AYRES v. LEVY* (1868), 19 L. T. 8.

1293. *Covering up—Where sealing up inconvenient.*]—A party to an action, who has obtained against his opponent the common order for production & inspection of books & documents, giving liberty to the opponent to seal up such parts of the books as do not relate to the matters in question, is not entitled to insist upon the actual sealing up of such parts of the books where so doing would interfere with the conduct of the opponent's business or be oppressive; & the covering up upon oath of the irrelevant parts of such books is a sufficient compliance with the order.—*GRAHAM v. SUTTON, CARDEN & Co.*, [1897] 1 Ch. 761; 66 L. J. Ch. 320; 76 L. T. 369, C. A.

1294. *Affidavit claiming to seal up.*]—Upon a motion for the production of documents described in a schedule to the answer, & admitted to be in deft.'s possession, liberty will be given to deft. to file an affidavit as a ground for qualifying the order for production by permitting him to conceal such parts of the documents as do not relate to the subject of the suit.—*CURD v. CURD* (1842), 1 Hare, 274; 6 Jur. 307; 66 E. R. 1036, L. C.
Annotation:—*Reid*. *Llewellyn v. Badeley* (1842), 1 Hare, 527.

1295. — — — — — *After affidavit of documents filed.*]—An application for liberty to seal up or not to deposit documents, possession of which is admitted by the affidavit of a deft. who has not been re-

quired to answer as to documents, need not be made on the original summons for production, but will be granted on summons by such deft. after he has filed his affidavit without his being required to pay the costs of his summons.—*TALBOT v. MARSHFIELD* (1865), L. R. 1 Eq. 6; 13 L. T. 424; 11 Jur. N. S. 901.

1296. — — — — — *What deponent must state.*]—*JONES v. ANDREWS*, No. 416, *ante*.

1297. — — — — — *How far conclusive.*]—*SHEFFIELD CANAL CO. v. SHEFFIELD & ROTHERAM RY. CO.*, No. 1287, *ante*.

1298. — — — — —.] — *JONES v. ANDREWS*, No. 416, *ante*.

1299. *Sealing up done without care—Not of itself ground for unsealing.*]—*JONES v. ANDREWS*, No. 416, *ante*.

SUB-SECT. 4.—COPIES AND PHOTOGRAPHS.

1300. *Right to take—General rule.*]—A party who has obtained the usual order for the inspection of documents has a right to inspect, take notes & make copies of all such parts as shall not have been sealed up under the terms of the order.—*COLEMAN v. WEST HARTLEPOOL HARBOUR & RY. CO.* (1861), 5 L. T. 266.

1301. — — — — —.]—Any party having a right to the production & inspection of documents has also a right to take copies of them.—*PRATT v. PRATT* (1882), 51 L. J. Ch. 838; 47 L. T. 249; 30 W. R. 837.

Annotation:—*Reid*. *Ormerod, Grierson v. St. George's Ironworks*, [1905] 1 Ch. 505.

1302. — — — — —.]—On the application of pltf., an order was made for the production at the office of deft.'s solr. of documents in the possession or power of defts. The order further provided that "appcts., their solrs. & agents, are to be at liberty to inspect & peruse the documents so produced & to take copies & abstracts thereof & extracts therefrom, as appcts. shall be advised":—*Held*: under this order pltf. were entitled, as they would have been under such an order made in the Ct. of Ch. before Jud. Act, to make copies themselves or by their solrs. or agents of the documents produced in accordance with the order.

R. S. C., Ord. 65, r. 27 (18), has not taken away the right of a litigant who obtains such an order to make copies himself of the documents produced.

The object of that sub-rule is only to fix the amount of the charge to be paid by the inspecting litigant when he formally requires a copy or extracts to be furnished to him by his opponent.—*ORMEROD, GRIERSON & Co. v. ST. GEORGE'S IRONWORKS, LTD.*, [1905] 1 Ch. 505; 74 L. J. Ch. 373; 92 L. T. 541; 53 W. R. 502; 49 Sol. Jo. 332, C. A.; *subsequent proceedings* (1906), 95 L. T. 694.

contains the entire of the accounts relating to the subject of the cause.—*NAPIER v. STAPLES* (1828), 2 Ir. L. Rec. 1st. ser. 82.—*IR*.

PART III. SECT. 13, SUB-SECT. 4.

1300 i. *Right to take—General rule.*]—Where a party is entitled to inspect a document, he, so long as he acts *bona fide*, is entitled to take copies of the same, unless the right is excluded on the mere construction of the contract or statute conferring the right of inspection.—*ALLEN v. BUCKINGHAM* (1904), 4 S. R. N. S. W. 158.—*AUS*.

1300 ii. — — — — —.]—A party producing documents upon his examination in the cause is bound to allow the opposite party to inspect & take copies

of them.—*EVANS v. BALFOUR* (1885), 3 Man. L. R. 243.—*CAN*.

1300 iii. — — — — —.]—When a party establishes his right to inspect books in the adverse party's possession, the ct. will allow pltf.'s solr., or any other person on his behalf, to take abstracts from them as to this matter.—*HIDE v. HOLMES* (1825), 2 Mol. 372.—*IR*.

1. — — — — — *Plans of underground workings.*]—The right to inspect underground workings in a mine carries with it the right to inspect & make copies of the plans of such workings.—*STAR MINING & MILLING CO. v. WHITE CO.* (1902), 9 B. C. R. 422.—*CAN*.

m. — — — — — *Lease or counterpart lost—Ejectment.*]—In ejectment on the

title, where the question was, whether the lands in dispute were included in a lease which had been lost, but of which a counterpart was in the possession of pltf., he was ordered to permit deft. to inspect & take a copy of the counterpart.—*BARRY v. SCULLY* (1872), 1 R. 6 C. L. 449.—*IR*.

n. — — — — — *Action for rent.*]—In an action of covenant for rent, on it appearing by affidavit that there was a subsisting lease, & that pltf. could not discover the counterpart thereof, deft. was ordered to permit inspection, & to give a copy of the lease, although he did not show that a counterpart was executed.—*STEENAN v. HARNETT* (1853), 5 Ir. Jur. 112.—*IR*.

o. — — — — — *Documents lodged in court.*]—

1303. — Effect of R. S. C., Ord. 65, r. 27 (18).]—*ORMEROD, GRIERSON & Co. v. ST. GEORGE'S IRONWORKS, LTD.*, No. 1302, *ante*.

1304. Method of taking—Photography.]—In an action for an alleged libel, the ct. allowed deft. to inspect & take facsimile copies, "by photograph or otherwise," of the documents referred to in the declaration.—*DAVEY v. PEMBERTON* (1862), 11 C. B. N. S. 628; 8 Jur. N. S. 891; 142 E. R. 942.

1305. — —.]—The ct. has power to allow a party to an action to take photographs of documents in the possession of the other party.—*LEWIS v. LONDESBOROUGH (EARL)*, [1893] 2 Q. B. 191; 62 L. J. Q. B. 452; 69 L. T. 353; 9 T. L. R. 516, D. C.

1306. Subjection to chemical tests.]—A suit was instituted to restrain proceedings at law to recover for work & labour in constructing a sewer, on the ground of fraud on the part of deft. in equity in improperly obtaining possession of an estimate in writing, & by chemical process removing the figures indicating the price. The document in question having been deposited with the clerk of records, in pursuance of an order for production, pltf. moved for liberty to subject it to chemical tests, for the purpose of the trial at law, upon an undertaking by deft. to produce it to be stamped at the trial at law. The ct. refused to make any order.—*TWENTYMAN v. BARNES* (1848), 2 De G. & Sm. 225; 12 Jur. 743; 64 E. R. 101.

1307. Documents impounded by court—Copies not allowed.]—In the case of documents impounded by order of the ct., the ct. cannot, while such documents are in the custody of the ct., part with such documents, but will give leave to inspect the same under R. S. C., Ord. 42, r. 33A. Copies, however, of such documents may not be taken.—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1891), 65 L. T. 584; 8 T. L. R. 1, D. C.

Statutory right to take copies—Of companies' books.]—See COMPANIES, Vol. IX., pp. 193, 209, Nos. 1213, 1296, 1298.

— **Of partnership books.]**—See PARTNERSHIP.

—The Lord Ordinary granted a diligence "for the recovery of all writings that either party might think necessary in support of their respective averments" to be produced to the commissioner to take such excerpts as he should deem of importance to the cause.—*CAMPBELL v. CAMPBELL* (1823), 2 Sh. (Ct. of Sess.) 139.—SCOT.

p. —.—.]—*MACKINTOSH v. GRANT* (1829), 8 Sh. (Ct. of Sess.) 184.—SCOT.

1304 i. Method of taking—Photography.]—The referee ordered that deft. be at liberty to make, or cause to be made, photographic reproductions of an alleged holograph will, in the presence of the prothonotary, upon 24 hours notice in writing to pltf.'s solr. of the time & place of such photographing.—*FOULDS v. BOWLER* (1908), 7 W. L. R. 517.—CAN.

1304 ii. —.]—Where a will lodged in the registry was impeached as a forgery, the ct. refused to allow the party propounding it to get a photograph copy of testator's & witnesses' signatures to it, without an affidavit explaining the circumstances, but, on consent, made an order that a copy might be taken of the body of it.—*TERNAN v. TERNAN* (1864), 11 L. T. 253.—IR.

q. **Right to receive copy—Books in actual use.]**—Where books were in actual use by deft., the ct. refused to order him to make verified copies of entries relative to matters in question

for pltf.'s use.—*MCDONELL v. MCKAY* (1867), 2 Ch. Ch. 141.—CAN.

r. —.— **Proper facilities for inspection not given.]**—Where a party has not afforded to his adversary all the information & facilities in his power for the inspection of documents, etc., to be relied on at the trial, the ct. will direct an inspection or copy, or both thereof, to be given, according to the circumstances of the case.—*O'NEILL v. DELACHORIS* (1857), 9 Ir. Jur. 50.—IR.

s. —.—.]—To an action upon a policy of insurance, the defts. pleaded that certain representations were made by the insured, at the time of effecting the assurance, which were false & untrue, & that, therefore, the policy was void. Upon an application by pltf., that copies of the representations might be furnished, or that pltf. might be at liberty to inspect them, if any such existed:—*Held*: defts. were bound to furnish the documents.—*GERMAINE v. ATHENAEUM LIFE INSURANCE CO.* (1856), 8 Ir. Jur. 331.—IR.

PART III. SECT. 15.

1311 i. To determine claim of privilege.]—Where documents for which privilege is claimed are or may be in their nature equivocal, the judge in chambers, if the claim to privilege is challenged, will exercise the power given by R. S. C. Ord. 31, r. 19 (A) (2), of looking at the

SUB-SECT. 5.—COSTS.

See Part VI., *post*.

SECT. 14.—INSPECTION OF CORPORATION BOOKS AND DOCUMENTS.

See CORPORATIONS, Vol. XIII., pp. 422–424.

SECT. 15.—INSPECTION BY COURT OR JUDGE

See R. S. C., Ord. 31, r. 19A (2).

1308. Jurisdiction of court or judge.]—Where fraud is alleged against deft., communications between himself & his solr. as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime & a civil fraud; & it is immaterial for this purpose whether the solr. is or is not a party to the alleged fraud.

The practice as to inspection by the judge himself, under R. S. C., Ord. 31, r. 19A (2), of documents for which privilege is claimed, discussed.—*WILLIAMS v. QUEBRADA RAILWAY, LAND & COPPER CO.*, [1895] 2 Ch. 751; 65 L. J. Ch. 68; 73 L. T. 397; 44 W. R. 76.

1309. —.]—The word "privilege" in R. S. C., Ord. 31, r. 19A (2), is not to be construed in a narrow sense so as to exclude the case of an objection to discovery based on the ground of irrelevancy. It includes any ground on which inspection is sought to be resisted.—*EHRMANN v. EHRMANN*, [1896] 2 Ch. 826; 65 L. J. Ch. 889; 75 L. T. 243.

Annotation:—*Apprvd.* *Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry.*, [1913] 3 K. B. 850.

1310. —.]—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. LONDON & NORTH WESTERN RY. CO.*, No. 394, *ante*.

1311. To determine claim of privilege.]—Under an order for production of documents, the denial upon oath of the relevancy of concealed passages will not be sufficient; & upon the ct. itself ascertaining that they might possibly refer to the

documents himself & will decide whether they are privileged or not.—*LION NOTTING MILLS PROPRIETORY, LTD. v. NOYES BROTHERS (MELBOURNE) PROPRIETORY, LTD.*, [1915] V. L. R. 383.—AUS.

1311 ii. —.]—*QUEENSLAND PINE CO. v. AUSTRALIA (COMMONWEALTH OF)*, [1920] St. R. Qd. 121.—AUS.

1311 iii. —.]—In an action for rent under a lease, in which the defence was that the estate of the lessor had determined, pltf., in his affidavit of discovery, claimed privilege for certain documents on the ground that they related solely to his own title or case, & did not assist deft.'s case or title. On a motion by deft. for further & better discovery & for inspection of the documents for which privilege was claimed:—*Held*: the ct. had power to & would inspect such documents for the purpose of seeing whether the documents were of the character they were represented to be in the affidavit.—*POWER v. FREEMAN* (1908), 42 I. L. T. 115.—IR.

1311 iv. —.]—An order for production under Imperial Act, 22 Vict. c. 20, s. 1, is equivalent to a *subpœna duces tecum* under which the person summoned, although not a party to the action, is bound to attend as a witness & bring the papers called for in obedience to the writ, but the judge alone has a right to inspect them in order to decide whether they are to

Sect. 15.—Inspection by court or judge. Sect. 16. Part IV.

questions at issue, an order was made upon deft. for the production of the concealed passages, with costs.—*CATON v. LEWIS* (1853), 22 L. J. Ch. 946; 1 W. R. 118.

1312. —.—.]—*WILKINSON v. WILKINSON* (*temp.* 1897–1910), cited in Halsbury's Laws of England, Vol. XI., p. 64.

1313. To determine relevancy.—Where it appeared doubtful whether certain documents of which a discovery is sought are material to the

issue:—*Held*: they must be produced to the ct., & if, in the opinion of the ct., on consideration of the arguments & examination of the documents, it was considered fit & proper, inspection would be granted.—*THE MACGREGOR LAIRD* (1866), L. R. 1 A. & E. 307; 36 L. J. Adm. 10; 15 W. R. 262.

Annotation:—*Refd. Hill v. Campbell* (1875), L. R. 10 C. P. 222.

SECT. 16.—INSPECTION OF PROPERTY.

See PRACTICE AND PROCEDURE.

Part IV.—Interrogatories.

SECT. 1.—IN GENERAL.

1314. Extent & nature of.—An action was brought by the A.-G. & a local board to restrain deft. from building across a public footpath. The amended statement of claim alleged that at a meeting of the board held after the commencement of the action deft. had attended & signed an agreement for settling the action on certain terms, & pltfs. sought to enforce this agreement, or, in the alternative, to restrain interference with the footpath by virtue of their original title. Deft., by his defence, denied the existence of any public right of way over the ground. He admitted the signature of the agreement, but alleged that it was obtained by threats & pressure after a long conversation & argument, & without his having it read & explained to him. Pltfs. delivered interrogatories as to the existence of a public right of way over the land, & as to what passed in the conversation at the board meeting & at a conversation between deft. & pltfs.' solr. before that meeting. Deft. declined to answer those interrogatories,

be submitted to examination.—*R. v. BORRETT* (1905), 24 N. Z. L. R. 584.—N.Z.

t. Effect of order to file documents—With view to inspection.—A ct. cannot be said to have received documents as admissible in evidence when, for want of time to inspect & consider them, it orders them to be filed; nor would it be wrong in law in rejecting or returning them after proper inspection.—*SOODUKHINA CHOWDHRY v. RAJ MOHUN BOSE* (1869), 11 W. R. 350.—IND.

PART IV. SECT. 1.

1314 i. Extent & nature of.—Interrogatories must be confined to facts which are relevant to some question at issue between the parties, & will not be allowed where they are in the nature of cross-examination. The procedure is not intended to apply to actions of a simple character, as for breach of contract, where the object can be accomplished by an application for particulars.—*STARRATT v. WHITE* (1913), 47 N. S. R. 162; 13 E. L. R. 8.—CAN.

1314 ii. —.—.]—*STEWART v. HENDERSON* (1912), 23 O. W. R. 135; 4 O. W. N. 166; 6 D. L. R. 862.—CAN.

1314 iii. —.—.]—An examination for discovery is, both in form & in substance, in the nature of a cross-examination, but limited to the issues raised by the pleadings. The object of an examination for discovery is to enable a litigant party to ascertain whether a party opposed in interest has a good cause of action or defence; & the examination may, so far as the issues raised in the pleadings are concerned, be as searching & thorough as the party's cross-examination as a witness

at the trial could be. In this action, pltf., the widow of C., sought to set aside the will of her husband, of which defts. had, as exors., obtained probate, alleging want of testamentary capacity & that the will was not executed & attested as required by statute; & also an account of the defts.' dealings with the estate, & delivery of the estate to herself.—*Held*: all matters which would throw any light upon testator's mental condition at the time he executed the will, or from which the ct. might legitimately draw inferences as to his mental condition, as well as the circumstances leading up to & surrounding the execution & attestation of the will, were relevant to the issues raised & proper subjects of inquiry upon the examination of defts. for discovery.—*CARNEY v. CARNEY* (1913), 26 W. L. R. 398.—CAN.

1314 iv. —.—.]—Examination for discovery is primarily for the purpose of enabling the opposite party to know what is the case he is to be called upon to meet; its second & subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. The rules contemplate only one examination for discovery of any party in the action. Any party adverse in interest, may initiate such examination. Notice of it should be given to all the parties adverse in interest to the party to be examined, so that they may be present upon the examination. An examination for discovery is not intended to be a cross-examination at all—although in a case where a party is supposed to be seeking to conceal the truth he may be cross-examined upon examination for discovery.—*GRAYDON v. GRAYDON*

alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; & as to the conversations he ought not to be called upon to answer till pltfs.' solr. had been examined & cross-examined as to the conversation:—*Held*: (1) deft. was bound to answer as to the existence of the right of way, for one object of interrogatories was to enable a party to obtain admissions from the other party, & so to relieve him from the necessity of adducing evidence; (2) as the conversations were material on the issue whether the agreement had been unduly obtained, deft. must answer as to them; & it would not be right to allow him to delay answering until he saw what account another person would give of what had taken place; (3) effect of the Jud. Acts on mode of procedure discussed (*see* No. 7, *ante*).

The objection taken to the interrogatories is this: it is said that they seek an admission or denial on oath by deft. on matters in issue between him & pltfs. as to which the *onus* of proof is on

(1921), 67 D. L. R. 116; 51 O. L. R. 301.—CAN.

1314 v. —.—.]—Interrogatories are not in this country to be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. Where the pleading of either party is too vague, the ct. may call for a further or fuller written statement, or may frame & record issues until the case raised by the pleadings is ascertained with sufficient clearness. Pltf. may interrogate with a view to obtain information or admission in support of his own case, & this right extends not only to his original case but also to any answers which he has to make to deft.'s case, subject to the qualification, *inter alia*, that the interrogatories must be directed to a case on which pltf. has already determined, & to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in deft.'s case or suggest any answer to it.—*ALI KADER SYUD HOSSAIN ALI v. GOBIND DASS* (1890), I. L. R. 17 Calc. 840.—IND.

1314 vi. —.—.]—The mere fact that questions would be admissible in cross-examination of a witness, does not make them good as interrogatories. Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case. The ct., will, in cases where the defence of waging is set up, refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the

pltfs. That is no reason at all. It is because there is the obligation of proof on pltfs. that they ask the question. If defts. were to admit pltfs.' title, pltfs. would be relieved of the obligation of proof, & would get judgment at once. But if he does not admit the whole, he may admit part of it, & to that extent pltfs. may relieve themselves of the obligation of proof (JESSEL, M.R.).—A.-G. v. GASKILL (1882), 20 Ch. D. 519; 51 L. J. Ch. 870; 46 L. T. 180; 30 W. R. 558, C. A.

Annotations:—As to (1) & (3) Rejd. Bidder v. Bridges (1885), 29 Ch. D. 29; Griebart v. Morris, [1920] 1 K. B. 659. *Generally, Mentd.* Proctor v. Smiles (1886), 55 L. J. Q. B. 467.

particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case.—BHAGWANDAS PARASHRAM v. BURJORJI RUTTONJI (1912), 1 L. R. 37 Bom. 347.—IND.

a. *Oral examination for discovery—As alternative form of written interrogatories.*—WINDSON MARINE INSURANCE CO. v. LADD (1871), 2 N. S. R. 493.—CAN.

b. —.—.—.]—Where the officer of a company-party is orally examined for discovery under Ord. 31 A. (copied from an Ontario Rule), the English practice requiring him to inform himself by inquiry from other officers or servants of the co. as to relevant matters not within his knowledge, is not applicable. In British Columbia, there are two distinct modes of obtaining this kind of discovery, namely, by means of written interrogatories & by oral examination; & the English practice referred to applies only when the procedure by interrogatories is adopted.—BRYDON JACK v. VANCOUVER PRINTING & PUBLISHING CO. (1911), 16 W. L. R. 262; 16 B. C. R. 55.—CAN.

c. —.—.—.] *As supplementing interrogatories.*—A party may be required to answer interrogatories delivered pursuant to Rule 407 B. of King's Bench Act, as enacted by 5 & 6 Edw. VII., c. 17, s. 2, notwithstanding that he has also been ordered to attend & be examined for discovery under Rule 387.—TIMMONS v. NATIONAL LIFE ASSURANCE CO. (1909), 19 Man. L. R. 139.—CAN.

d. —.—.—.]—The rights of obtaining discovery by administering interrogatories, under Rule 423 of King's Bench Act, & by an oral examination under Rules 398-421, are cumulative; & although a party has sufficiently answered interrogatories administered to him by his opponent, the latter has also a right to require him to attend upon an appointment & submit to an oral examination for further discovery.—BASKIN v. LINDEN (1914), 28 W. L. R. 130.—CAN.

e. —.—.—.]—A party may be required to attend for examination for discovery although he has made answers to interrogatories.—SEGAL v. SCOTT, [1922] 2 W. W. R. 144; 65 D. L. R. 784.—CAN.

—.—.—.] *supplementing affidavit on production.*—An affidavit on production is not within the provisions of Ord. 268, & therefore the party making it, does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Ord. 138. Only one examination of a party under Ord. 138 can be had.—PAXTON v. JONES (1873), 6 P. R. 135.—CAN.

g. —.—.—.] *How limited.*—Discovery by means of oral examination under R. S. O. 1877, c. 50, s. 156 *et seq.*, is limited to cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite

party.—JONES v. GALLON (1881), 9 P. R. 296.—CAN.

h. —.—.—.]—The greatest latitude should be allowed to a party who is examining an adverse party for discovery so that the fullest inquiry may be made as to all matters which can possibly affect the issues between the parties.—MOUNT HOPE, No. 279, RURAL MUNICIPALITY v. FINDLAY, [1919] 1 W. W. R. 397.—CAN.

k. —.—.—.] *How conducted.*—An examination for discovery should be conducted as an examination-in-chief, & not as a cross-examination.—CARROLL v. GOLDEN CACHE MINES CO., LTD., LIABILITY (1890), 6 B. C. R. 354.—CAN.

l. —.—.—.] *Particulars disclosed in—How far binding.*—The particulars disclosed at an examination for discovery are as binding on the party discovering as they would be if delivered in the form of a pleading.—KELLY v. KELLY (1908), 18 Man. L. R. 331.—CAN.

m. —.—.—.] *When examinable party out of jurisdiction.*—A party resident out of the jurisdiction cannot be examined for discovery in an action unless by means of a special order made under rule 477 of the rules of 1897; & if served, pursuant to rules 439 & 443, while temporarily in the jurisdiction, with an appointment & subpoena for his examination, cannot be compelled to attend thereon.—CONNOLLY v. DOWD (1898), 18 P. R. 38.—CAN.

n. —.—.—.]—Where deft. resides out of Ontario, & is only in it for temporary purpose, his attendance to be examined for discovery can only be obtained, under Rule 477, by a judge's order upon notice, & not by appointment under rule 443. An order was made under Rule 447 for the examination in Ontario of deft. who resided in British Columbia & who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member. Although this order could not be enforced by attachment against deft. while the House was in session, in the event of his refusing or neglecting to attend, it could be enforced, under Rule 454, by striking out his defence.—COX v. PRIOR (1899), 18 P. R. 492.—CAN.

o. —.—.—.]—A person for whose benefit an action is brought or the assignor of a chose in action can only be examined for discovery when such person is within Ontario; but a deft. by counterclaim, resident within a foreign jurisdiction, may under Rule 328, be ordered to come within Ontario & submit to examination for discovery upon matters relating to the counterclaim & if he fails to so attend his defence to the counterclaim may be struck out.—STOCKBRIDGE v. McMARTIN (1916), 27 O. W. R. 401; 38 O. L. R. 95.—CAN.

p. —.—.—.]—One of the pltfs., in an action brought in the Supreme Ct. of Ontario, resided in New York, & an order was made, under Rule 328, requiring him to attend in Toronto for examination for discovery at the

1315. *Distinguished from particulars.*—A policy of insurance effected with defts. against fire provided that the policy should not cover loss or damage by fire occasioned by or happening through earthquakes. In an action upon the policy defts. pleaded that the loss was caused by earthquake & not by fire. Upon the application of defts. pltfs. were ordered at Chambers to give particulars as to the cause of the fire, & it was ordered that unless the particulars were delivered within six weeks all further proceedings should be stayed until delivery thereof, & pltfs. were not to be precluded from giving evidence at the trial of any matter

instance of defts. On appeal the order was varied so as to provide for the examination taking place in New York. Ordinarily the place of residence of the person to be examined is the proper place for his examination—in this case no special circumstances were suggested; & it seemed "just & convenient" (Rule 328) that the examination should take place in New York.—DUELL v. OXFORD KNITTING CO. (1918), 42 O. L. R. 408; 14 O. W. N. 42.—CAN.

q. —.—.—.]—An action in the Supreme Ct. of Ontario was commenced, by a person residing in New York, in the Toronto office of the ct., where also the pleadings were filed; & the solrs. for both parties practised in Toronto.—*Held*: it was "just & convenient" (Rule 328) that pltf. should attend in Toronto for examination for discovery.—HAMILTON v. HAMILTON (1920), 47 O. L. R. 359; 18 O. W. N. 133.—CAN.

r. —.—.—.]—Rule 337 which provides that "a party within Ontario shall attend for examination for discovery before the proper officer of the county in which he resides upon service of an appointment upon his solr. 7 days before the day appointed for the examination," is not applicable to the case where the "party" is temporarily out of Ontario: that case is provided for by Rule 328. The rule is predicated upon the physical presence of the party to be examined within the province. The words "within Ontario" are in the rule itself, contrasted with "the county in which he resides."—McWILLIAMS v. FLYNN (1921), 64 D. L. R. 151; 50 O. L. R. 75.—CAN.

s. *Surgical examination—When an examination for discovery.*—An examination of the person by a surgeon under Con. Rules 462, in an action for personal injuries, is an examination for discovery; & that rule must be applied in the same way as Con. Rule 442; therefore an order for such an examination, in an action where the liability is disputed will, not, if opposed, be made before the delivery of the defence.—BURNS v. TORONTO RY. CO. (1907), 9 O. W. R. 277; 13 O. L. R. 404.—CAN.

t. *Leave to administer—Grounds on which discretion exercised.*—An application was made to a judge in chambers to set aside answers to interrogatories administered to pltfs., on the ground that the order for the examination of witnesses did not authorise the examination of parties & that neither the order nor the affidavit therefor gave any indication that it was proposed to examine pltfs., otherwise the order would not have been consented to. The judge having refused to set aside the interrogatories: *Held*: parties to a cause stand in a different position from other witnesses, & that in order to obtain a commission permitting the examination of pltf., facts should have been given upon which the judge to whom the application was made could have exercised his discretion to grant or withhold

l. 1.—In general. Sect. 2:

not disclosed in their particulars provided it came to their knowledge subsequently. Pltfs. appealed, alleging that there were several theories as to the origin of the fire:—*Held*: the information asked for was not the proper subject matter for particulars, interrogatories being the proper method of obtaining the information.—*YOUNG (G. & W.) & Co., LTD. v. SCOTTISH UNION & NATIONAL INSURANCE CO., SAME v. NORTH BRITISH & MERCANTILE INSURANCE CO.* (1907), 24 T. L. R. 73, C. A.

1316. Allowed instead of particulars of justification—By consent.—*HALL v. BRYCE* (1890), 6 T. L. R. 344, C. A.

SECT. 2.—IN WHAT PROCEEDINGS GRANTED.

SUB-SECT. 1.—IN GENERAL.

Interrogatories in particular actions.—*See Sect. 5, sub-sect. 6, post.*

1317. Arbitration—Before county court judge—Workmen's Compensation Act, 1906 (c. 58).—*SUTTON v. GREAT NORTHERN RY. CO.*, No. 89, *ante*.

1318. — Arbitration Act, 1889 (c. 49).—*KURSELL v. TIMBER OPERATORS & CONTRACTORS, LTD.*, No. 57, *ante*.

Bankruptcy.—*See BANKRUPTCY & INSOLVENCY, Vol. V., p. 622, No. 5598.*

1319. Commercial list.—*BRITISH WEST AFRICA CONTRACT SYNDICATE, LTD. v. BALLI & SONS* (1896), 12 T. L. R. 424, C. A.

1320. Election petition.—Particulars of a resp.'s accounts can be obtained only by means of interrogatories.—*STAFFORD ELECTION PETITION CASE* (1869), 20 L. T. 237.

1321. —.—The ct. has no power to order interrogatories to be delivered to a resp. to a Parliamentary election petition, under Parliamentary Elections Act, 1868 (c. 125); for though sect. 2 gives the ct. the same powers, with reference to such petition, as it would have if such petition were an ordinary cause, yet this is "subject to the provisions of the Act"; & sect. 26 enacts that until rules have been made, & none

have been made as to interrogatories, the "principles, practice & rules on which committees of the House of Commons have heretofore acted in dealing with election petitions" are to be observed in the case of election petitions under the Act.—*WELLS v. WREN* (1880), 5 C. P. D. 546; *sub nom. Re WALLINGFORD ELECTION PETITION, WELLS v. WREN*, 49 L. J. Q. B. 681.

Annotations:—*Apld. Moore v. Kennard* (1883), 10 Q. B. D. 290. *Mentd. Clark v. Lowley* (1883), 48 L. T. 762.

1322. Interpleader issue.—Interrogatories may be delivered on an interpleader issue.—*WHITE v. WATTS* (1862), 12 C. B. N. S. 267; 31 L. J. C. P. 381; 6 L. T. 387; 142 E. R. 1146.

1323. Petition under private Act of Parliament.—*Re LONDON DOCK CO.*, No. 78, *ante*.

1324. Probate, Divorce & Admiralty Division—Suits for nullity of marriage.—In a suit for nullity of marriage the ct. has power to order interrogatories.—*EUSTON v. SMITH* (1884), 9 P. D. 57; 32 W. R. 596.

Annotations:—*Folld. Harvey v. Lovekin* (1884), 10 P. D. 122. *Consd. Redfern v. Redfern*, [1891] P. 139.

1325. —.—(1) In a suit for nullity of marriage, the ct. has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the Ecclesiastical Cts., which had power to allow interrogatories to be administered between the parties, & now all the jurisdiction of the Ecclesiastical Cts. as to suits for nullity of marriage, including matters of practice & procedure, is vested in the Probate, Divorce, & Admlty. Div. Further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, & Admlty. Div. by Jud. Act, 1873; for at the time of passing that statute the Superior Cts. of Common Law & the Ct. of Ch. had power to allow interrogatories to be administered between the parties to a suit; & by sect. 16 all the jurisdiction of those cts., including the ministerial powers & authorities incident thereto, was transferred to & vested in the High Ct., & by sect. 23 the jurisdiction transferred to the High Ct. may, so far as regards procedure & practice, be exercised in the same manner, as it might have been exercised by any of the cts. whose jurisdiction has been transferred.

the order; this not having been done the appeal should be allowed as to so much of the order as permitted pltfs. to be examined out of the jurisdiction, & the order modified accordingly.—*SEYMOUR v. DOULL* (1891), 23 N. S. R. 364.—CAN.

a. —.—Pltf. cannot, after examining an officer of deft. corpn. for discovery under Rule 387 of King's Bench Act, require another officer of the corpn. to attend for a similar examination when the information desired could have been obtained from the first officer examined.—*BROWN v. LONDON FENCE, LTD.* (1909), 19 Man. L. R. 138.—CAN.

b. —.—Leave to deliver interrogatories is in the discretion of the master, & if he considers that they are not necessary for the purpose of disposing fairly of the case, or for saving of costs, & further, that the party has already sufficient knowledge & information to enable him to conduct his case, leave for interrogatories may be refused.—*PICKELS Co. v. PICKUP* (1913), 12 E. L. R. 577.—CAN.

c. Service of copies on opponent—Whether necessary.—Pltf. is not bound to serve a copy of the interrogatories on deft. nor can deft. who has appeared & been served with a copy of the bill, move to dismiss the bill because no

copy of interrogatories has been served on him.—*PITFIELD v. RANNEY* (1868), (1825-97), N. B. Dig. 646.—CAN.

d. Filing cross-interrogatories—Where foreign commission issued.—When a foreign commission issues on the master's certificate, under G. Ord. 221, cross-interrogatories should be filed in the office of the clerk of records & writs; & where they were filed by deft. in the master's office instead, & notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs.—*DARLING v. DARLING* (1880), 8 P. R. 391.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.

e. Where order for particulars suffice.—Interrogatories must be confined to facts which are relevant to some question at issue between the parties, & will not be allowed where they are in the nature of cross examination. The procedure is not intended to apply to actions of a simple character, as for breach of contract, where the object can be accomplished by an application for particulars.—*STARRATT v. WHITE* (1913), 47 N. S. R. 162; 13 E. L. R. 8.—CAN.

f. Where amount of damages only in dispute.—An examination for discovery may be ordered in an action wherein no defence, but only a demand of notice, has been delivered, & the only issue to be determined is the amount of damages.—*BOWEN v. CANADIAN NORTHERN RY. CO.*, [1918] 1 W. W. R. 417.—CAN.

g. Patent cases.—The general law applicable to discovery governs in patent cases. Dft. may be properly interrogated as to the grounds of his attacking pltf.'s patent, & there should be a fair & full disclosure of the particular lines of attack which are contemplated, but so such individualising of the persons who are alleged to be prior users as would enable pltf. to fix upon the deft.'s witnesses.—*SMITH v. GREY* (1884), 10 P. R. 482.—CAN.

h. Champerty & maintenance.—Discovery was not enforceable in equity in cases of champerty & maintenance, nor should it be under the equivalent remedies given by the Jud. Act; & pltf. should not be compelled on examination to answer questions touching an alleged champertous agreement.—*WELBOURNE v. CANADIAN PACIFIC RY. CO.* (1894), 16 P. R. 343.—CAN.

k. Action for criminal conversation—Whether wife examinable.—In an action of criminal conversation, after

(2) Leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony; he may, however, decline to answer them.

(3) *Semble*: inasmuch as proceedings for divorce & for other matrimonial causes are excluded from the operation of R. S. C., 1883, by Order LXVIII., r. 1 (d), an application for leave to administer interrogatories between the parties to a suit ought not to be made to a registrar of the Divorce Div.; but it ought to be made in the first instance to one of the judges of the ct.—*HARVEY v. LOVEKIN* (1884), 10 P. D. 122; 54 L. J. P. 1; 33 W. R. 188; 1 T. L. R. 136, C. A.

Annotations:—*As to* (1) *Consd.* *Redfern v. Redfern*, [1891] P. 139. *As to* (2) *Refd.* *Martin v. Treacher* (1886), 55 L. J. Q. B. 209.

1326. — Divorce—To prove adultery.—*REDFERN v. REDFERN*, No. 99, *ante*.

1327. — — — — —.—A wife in her petition for divorce on the ground of her husband's cruelty & adultery alleged in paragraph 4, as an act of cruelty, the wilful communication to her of a venereal disease & in paragraph 7 she alleged an act of adultery with a woman unknown at the same date whereby he had contracted the disease. The wife proposed to interrogate resp. as to whether he was not suffering from venereal disease at the time in question, & whether a doctor did not attend him for it; contending that the interrogatories went solely to the charge of cruelty alleged in paragraph 4:—*Held*: the interrogatories were not admissible.—*E. v. E.* (1907), 24 T. L. R. 78.

1328. Probate—To bring in testamentary document—Probate Act, 1857 (c. 77), s. 26.—The ct. gave leave to two of the exors. named in a will to interrogate the solr. of the testator touching a memorandum which the solr. had stated to the exors. had been executed by the testator in reference to his property.—*In the Goods of LOCKWOOD* (1891), 66 L. T. 124.

SUB-SECT. 2.—ACTIONS FOR PENALTIES AND FORFEITURE.

A. Penalties.

Criminating Interrogatories.—*See* Sect. 8, subsect. 4, B., *post*.

1329. General rule.—*SELWYN v. HONEYWOOD*, No. 1352, *post*.

pleading & examination of pltf. for discovery, particulars of the matters complained of should not be ordered except upon a full & satisfactory affidavit of deft. showing his innocence & ignorance of the ground of complaint. In such action there is no power, having regard to R. S. O. 1887, c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery.—*MURRAY v. BROWN* (1894), 16 P. R. 125.—*CAN.*

l. — — — — —.—In an action for criminal conversation with pltf.'s wife, deft. cannot be compelled to submit to examination for discovery.—*MULHOLLAND v. MISENER* (1895), 17 P. R. 132.—*CAN.*

m. — — — — —.—*When claim for alienation of wife's affection joined.*—In an action for criminal conversation deft. cannot be compelled to submit to examination for discovery. But where in the action damages are also claimed for the alienation of the affections & loss of the society of pltf.'s wife, deft. can be

examined upon that branch of the case.—*TAYLOR v. NEIL* (1896), 17 P. R. 134.—*CAN.*

n. — — — — —.—An action for criminal conversation & for alienating the affections of pltf.'s wife is an action instituted in consequence of adultery within the meaning of Evidence Act, R. S. O. 1897, c. 73, s. 7, & deft. in such an action cannot be compelled to submit to examination for discovery.—*FLEURY v. CAMPBELL* (1898), 18 P. R. 110.—*CAN.*

o. — — — — —.—Rule 278 providing for examination for discovery is applicable to an action for criminal conversation.—*HUNT v. SMITH*, [1919] 3 W. W. R. 586.—*CAN.*

p. — — — — —.—In an action for criminal conversation, which is an action instituted in consequences of adultery, deft. cannot be compelled to be examined for discovery, although R. 398 of King's Bench Act makes no exception to the right of examination for discovery there generally given;

1330. — — — — —.—The rule of law is that a man shall not be obliged to discover what may subject him to a penalty, not what must only.—*HARRISON v. SOUTHCOTE & MORELAND* (1751), 1 Atk. 528; 2 Ves. Sen. 389; 26 E. R. 333, L. C.

Annotations:—*Distd.* *Derby Corp. v. Derbyshire County Council* (1897), 77 L. T. 107. *Refd.* *A.-G. v. Duplessis* (1752), Park. 144; *U. S. A. v. McRae* (1867), L. R. 4 Eq. 327; *Re A Debtor*, [1910] 2 K. B. 59. *Mentd.* *Mackreth v. Symmons* (1808), 15 Ves. 329.

1331. Effect of Judicature Acts & Rules.—(1) The Jud. Acts & Rules have only altered the procedure & not the rights of parties, & interrogatories will not be allowed in cases where, as when a penalty is the gist of the action, the Ct. of Ch. before those Acts would not have allowed interrogatories to be administered; (2) effect of the Jud. Acts on mode of procedure discussed, *see* No. 12, *ante*.—*HUNNINGS v. WILLIAMSON* (1883), 10 Q. B. D. 459; 48 L. T. 581; 47 J. P. 390; *sub nom.* *HUMMINGS v. WILLIAMS*, 52 L. J. Q. B. 273; *sub nom.* *HEMMINGS v. WILLIAMSON*, 31 W. R. 336, D. C.

Annotations:—*Distd.* *Harvey v. Lovekin* (1884), 10 P. D. 122. *Follid.* *Martin v. Treacher* (1886), 16 Q. B. D. 507. *Apld.* *Mexborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111. *Refd.* *Derby Corp. v. Derbyshire County Council* (1897), 77 L. T. 107.

1332. Discretion of court—Chemist carrying on business without license.—Discovery in an action for penalties is in the discretion of the judge & was allowed where the action was for penalties under Apothecaries' Act, 1815 (c. 194), for carrying on business as a chemist without being duly licensed.—*APOTHECARIES SOCIETY v. NOTTINGHAM*, [1875] W. N. 259; Bitt. Prac. Cas. 72; 1 Char. Cham. Cas. 110.

Annotation:—*Consd.* *Martin v. Treacher* (1886), 16 Q. B. D. 507.

1333. Ecclesiastical penalties.—(1) Where a deft. did not except to the first report of insufficiency of an answer:—*Held*: he was not absolutely excluded from insisting on the same matter in his second answer.

(2) Though a deft. is not bound to answer what may subject him to ecclesiastical penalties; or whether he is or not married to a woman he cohabits with; or whether he is an alien, etc.; he must, in a proper case, answer whether he hath, or not, a legitimate son.

(3) Pltf. entitled to discovery of facts material to the merits, for want, or in aid of, proof or to substantiate his proceedings.—*FINCH v. FINCH* (1752), 2 Ves. Sen. 491; 28 E. R. 315, L. C.

Annotation:—*As to* (2) *Refd.* *Redfern v. Redfern*, [1891] P. 139.

1334. Penalty under charterparty.—Bill by the E. I. Co., claiming from a part-owner of a ship,

the particular enactment in the Imperial Act, 32 & 33 Vict. c. 68, has not been repealed by necessary implication & is still in force. If deft. cannot be compelled to answer questions on an examination for discovery, he should not be compelled to attend.—*WARMBEIN v. ULRICH*, [1919] 3 W. W. R. 959.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 2.—A.

q. Controverted election.—Pltf. is not entitled to examine deft. for discovery in an action for penalties under Ontario Elections Act, 1892.—*MALCOLM v. RACE* (1894), 16 P. R. 330.—*CAN.*

r. Under statute restricting importation of aliens.—An action brought in the High Ct. of Justice for Ontario, in the name of H. M., to recover a penalty for a violation of the statute of Canada, 60 & 61 Vict., c. 11, restricting the importation & employment of aliens, is an action to which Canada Evidence Act, s. 31, s. 2,

Sect. 2.—In what proceedings granted: Sub-sect. 2, A. & B.]

freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charterparty & a bye-law to the co., one moiety to their use, the other to be paid or returned to the person, who shall give the co. information & make proof; the deed being on settling the account cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject deft. to penalty, covering, not only the direct charge, but also circumstances of mere inducement, as, the execution & cancellation of the deed, & to the relief, generally, for want of equity, & for defect of parties, viz. the other part-owners, particularly one, who executed, & the informer, was overruled.—**EAST INDIA CO. v. NEAVE** (1800), 5 Ves. 173; 31 E. R. 530, L. C.

*Annotations:—***Refd.** *Green v. Weaver* (1827), 1 Sim. 404; *Robinson v. Kitchin* (1856), 21 Beav. 365. **Mentd.** *Thomson v. Thomson* (1802), 7 Ves. 470.

1335. Stockbroker—Stock Jobbing Act, 1733 (c. 8).]—Discovery, in support of an action to recover money under above Act, confined to those clauses, as to which it is expressly given with protection from the penalties; & therefore not extended to ss. 5 & 8. Though under the allegation of a fact by a bill pltf. may interrogate to incidental circumstances, he cannot as to a distinct subject.—**BULLOCK v. RICHARDSON** (1803), 11 Ves. 373; 32 E. R. 1131, L. C.

*Annotations:—***Consd.** *Billing v. Flight* (1816), 1 Madd. 230. **Refd.** *Pritchett v. Smart* (1849), 7 C. B. 625.

1336. ——— Matters partly lawful partly unlawful.]—A. employed a stockbroker in sundry transactions in the stock market on his own account, & also entered into a verbal agreement with the broker to be allowed a proportion of such commission as he should receive from customers recommended to him by A. Disputes having taken place between them A. filed his bill for an account relating to the dealings between them & for discovery. The answer stated that the business done for A. was partly real & partly consisted of time bargains, & discovery would subject them to penalties under above Act. They also set up Stat. Frauds; & they claimed the benefit of General Order 38 of Aug. 1841, to protect them from discovery though the time for demurring had long since gone by:—**Held**: (1) as it was admitted that some of the matters interrogated to were lawful & some unlawful, under above Act, deft. could not refuse to answer to the whole, because some part was unlawful; & (2) deft. could not refuse, under the said General Order of Aug. 1841, to answer any interrogatory merely on the ground of the general demurrableness of the bill.—**FISHER v. PRICE** (1849), 11 Beav. 194; 18 L. J. Ch. 235; 13 L. T. O. S. 41; 50 E. R. 791.

1337. ———.]—Where defts., stockbrokers, were interrogated as to the particulars of transactions which had taken place between them & pltf., & they declined to answer, by reason that they believed that a discovery of the particulars required would tend to subject them to the penalties & forfeiture imposed by above Act:—**Held**: such statement protected defts. from making the discovery required by the bill.—**SHORT v. MERCIER** (1851), 3 Mac. & G. 205; 20

L. J. Ch. 289; 16 L. T. O. S. 453; 18 L. T. O. S. 266; 15 Jur. 93; 42 E. R. 239, L. C.

*Annotations:—***Folld.** *Robinson v. Lamond* (1851), 15 Jur. 240. **Distd.** *Robinson v. Kitchin* (1856), 21 Beav. 365. **Refd.** *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *Scott v. Miller* (1859), John. 328; *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249.

1338. Broker in City of London—Penalty under bond given to Corporation of London.]—**GREEN v. WEAVER**, No. 1181, ante.

1339. Gaming debt.]—Upon an action brought to recover a sum of money lent upon the security of an I.O.U., & upon a bill filed to discover whether the money had not been lent for the purpose of gaming:—**Held**: deft. was bound to state by his answer whether it was so lent; it being still a question open to argument in a ct. of law, whether money lent at play, or for the purposes of play, is recoverable.—**WILKINSON v. L'EAUGIER** (1836), 2 Y. & C. Ex. 363; 160 E. R. 437.

1340. ——— Gaming Act, 1710 (c. 19), s. 1.] The forfeiture of securities under above Act for moneys lent at play, is not a penalty of such a nature as to protect a party from discovering whether the consideration of the security on which he brings his action was not moneys lent at play.—**SLOMAN v. KELLY** (1840), 4 Y. & C. Ex. 169; 160 E. R. 965.

*Annotation:—***Consd.** *Sidebottom v. Adkins* (1857), 29 L. T. O. S. 310.

1341. Action by common informer.]—Interrogatories delivered without leave in an action for penalties brought by a common informer were ordered to be struck out, by analogy to the practice in equity not to allow discovery where, if given, the party interrogated would be liable to penalties.—**ANON.** (1875), 20 Sol. Jo. 80; Bitt. Prac. Cas. 27; 1 Char. Cham. Cas. 104.

*Annotation:—***Expld. & Apld.** *Martin v. Treacher* (1886), 16 Q. B. D. 507.

1342. ———.]—The general rule is that in an action for penalties by a common informer leave will not be given to pltf. to administer interrogatories.—**MARTIN v. TREACHER** (1886), 16 Q. B. D. 507; 55 L. J. Q. B. 209; 54 L. T. 7; 50 J. P. 356; 34 W. R. 315; 2 T. L. R. 268, C. A.

*Annotations:—***Distd.** *Adams v. Batley, Cole v. Francis* (1887), 18 Q. B. D. 625. **Apld.** *Whiteley v. Barley* (1887), 56 L. J. Q. B. 312. **Consd.** *Hobbs v. Hudson* (1890), 25 Q. B. D. 232. **Apld.** *Mexborough v. Whitwood* U. D. C., [1897] 2 Q. B. 111. **Mentd.** *Reeve v. Gibson* (1891), 64 L. T. 141.

1343. Copyright—Dramatic Copyright Act, 1833 (c. 15), s. 2.]—By sect. 2 of above Act if any person shall, during the continuance of the sole liberty of representing a dramatic piece, represent such piece without the consent of the author, every such offender shall be liable for each & every representation to the payment of an amount not less than 40s.:—**Held**: this sect. did not impose a penalty upon the offender so as to preclude pltf. in an action to recover the specified amount from administering interrogatories to him.—**ADAMS v. BATLEY, COLE v. FRANCIS** (1887), 18 Q. B. D. 625; 56 L. J. Q. B. 393; 56 L. T. 770; 35 W. R. 437; 3 T. L. R. 511, C. A.

*Annotations:—***Consd.** *Jones v. Jones* (1889), 22 Q. B. D. 425; *Hobbs v. Hudson* (1890), 54 J. P. 360. **Distd.** *Saunders v. Wiel*, [1892] 2 Q. B. 321. **Refd.** *Re Derbyshire County Council & Derby Corpn.*, [1896] 2 Q. B. 53. **Mentd.** *Reeve v. Gibson*, [1891] 1 Q. B. 652; *Thomson v. Clannorris*, [1900] 1 Ch. 718.

—**See, generally**, COPYRIGHT, Vol. XIII., pp. 225–226.

applies. In such an action, having regard to the provisions of sect. 5 of that Act, as now found in 61 Vict. c. 53, deft. can be examined for discovery before the trial.—**R. v. FOX** (1898), 18 P. R. 343.—**CAN.**

s. Motion by Attorney-General for

leave to administer.]—A motion by pltf., the A.-G., for leave to deliver interrogatories in an action for penalties was refused.—**BOWSER (A.-G.) v. MCCUTCHEON BROTHERS** (1913), 25 W. L. R. 608.—**CAN.**

t. For infringement of copyright.]

—By Copyright (Works of Art) Act, 1862 (c. 68), s. 6, which prohibits infringement of copyright in registered paintings, drawings, or photographs, it is enacted that any person infringing such copyrights "shall, for every such offence, forfeit to the proprietor of the

1344. Fraudulent removal of goods by tenant—Action for double value.]—An action for double the value of goods fraudulently removed by a tenant, brought under Distress for Rent Act, 1737 (c. 19), is a penal action, & pltf. is not entitled to administer interrogatories to deft.—**HOBBS & CO. v. HUDSON** (1890), 25 Q. B. D. 232; 59 L. J. Q. B. 562; 63 L. T. 215; 38 W. R. 682; 6 T. L. R. 381, C. A.

Annotation :—**Reid. Saunders v. Wiel** (1892), 67 L. T. 207.

1345. Patent—Patents Act, 1883 (c. 57).]—By sect. 58 of above Act, which prohibits infringements of copyright in registered designs, it is enacted that any person who acts in contravention of the sect. shall be liable for every offence to forfeit a sum not exceeding £50 to the registered proprietor of the design, who may recover such sum as a simple contract debt by action:—**Held**: a sum so forfeited must be taken to be a penalty, & pltf. in an action to recover such a sum is not entitled to interrogate deft. as to the infringements charged.—**SAUNDERS v. WIEL**, [1892] 2 Q. B. 321; 62 L. J. Q. B. 37; 67 L. T. 207; 40 W. R. 594; 8 T. L. R. 650; 36 Sol. Jo. 591; 4 R. 1, C. A.

Annotations :—**Folld. Astle v. Mansfield** (1905), 22 R. P. C. 356. **Refd. Re Derbyshire County Council & Derby Corpn.**, [1896] 2 Q. B. 53. **Mentd. Thomson v. Clanmorris**, [1900] 1 Ch. 718.

1346. —.]—The registered proprietors of a design commenced an action for infringement, claiming an injunction, damages or alternatively penalties, & delivery up. Pltfs., however, under an order elected to claim penalties & not damages, & amended their statement of claim accordingly. Deft. denied infringement & alleged the invalidity of the design. Pltfs. then applied for leave to deliver interrogatories. Some of the proposed interrogatories related to the acts complained of & others to the issue of novelty:—**Held**: the action was substantially an action to recover penalties, & leave to deliver interrogatories was refused.—**ASTLE (TITUS), LTD. v. MANSFIELD** (1905), 22 R. P. C. 356.

1347. Pollution of river—Proceedings in county court—Rivers Pollution Prevention Act, 1876 (c. 75), ss. 3, 10.]—**DERBY CORPN. v. DERBYSHIRE COUNTY COUNCIL**, No. 1178, *ante*.

1348. Expiry of time—For suing for penalties.]—To part of the discovery sought by a bill, deft. pleaded clauses of an Act of Parliament inflicting certain penalties for doing the acts to which the discovery related; but, in the interval between the filing & the arguing of the plea, the period elapsed within which the penalties could be sued for:—**Held**: deft. must make discovery.—**TRINITY HOUSE CORPN. v. BURGE** (1828), 2 Sim. 411; 7 L. J. O. S. Ch. 44; 57 E. R. 842.

1349. —.]—**A.-G. v. CUNARD S.S. Co.** (1887), 4 T. L. R. 177.

Foreign Enlistment Act, 1870 (c. 90).]—*See ADMIRALTY*, Vol. I., p. 191, No. 1055.

B. Forfeiture.

Criminating interrogatories.]—*See* Sect. 8, subsect. 4, B., *post*.

1350. Married woman.]—Baron & *feme* defts. to a bill; the *feme* must answer, though the answer cannot be read against the husband, but may, possibly, be read against her, if she survive.

But in this case the *feme* not bound to answer the bill subjecting her to a forfeiture, though the

husband had submitted to answer.—**WROTTESELEY v. BENDISH** (1733), 3 P. Wms. 235; 24 E. R. 1042, L. C.

Annotations :—**Consd. A.-G. v. Duplessis** (1752), Park. 144; **A.-G. v. Lucas** (1843), 12 L. J. Ch. 506. **Refd. Whiting v. Rush, Peacock v. Rush** (1837), 2 Y. & C. Ex. 546; **Ex p. Lloyd** (1839), 8 L. J. Ex. 147.

1351. Papist—Inability to succeed to land.]—**JONES v. MEREDITH** (1739), 2 Com. 661; 2 Eq. Cas. Abr. 379; Bunb. 346; 92 E. R. 1257.

Annotations :—**Consd. Harrison v. Southcote & Moreland** (1751), 2 Ves. Sen. 389. **Mentd. Arnold v. Revoult** (1819), 4 Moore, C. P. 66; **Shrewsbury v. Scott** (1859), 6 C. B. N. S. 1.

1352. Seat in Parliament.]—S. gave a bond to pay £800 a year to H. during S.'s enjoying the office of . . . or whilst any body held it in trust for him; H. put the bond in suit; S. brings a bill for an injunction, & a cross bill is brought by H. to discover whether E. held the office in trust for S. S. insisted in his answer he was not obliged to discover what would subject him to the incapacities of the several Acts to vacate a seat in Parliament on a member's accepting a place:—**Held**: S. need not make the discovery.

A deft. is not obliged to disclose any fact which would tend to subject him to a corporal punishment or a pecuniary penalty or endanger a loss of office.—**SELWYN v. HONEYWOOD** (1744), 9 Mod. Rep. 419; 88 E. R. 546; *sub nom. HONEYWOOD v. SELWIN*, 3 Atk. 276, L. C.

1353. Alien—Former disability.]—By the known law of the land, no alien born can take by grant, devise, or other purchase, any freehold or chattels real for his own benefit: but can & does, in such cases, take for the benefit of the Crown; yet this disability being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth, in order to establish the fact of alienage.—**DUPLESSIS v. A.-G.** (1753), 1 Bro. Parl. Cas. 415; 1 E. R. 658; *sub nom. A.-G. v. DUPLESSIS*, Park. 144, H. L.

Annotations :—**Refd. Finch v. Finch** (1752), 2 Ves. Sen. 491; **Muckleston v. Brown** (1801), 6 Ves. 52; **Stickland v. Aldridge** (1804), 9 Ves. 516; **Podmore v. Gunning** (1836), 7 Sim. 644. **Mentd. Rittson v. Stordy** (1855), 3 Sm. & G. 230; **Wallgrave v. Tobbs** (1855), 2 K. & J. 313; **Barrow v. Wadkin** (1857), 24 Beav. 1.

See, now, Naturalization Act, 1870 (c. 14), &, generally, ALIENS.

1354. Marriage with minor—Forfeiture of interest in wife's property—Marriage Act, 1823 (c. 76), s. 23.]—The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information under above sect., seeking the forfeiture of his interest in the wife's property, & a settlement of the same upon her & her issue.—**A.-G. v. LUCAS** (1843), 2 Hare, 566; 12 L. J. Ch. 506; 7 Jur. 1080; 67 E. R. 234.

1355. Interest under will.]—Testator, after giving certain benefits to his heir, revoked them in case she should ever dispute his will or his competency to make it, or should not confirm it when required, or should not resist any proceeding by the result of which a greater benefit might be attainable by her than was intended by the will. A bill against the heir & others, to establish the will & carry the trusts into execution, contained statements & interrogatories founded on them, relating to testator's sanity, & to the heir having refused to confirm the will:—**Held**: the heir was not bound to answer any of the interrogatories relating to testator's sanity, notwithstanding the

copyright for the time being a sum not exceeding ten pounds," & sect. 8 provides that all pecuniary penalties may be recovered by the complainant

by action or by summary proceeding before two justices:—**Held**: sums so forfeited are penalties, & pltf. in an action claiming an injunction, damages,

& also the penalties given by the Act, is not entitled to interrogate deft.—**ELITE PORTRAIT CO. v. BAIRD** (1903), 37 I. L. T. 142.—**IR**,

Sect. 2.—In what proceedings granted: Sub-sect. 2, B. Sect. 3.]

revocation clause might be invalid, or she might have made an admission in her answer, which subjected her to its operation, if it were valid.—*COOKE v. TURNER* (1844), 14 Sim. 218; 4 L. T. O. S. 33; 8 Jur. 703; 60 E. R. 341.

1356. Action of ejectment.—To enforce forfeiture.]—*CHESTER v. WORTLEY*, No. 1648, *post*.

1357. ———.]—Interrogatories not allowed on the part of pltf. in an action of ejectment on a forfeiture.—*BLYTH v. L'ESTRANGE* (1862), 3 F. & F. 154.

1358. ——— Breach of covenant.]—Where interrogatories are put to a tenant, a party in an action of ejectment, the answer to which might deprive him of his estate by reason of forfeiture for underletting the premises, the ct. will not compel him to answer.—*PYE v. BUTTERFIELD* (1864), 5 B. & S. 829; 5 New Rep. 117; 34 L. J. Q. B. 17; 11 L. T. 448; 29 J. P. 581; 11 Jur. N. S. 220; 13 W. R. 178; 122 E. R. 1038.

*Annotations:—*Consd. *Martin v. Treacher* (1886), 2 T. L. R. 268. *Apld.* *Seaward v. Dennington* (1896), 12 T. L. R. 528. *Expld. & Apld.* *Mexborough v. Whitwood U. D. C.* [1897] 2 Q. B. 111. *Refd.* *Jones v. Jones* (1889), 22 Q. B. D. 425.

1359. ———.]—*MEXBOROUGH (EARL) v. WHITWOOD URBAN DISTRICT COUNCIL*, No. 126, *ante*.

1360. Property in foreign country.]—To a bill filed by the United States of America, alleging that they had succeeded to the rights of the late Confederate States of America, & praying an account & relief in respect of money received by deft., as agent for the Confederate States, deft. pleaded that by a law of the United States the property of all persons who had acted as agents for the Confederate States was liable to confiscation, & that proceedings were actually pending in America for confiscation of his property there on the ground of his having so acted as agent, & that he could not answer without exposing himself to such confiscation, & that pltf. could not have relief without waiving the right to confiscate:—*Held*: the plea was bad so far as related to the relief, but good as to the discovery, & pltf. must be allowed to proceed & prove their case if they were able to do so without the answer of deft.—*U.S.A. v. McRAE* (1867), 3 Ch. App. 79; 37 L. J. Ch. 129; 17 L. T. 428; 16 W. R. 377, L. C.

*Annotations:—*Consd. *Re Derbyshire County Council & Derby Corp.*, [1896] 2 Q. B. 297. *Mentd.* *Copin v. Adamson*, *Copin v. Strachan* (1874), 31 L. T. 242.

PART IV. SECT. 3.

a. Compellable witness for opponent.]—Discovery by means of oral examination under R. S. O. 1877, c. 50, s. 156 *et seq.*, was limited to cases in which the party to be examined was compellable to give evidence by or on behalf of the opposite party.—*JONES v. GALLON* (1881), 9 P. R. 296.—**CAN.**

b. Person for whose immediate benefit action brought.]—An action against an indorser of a promissory note, was brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. & M., who had dissolved partnership, & the action was brought after the dissolution in the name of M. only. The master in chambers made an order under rule 224 O. J. Act for the examination, & the production, of documents by, B., as a person for whose immediate benefit the action was being prosecuted. On appeal, the appellate judge thought the evidence as to the interest of B. unsatisfactory, but refused to set aside

the order of the master, varying it, however, by directing that the examination of B. & his affidavit on production should not be used except for the purpose of discovery.—*MINKLER v. McMILLAN* (1884), 10 P. R. 506.—**CAN.**

c. ———.]—The debt to recover which the action was brought had been assigned to pltf. by C. in part satisfaction of a judgment debt due by him to them:—*Held*: C. was a person for whose immediate benefit the action was brought within Rule 704, & defts. were entitled to examine him for discovery.—*TOLLEMACHE v. HOBSON* (1897), 5 B. C. R. 214.—**CAN.**

d. ———.]—In an action for specific performance, deft. moved for the examination for discovery of two other persons, strangers to the action, under C. R. 440, upon an affidavit which alleged an admission by them that they were interested in the lands in question:—*Held*: the affidavit did not show that the persons sought to be examined were persons for whose immediate benefit the action was being

prosecuted & therefore the motion could not succeed.—*AIKINS v. McGUIRE* (1912), 23 O. W. R. 98; 4 O. W. N. 132; 6 D. L. R. 864.—**CAN.**

e. ———.]—In an action by administrators of the estate of a deceased intestate to recover from deft. money & property in his hands alleged to form part of the estate of deceased:—*Held*: a sister of deceased, who, it was said, was entitled to a third of his estate was not a person for whose immediate benefit the action was prosecuted, & was not therefore, examinable by deft. for discovery under Rule 334. If she should receive any benefit from the action, it would be received mediately & not immediately.—*TRUSTS & GUARANTEE CO. v. SMITH* (1915), 7 O. W. N. 773; 33 O. L. R. 155.—**CAN.**

—.]—Deft. in an action is person "for whose immediate benefit" a garnishee issue in the action is being prosecuted, to permit him to be examined for discovery by the garnishee.—*UNITED STATES FIDELITY & GUARANTY CO. v. GOUIN* (1915),

Confusion of boundaries.]—See **BOUNDARIES**, Vol. VII., p. 324, No. 439.
Interrogatories on actions for recovery of land.]—See Sect. 5, sub-sect. 15, L., *post*.

SECT. 3.—BY AND AGAINST WHAT PERSONS INTERROGATORIES ADMINISTERED.

1361. Co-defendants.]—Order by one deft. to examine another, not of course after, as before, a decree.

In a special case, to ascertain who actually received money, all the trustees having signed the receipt, the ct. refused to discharge the order made two years before, but required the examination without delay.—*FRANKLYN v. COLQUHOUN* (1809), 16 Ves. 218; 33 E. R. 967, L. C.

*Annotation:—*Consd. *Paris v. Hughes* (1836), 1 Keen, 1.

1362. ———.]—A decree directed an inquiry whether certain younger children had made any & what assignment of their shares, & under what circumstances. One of the defts. claiming to be an assignee of a share carried into the master's office a state of facts setting forth the assignment under which he claimed. A co-deft., one of the children, carried in a counter state of facts impeaching the assignment as having been executed for an inadequate consideration, & without legal assistance. A motion to suppress interrogatories filed in support of the counter state of facts as relating to questions in dispute between co-defts. only, & not in issue in the cause, was refused.—*LENNARD v. CURZON* (1847), 1 De G. & Sm. 350; 63 E. R. 1099.

1363. ———.]—*WINTER v. WINTER* (1837), 1 Jur. 754.

1364. ———.]—(1) By the decree made in a suit to redeem mortgaged estates, in which several sets of incumbrancers were defts., the usual accounts were ordered to be taken, & the usual order made for payment, & in default of payment the bill was to be dismissed. By a decree made on a bill of revivor & supplement, in which one of the subsequent incumbrancers was pltf., the accounts were directed to be carried on:—*Held*: the subsequent incumbrancer, pltf. in the bill of revivor & supplement, was not entitled to exhibit interrogatories for the examination of the prior incumbrancers, who were co-defts. in the first suit & mortgagees in possession, although pltf. declined to prosecute the decree & to have the accounts taken.

(2) Where the decision of the right between co-defts. is essential to & necessarily involved in the decision of pltf.'s right, the decree will be conclusive as between co-defts.; but, otherwise, the rights of co-defts. *inter se* will not be affected by proceedings which are necessary only for establishing or ascertaining the rights of pltf.—*COTTINGHAM v. SHREWSBURY (EARL)* (1846), 15 L. J. Ch. 441, L. C.

Annotations:—*As to* (2) *Refd.* Lennard v. Curzon (1847), 1 De G. & Sm. 350. *Generally, Mentd.* Pelly v. Wathen (1849), 7 Hare, 351.

1365. —.]—*MARSHALL v. LANGLEY*, [1889] W. N. 222.

1366. *Co-defendant to counterclaim.*—M. commenced an action against K. K. delivered a defence & counterclaim, to which M. & I. were defts. I. applied for leave to exhibit interrogatories for the examination of M.:—*Held*: as I. was not a deft. in the original action, & I. & M. were co-defts. in the counterclaim, they were not opposite parties, & I. had no right to interrogate M.—*MOLLOY v. KILBY* (1880), 15 Ch. D. 162; 29 W. R. 127, C. A.

Annotations:—*Consd.* Eden v. Weardale Iron & Coal Co. (1887), 34 Ch. D. 223. *Apld.* Marshall v. Langley, [1889] W. N. 222. *Consd.* Birchall v. Birch, Crisp, [1913] 2 Ch. 375.

1367. *Plaintiff & third party.*—Pltf. may file interrogatories for the examination of a person made a party by supplemental order under the

new practice.—*ANON.* (1855), 25 L. T. O. S. 61, L. JJ.

1368. —.]—Persons who had been served by a deft. with a third party notice for the purpose of claiming indemnity, obtained an order (a) that the question of indemnity should be tried after the trial of the action; & (b), that they should be at liberty to appear at the trial of the action, & oppose pltf.'s claim so far as they were affected thereby, & for that purpose to put in evidence & cross-examine witnesses:—*Held*: third parties had put themselves in the position of "opposite parties" to pltf., & pltf. had a right to examine them by interrogatories.—*EDEN v. WEARDALE IRON & COAL CO.* (1887), 34 Ch. D. 223; 56 L. J. Ch. 178; 55 L. T. 860; 35 W. R. 235, C. A.

Annotations:—*Folld.* Eden v. Weardale Iron & Coal Co. (1887), 35 Ch. D. 287. *Mentd.* Barton v. L. & N. W. Ry. (1888), 36 W. R. 452.

1369. *Third party & plaintiff.*—Persons who are served by a deft. with a third party notice are not thereby made defts. within Jud. Act, 1873 (c. 66), s. 100, nor do they become defts. by putting in a statement of defence. But where persons had been served with a third party notice by deft. for the purpose of claiming an indemnity & had obtained an order (a) that the question of indemnity should be tried after the trial of the action; & (b) that they should be at liberty to appear at the trial of the action & oppose pltf.'s claim so far as they

31 W. L. R. 912; 8 Sask. L. R. 182.—*CAN.*

g. *Party adverse in interest—Co-defendant submitting to relief sought.*—A deft. who, in his defence, submits completely to the relief sought by pltf., neither denying nor admitting the allegations of the statement of claim is not a party adverse in point of interest to another deft., who disputes pltf.'s rights, within the meaning of Rule 387 of King's Bench Act, & the latter, therefore, cannot, under that rule, examine the former for discovery, as the pleadings do not raise any issue between them.—*FONSECA v. JONES* (1909), 19 Man. L. R. 334.—*CAN.*

h. — *Co-defendant legatee under will—Validity denied by other defendants.*—In an action to establish a will, a deft. was entitled thereunder to a substantial legacy:—*Held*: "he was adverse in interest" to a class of defts. who were contesting the validity of the will on the ground of undue influence & incapacity; & an order was made compelling her attendance for examination for discovery at their instance.—*MENZIES v. MCLEOD* (1915), 9 O. W. N. 166; 34 O. L. R. 572.—*CAN.*

k. — *Co-defendant assignor of other defendant—Effect of submitting to examination when not compellable.*—Under order from the Power Controller, the T. Co. delivered a certain amount of electric power to the O. Co. The T. Co. subsequently assigned all its rights against the O. Co. to pltf., who, by its information, as assignee of the T. Co., asked the ct. to fix the amount due to the T. Co., & that the O. Co. be ordered to pay this amount. The T. Co. filed defence but made no claim against the O. Co., its co-deft. An appointment was taken out by the Ontario Power Co. to examine an officer of its co-deft. on discovery, pltf. not being notified. The examination was begun without objection from either party & was continued until a certain question being put, witness refused to answer:—*Held*: though any adverse party in a suit can be examined on discovery, yet such examination must be limited to the issues to be tried in the action as between the parties; on the above stated facts, the O. Co. had no right to

examine its co-deft. on discovery, not being an adverse party, the right thereto being against the Crown only as the adverse party: & a witness submitting himself to examination for discovery does not waive his right to object to answer questions on matter not open to the examining party, & he is not bound to all questions whether properly put or not: *Semble*: where a co-deft. is an adverse party, the right to discovery would exist.—*R. v. ONTARIO POWER CO. & TORONTO POWER CO.* (1919), 19 Exch. C. R. 329; 51 D. L. R. 102.—*CAN.*

1367 i. *Plaintiff & third party.*—In an action of replevin a party was added as a deft. at the instance of deft., who claimed indemnity against him on the ground of a warranty. After issue, pltf. obtained an order to examine for discovery the third party:—*Held*: though on the face of the pleadings there was no direct issue between pltf. & third party, yet as the latter had all the rights of deft., & virtually took his place, the case was within the spirit at all events, of Rule 224 O. J. Act, & the examination should be allowed.—*BRADLEY v. CLARKE* (1883), 9 P. R. 410.—*CAN.*

1367 ii. —.]—In an action of ejectment, where pltf. claimed title under a conveyance from the father of deft. in 1885, & deft. claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, & deft. said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father & production of his books for the purpose of discovery before the trial:—*Held*: the father might have been made a party under Rule 109 on the ground of his having been a party to a fraud in conveying land to pltf. after he had made an agreement with his son, & such being the case, there was no doubt of his liability to be examined under rule 285.—*McMASTER v. MASON* (1887), 12 P. R. 278.—*CAN.*

l. *Action against board of trustees—On building contract—Architect.*—In an action against the trustees of an Orange Lodge for the price of work & materials in building a hall, the chairman of the board of trustees was

examined, & could give no information as to the matters in dispute. His examination showed that the architect employed by defts. was the person from whom alone the information could be had. Defts. had successfully resisted production of the plans, as being in custody of the architect, & belonging to him. In these circumstances an order for the examination of the architect by pltf., for discovery only, was affirmed.—*SMITH v. CLARKE* (1887), 12 P. R. 217.—*CAN.*

m. *Suit for specific performance—Predecessors in title.*—In an action by a vendor for specific performance of a contract for sale of land, at the price of \$24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was \$5,000. The sisters were old & infirm, & being unmarried lived, & had for a great many years lived, with pltf., & were said to be under his influence. Dft. was advised that so great a difference in the price required explanation, & had made endeavours to see the sisters, but had been refused access to them & pltf. had refused to procure them to join in the conveyance to the deft.:—*Held*: in these circumstances deft. should be allowed, under rule 285, to examine the two sisters for discovery before delivering the defence.—*BROWN v. PEARS* (1888), 12 P. R. 396.—*CAN.*

n. *Action by assignee of chose in action—Assignor—Effect when assignor a company.*—Rule 441 of the Rules of 1897 provides that where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery:—*Held*: this rule cannot be extended, by reference to rule 439 or otherwise, to the examination of an officer of a corp., the assignors of a chose in action.—*BANK OF TORONTO v. QUEBEC FIRE INSURANCE CO., BANK OF TORONTO v. KEYSTONE FIRE INSURANCE CO. OF ST. JOHN* (1898), 18 P. R. 41.—*CAN.*

o. — — —.]—R. 236 of the Alberta Rules of Ct. provides that where an action is brought by an assignee of a chose in action the ct. or a judge may order the assignor to be examined for discovery:—*Held*:

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were affected thereby & for that purpose to put in evidence & cross-examine witnesses:—*Held*: the third parties had been placed by the order in the position of defts. & had a right to examine pltf. by interrogatories under R. S. C., Ord. 31, r. 1.—*EDEN v. WEARDALE IRON & COAL CO.* (1887), 35 Ch. D. 287; 56 L. J. Ch. 400; 56 L. T. 464; 35 W. R. 507, C. A.

Annotations:—*Consd. Barclays Bank v. Tom*, [1923] 1 K. B. 221. *Mentd. Barton v. L. & N. W. Ry.* (1888), 36 W. R. 452; *Studley v. Studley*, [1913] P. 119.

1370. Foreigner living abroad.—The ct. will order a pltf., though a foreigner resident abroad, to answer interrogatories, under the C. L. P. Act, 1854 (c. 125).—*POHL v. YOUNG* (1855), 25 L. J. Q. B. 23; 26 L. T. O. S. 108; 1 Jur. N. S. 1139; 4 W. R. 84.

1371. Officer of banking company.—Under

where the assignor is a corpn. its officer may be examined to be selected in the same manner as provided by R. 250.—*BROWN v. SCOTT*, [1923] 1 W. W. R. 67.—CAN.

p. ———.]—R. 236 providing that "where an action is brought by an assignee of a chose in action the ct. or a judge may order the assignor to be examined for discovery" does not apply where the pltf. sues as the holder by indorsement or delivery of a bill of exchange, the law regarding which is quite distinct & apart from that relating to transference of property in other choses in action by assignment; nor does the rule authorise the examination of an assignor of a chose in action beyond the immediate assignor of pltf. *Seem*: if pltf. is the assignee under said rule of a corpn. assignor the latter may be examined by the examination of one of its officers—but R. 234 is not applicable to make an employee or past employee of the corpn. examinable.—*EMPIRE FINANCIERS, LTD. v. NANCE*, [1920] 1 W. W. R. 694; 51 D. L. R. 231.—CAN.

q. Witness out of jurisdiction.—On an application of deft. interrogatories will be allowed, & a commission will issue to examine a witness outside the jurisdiction where the interrogatories & the evidence of the absent witness are relevant to the proof of any possible defence to the action.—*PITCHES v. BANK OF NEW SOUTH WALES* (1891), 10 N. Z. L. R. 252.—N.Z.

r. Co-defendants & plaintiff.—*Plaintiff out of jurisdiction.*—Where pltf. resident out of the jurisdiction brings an action on a bill of exchange, & defts. obtain leave to defend, leave will be granted to administer interrogatories to pltf. without terms.—*LAND & LOAN CO. OF NEW ZEALAND, LTD. v. FULTON* (1892), 11 N. Z. L. R. 531.—N.Z.

s. Separate employee of partner.—*Where firm a party.*—Y., F., & G., carrying on business as the M. H. Co., brought an action in the firm name against deft. co. for the price of certain carloads of wheat. Defts. alleged that they purchased the wheat from F. & G., who also carried on business under another firm name, & that F. & G. owned the wheat, or that Y., F. & G., had permitted F. & G. to deal with the same:—*Held*: defts. were entitled to an order under Rule 234, for the examination for discovery of one K., a separate employee of Y.—*MEDICINE HAT WHEAT CO. v. NORRIS COMMISSION CO., LTD.* (1916), 34 W. L. R. 1019.—CAN.

t. Plaintiff & several defendants.—*Must allege cause of action against all.*—Where there are several defts. in an action the ct. will not allow pltf.,

under C. L. P. Act (Ireland), 1856, ss. 56, 57 to administer interrogatories to "defts." unless the affidavits upon which the motion is grounded contain the averment that pltf. has a good cause of action against all defts.—*DOOLIN v. DIXON* (1868), 16 W. R. 796.—IR.

a. In action for seduction.—*Not person seduced.*—Pltf. in an action of seduction was examined for discovery by deft., but was able to give very little information:—*Held*: nevertheless, deft. was not entitled to examine pltf.'s daughter.—*HOLLISTER v. ANNABLE* (1890), 14 P. R. 11.—CAN.

b. In action for criminal conversation.—*Not wife of plaintiff.*—In an action of criminal conversation, there is no power, having regard to R. S. O. 1887, c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery.—*MURRAY v. BROWN* (1894), 16 P. R. 125.—CAN.

c. Infant party.—As a general rule, an infant, party to an action, may now be examined by the opposite party for discovery before the trial, under rule 487, in the same way as an adult.—*ARNOLD v. PLAYTER* (1892), 14 P. R. 399.—CAN.

d. Defendant not defending.—*BUIST v. CURRIE*, 17 C. L. T. Occ. N. 335.—CAN.

e. ———.]—In a mtgc. action against T. M., the mtgor., & C. M. the registered owner, of certain lands, T. M. pleaded that he had executed the mtgc. as agent for C. M. to the knowledge of pltf. When examined for discovery pltf. denied such knowledge:—*Held*: T. M. was not entitled to issue interrogatories to C. M., who had not defended.—*RUTHERFORD v. MOSE* (1916), 34 W. L. R. 521; 10 W. W. R. 625.—CAN.

f. ———.]—In an action against two defts. for damages resulting from an automobile accident:—*Held*: a deft., who had not defended but demanded notice of proceedings might be examined for discovery.—*MCCALLUM v. MOSHER*, [1919] 3 W. W. R. 537.—CAN.

g. Officer of foreign corporation.—The chief officer in this Province of a foreign corpn. can be examined for discovery.—*REAL ESTATE LOAN CO. v. MOLSWORTH* (1885), 2 Man. L. R. 93.—CAN.

1371 i. Officer of banking company.—In an action to recover moneys alleged to have been deposited with deft., a banking corpn., at a branch, pltf. examined for discovery as officers the persons who were respectively manager & ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager:—*Held*: pltf. had the right

C. L. P. Act, 1854 (c. 125), s. 51, interrogatories may be administered to the public officer suing on behalf of a banking co., carrying on business in co-partnership, under Country Bankers Act, 1826 (c. 46).—*M'KEWAN v. ROLT* (1859), 4 H. & N. 738; 28 L. J. Ex. 380; 33 L. T. O. S. 240; 5 Jur. N. S. 714; 7 W. R. 601; 157 E. R. 1032.

1372. Officer of company.—*When not party to suit.*—Where a co. or corpn. is pltf. in a suit, deft. cannot, under 15 & 16 Vict. c. 86, s. 19, file interrogatories for the examination of its officers, when they are not parties to the suit.—*IMPERIAL MERCANTILE CREDIT ASSOCN. v. WHITHAM* (1866), L. R. 3 Eq. 89; 15 L. T. 203; 15 W. R. 97; *sub nom. IMPERIAL MERCANTILE CREDIT ASSOCN. v. GIBBON*, 12 Jur. N. S. 898.

1373. ———.]—*WILSON v. CHURCH*, No. 35, *ante*.

1374. ———.]—*TANNETTA, WALKER & CO. v. NEWPORT (ALEXANDRA) DOCK CO.* (1890), 6 T. L. R. 325, D. C.

under rule 487 to examine the general manager as an officer of the corpn., & the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance.—*DILL v. DOMINION BANK* (1897), 17 P. R. 488.—CAN.

1371 ii. ———.]—A bank president is examinable for discovery as a person "employed" by the bank within Rule 234.—*CARTER v. GREAT WEST LUMBER CO.*, [1919] 3 W. W. R. 901.—CAN.

h. Officer of company.—*Who is examinable officer.*—*General rule.*—When designating an officer of a co. for examination on discovery in order that such examination may be used as evidence against the co., that officer should be designated who has most personal knowledge of the facts & circumstances relevant to the issue in the action. In the present case it was held more just & convenient to designate the co.'s president rather than the local manager who had occupied said position for only two months & had no personal knowledge of the matters in issue.—*REGINA CITY v. ROBINSON'S CLOTHES, LTD.*, [1922] 2 W. W. R. 807; 66 D. L. R. 820.—CAN.

k. ———.]—The test of the propriety of allowing an officer or servant of a corpn. to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is as to that particular occasion & for that particular purpose to be regarded as an officer of the corpn. as distinguished from a mere servant, no matter how temporary his employment, or how summary the corpn.'s power of dismissal.—*LEITCH v. GRAND TRUNK RY. CO.* (1888), 12 P. R. 541, 671; 13 P. R. 389.—CAN.

l. ———.]—The word "officer" of a corpn. includes for purposes of examination for discovery employees who are usually termed "servants" as distinguished from officials.—*ELLIOTT v. HOLMWOOD & HOLMWOOD* (1915), 33 W. L. R. 134; 9 W. W. R. 490; 22 B. C. R. 335.—CAN.

m. ———.]—*Engine driver.*—In an application to rescind an order for the examination of the engine driver & paymaster of defts. co. on the ground that they were not officers within R. S. O., c. 50, s. 156:—*Held*: the summons should be made absolute.—*MOLAN v. GREAT WESTERN RY. CO.* (1878), 7 P. R. 358.—CAN.

n. ———.]—Where a corpn. was sued for negligence resulting in an accident, an order was made for the examination for discovery of the driver of the traction engine which was the alleged cause of

1875. —.]—Where in an action against a co. an application is made under R. S. C., Ord. 31, r. 5, for leave to deliver interrogatories to a member of the co., notice of the application must be served upon the member.

An application on the part of pltf. for leave to deliver interrogatories to H. the secretary of the co., & for an order that H. should answer the in-

terrogatories, was resisted by the co. on the ground that H. had ceased to be secretary of the co. before the date of the application, & it was ordered that the interrogatories should be answered by the proper officer of the co. H. was still a member of the co., but had not been served with notice of the application :—*Held* : the order was right.—**CHADDOCK v. BRITISH SOUTH AFRICA Co.**, [1896]

the accident.—**ODELL v. OTTAWA CITY** (1888), 12 P. R. 446.—**CAN.**

o. —.]—A rule of deflt. co., provided that the driver of a "light engine" has all the responsibilities of a conductor in cases where a train of cars is attached to the engine :—*Held* : the driver of the light engine which knocked down & killed the man for whose death the action was brought, was an officer of the co. who could be examined for discovery under rule 487.—**LEACH v. GRAND TRUNK RY. Co.** (1890), 13 P. R. 467.—**CAN.**

p. — foreman, a switch-foreman, & two engine-drivers in the employ of deflt. co. are not officers of the co. examinable for discovery under rule 487, in an action for damages arising out of a railway accident.—**KNIIGHT v. GRAND TRUNK RY. Co.** (1890), 13 P. R. 386.—**CAN.**

q. — *Sub-editor.*—The assistant or sub-editor of the deflt. co. was an officer examinable for the purpose of discovery under R. S. O. 1877, c. 50, s. 156.—**MATTLAND v. GLOBE PRINTING Co.** (1883), 9 P. R. 370.—**CAN.**

r. —.]—In an action against a newspaper publishing co. for a libel contained in an article written, by a member of the newspaper staff who procured special information therefor, under the supervision of the managing editor, & in which action defts. pleaded justification :—*Held* : (1) the writer was not in the position of a sub-editor, nor could he be called an officer of the co. & he was not examinable for discovery under rule 487 ; (2) no sufficient foundation was otherwise laid for his examination ; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification.—**MURRAY v. MAIL PRINTING Co.** (1892), 14 P. R. 405.—**CAN.**

s. — *Station agent.*—A station agent of a railway co. is an officer examinable under R. S. O. 1877, c. 50, s. 156.—**RAMSAY v. MIDLAND RY. Co.** (1883), 10 P. R. 48.—**CAN.**

t. — *Insurance agent.*—In an action upon a fire insurance policy against a co. :—*Held* : the local agents of the co., who received the application & the premium & issued the interim receipt, & his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the co. under C. L. P. Act.—**GORING v. LONDON MUTUAL FIRE INSURANCE Co.** (1885), 10 P. R. 642.—**CAN.**

a. —.]—In an action upon a life Insurance policy an order was made, at the instance of pltf., for the examination of the local agent of the co., who procured the application for insurance, for discovery only.—**HARTNETT v. CANADA MUTUAL AID ASSOCN.** (1888), 12 P. R. 401.—**CAN.**

b. —.]—A local agent of an insurance co. may be examined for discovery as an "other officer or servant" under Ord. 31—A, Rule 370, C. (2).—**YAMASHITA v. HUDSON BAY INSURANCE Co.**, [1918] 3 W. W. R. 671.—**CAN.**

c. — *Locomotive foreman.*—locomotive superintendent &

locomotive foreman of a railway co. are "officers of the Corp'n." who may be examined as provided in R. S. O. 1877, c. 50, s. 156, & the evidence of such officers as to the conditions of the respective engines & the difference as to danger from fire between a wood-burning & a coal-burning engine, taken under the above sect., was properly admitted on the trial of this cause.—**CANADA ATLANTIC RY. Co. v. MOXLEY** (1888), 15 S. C. R. 145.—**CAN.**

d. — *Conductor of train.*—An order for the examination of a person as an officer of a corporation, under R. S. O. 1877, c. 50, s. 156, is properly made *ex parte*. The conductor of a train in which pltf. was a passenger when the accident out of which the action arose occurred, was held examinable as an officer of the co. under that sect.—**LEITCH v. GRAND TRUNK RY. Co.** (1888), 12 P. R. 541, 671 ; 13 P. R. 369.—**CAN.**

e. — *In*—In damages for bodily injuries sustained by a pedestrian by reason of the negligent management & operation of a car of deflt. co. :—*Held* : the conductor & motor-man of the car were officers of the co. examinable for discovery ; but, as pltf. had already examined the general manager, she must elect which of the above officers she would examine, under rule 439 (2).—**DAWSON v. LONDON STREET RY. Co.** (1898), 18 P. R. 223.—**CAN.**

f. — *Foreman in charge of fences.*—In an action to recover the value of horses killed by a train on defts.' railway, it was alleged by pltf. & denied by defts. that the latter had failed to erect & maintain proper fences on either side of the railway where it crossed pltf.'s property :—*Held* : the foreman who had charge of the fences on the railway in the section which included the *locus in quo*, subject to the orders of a roadmaster, was not an officer of the co. who could be examined for discovery.—**FOWLE v. CANADIAN PACIFIC RY. Co.** (1890), 13 P. R. 413.—**CAN.**

g. — *Health officer.*—In an action for an injunction & damages in respect of the alleged unsanitary condition of a certain bay into which defts. drained part of their sewage, pltf. sought to examine for discovery the medical health officer of defts., whose sole connection with the subject-matter of the action arose from his having made an examination of, & a report to the local board of health upon the sanitary condition of the bay. The only object of the examination was to ascertain the reasons & grounds of the report :—*Held* : for this purpose he was not examinable as an officer of defts.—**COLEMAN v. TORONTO CITY** (1892), 15 P. R. 125.—**CAN.**

h. — *Caretaker of building.*—In an action for damages for negligence in keeping a building in such a dangerous condition that pltf. was injured while in it :—*Held* : the caretaker of the building, an employee of defts., was an officer examinable for discovery under rule 487.—**SCHMIDT v. BERLIN TOWN** (1894), 16 P. R. 242.—**CAN.**

k. — *Electrician control-*ling power-house.]—Pltf.'s cause of action was that, while in the employ of defts. & working with some wires, the electric current was carelessly turned on, whereby he sustained injury.

The current was generated at & turned on from the building called the power house, & S. was an electrician in defts.' employ at the power house & had the control & management thereof & of the electric current as a foreman, but his duties had never been defined by the directors nor had any resolution or bye-law been passed making him an officer of the co. :—*Held* : he was an officer of the co. within Rule 379, & should attend & submit to be examined for discovery.—**DIXON v. WINNIPEG ELECTRIC STREET RY. Co.** (1895), 10 Man. L. R. 660.—**CAN.**

l. — *Flagman at railway crossing.*—A flagman in the employment of a railway co. whose duty it is to give notice of danger to persons intending to cross a line at a particular place, he being under the superintendence of the yard foreman, is not an officer of the co. examinable for discovery at the instance of pltf. in an action against the co. to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger.—**HENDERSON v. CANADA ATLANTIC RY. Co.** (1897), 17 P. R. 337.—**CAN.**

m. — *Roadmaster.*—In an action for damages for the death of pltf.'s husband who was killed while on duty as a fireman on a train of deflt. co., owing to the displacement of a switch :—*Held* : the roadmaster in charge of the section of the line in which the accident occurred, although he was under the control of the chief engineer, was an officer of the co. examinable for discovery.—**CASSELLMAN v. OTTAWA, ARNPRIOR & PARRY SOUND RY. Co.** (1898), 18 P. R. 261.—**CAN.**

n. — *Water meter inspector.*—In an action against a city corp'n. for damages occasioned by the negligence of an employee of the water-works department of the city in discharging his duty of examining a water meter in pltf.'s premises, pltf. has a right, under Rule 387 King's Bench Act, to examine for discovery a water meter inspector of the city as an officer of the corp'n.—**SHAW v. WINNIPEG** (1910), 19 Man. L. R. 551.—**CAN.**

aa. — *Sales agent.*—S. was an agent for the sale of pltf. co.'s machinery on commission, that being a part only of his business ; & he canvassed deflt. to buy machinery from pltf. co. ; which deflt. did ; & the action arose out of that transaction :—*Held* : as Rule 224, as amended in 1902, permits the examination of the officer of a corp'n. to be used as evidence in the same way as the examination of a party, it could not be said that S. was such an "officer" as was intended by the Rule.—**NICHOLS & SHEPARD Co. v. SKEDANUK** (1912), 22 W. L. R. 114 ; 6 D. L. R. 115.—**CAN.**

bb. —.]—A selling agent of a co. paid a commission on sales while not an officer of deflt. co. was a "servant" thereof & could therefore be examined for discovery.—**CLARKE & MONDS v. PROVINCIAL STEEL Co.** (1913), 24 O. W. R. 287 ; 4 O. W. N. 991 ; 9 D. L. R. 803.—**CAN.**

cc. — *Foreman of works.*—In an action against an incorporated co. to recover damages for the death of intestate while in the employment

Sect. 3.—By and against what persons interrogatories administered. Sect. 4.]

2 Q. B. 153; 65 L. J. Q. B. 635; 74 L. T. 755; 44 W. R. 658; 12 T. L. R. 489; 40 Sol. Jo. 598, C. A.

Annotation:—Reid. Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co., [1900] 2 Ch. 1.

1376. Liquidator of company.]—Re BARNED'S BANKING CO., Ex p. CONTRACT CORPN., No. 318, ante.

1377. —.]—The liquidator of a co. is entitled to deliver interrogatories to a person, claiming to prove, who has made an affidavit of documents.—*Re ALEXANDRA PALACE CO. (1880), 16 Ch. D. 58; 50 L. J. Ch. 7; 43 L. T. 406; 29 W. R. 70.*

Answer by corporation.]—See Sect. 8, sub-sect. 3, post.

Arbitration.]—See ARBITRATION, Vol. II., p. 430, Nos. 798–802.

1378. Guardian ad litem.]—A guardian *ad litem* is not a party to the action within the mean-

ing of R. S. C., Ord. 31, r. 1, & therefore cannot be compelled to answer interrogatories.—*INGRAM v. LITTLE (1883), 11 Q. B. D. 251; 31 W. R. 858, D. C.*

Annotation:—Consd. Paspati v. Paspati, [1914] 1 P. 110.

1379. Infant.]—An infant pltf. or deft. cannot be compelled to answer interrogatories.—*MAYOR v. COLLINS (1890), 24 Q. B. D. 361; 59 L. J. Q. B. 199; 62 L. T. 326; 38 W. R. 349; 6 T. L. R. 186, D. C.*

Annotations:—Distd. Redfern v. Redfern, [1891] P. 139. Apld. Curtis v. Mundy, [1892] 2 Q. B. 178.

See, now, R. S. C., Ord. 31, r. 29.

SECT. 4.—AT WHAT STAGE OF PROCEEDINGS INTERROGATORIES ADMINISTERED.

1380. Whether defendant may interrogate—Before defence delivered.]—An action was brought

of defts. in their works, by reason of the negligence of defts. as alleged, pltf. sought to examine for discovery a man who was the foreman of defts. in their works at the time of the occurrence, but had ceased to be in their employment:—*Held*: the foreman was not a former officer of the co. who could be examined under Rule 278; &, being no longer in the co.'s service, he could not be examined as a servant under Rule 279.—*TORONTO GENERAL TRUSTS CORPN. v. MUNICIPAL CONSTRUCTION CO. (1912), 20 W. L. R. 201.—CAN.*

r. — Solicitor.]—A solr. appointed & employed by a municipal corpn. at a fixed salary, who devoted his services exclusively to the corpn., is an "officer" within Rule 370 (1), & is, therefore, examinable for discovery.—*DUNCAN v. VANCOUVER, [1917] 3 W. W. R. 18; 36 D. L. R. 218.—CAN.*

s. — Financial secretary.]—In an action against the Canadian Order of Foresters to recover the amount of an insurance policy or certificate on the life of a deceased member of the order:—*Held*: deft.'s proper officer for examination for discovery was the financial secretary of the subordinate court of which deceased was a member, rather than the high secretary of the order who was named by deft. as the officer for examination.—*NATIONAL TRUST CO., LTD. v. CANADIAN ORDER OF FORESTERS, [1923] 1 W. W. R. 932.—CAN.*

t. — When other officer already examined—Discretion of court.]—Where an officer of a co. has been examined for discovery, an order may be made, under Rule 297 (2), for the examination of another officer or servant, in the discretion of the ct. Where, in an action for damages for injuries alleged to have been caused by the negligence of deft. co., their servants or agents, in the operation of a hoist, the secretary-treasurer & superintendent of construction of the co. had been examined for discovery, but was able to give little information, an order was made for the examination of the engineer in charge of the hoist.—*COXALL v. PARSONS BUILDING CO. (1913), 23 W. L. R. 529; 10 D. L. R. 805; 4 W. W. R. 131.—CAN.*

a. — —.]—Although there is nothing in the Rules to indicate an intention to depart from the principle of ordering the examination of another officer of a corpn., where the examination of the officer first examined makes it appear that he is not possessed of the knowledge he is supposed to have, where on the question first coming up it is apparent that

each of the employees whose examination is asked occupies a different position with regard to the corpn. & has different duties with regard to its property or operations relating to the occurrence in question, it is quite proper to direct at once the examination of all of them.—*McLEAN v. CANADIAN PACIFIC RY. CO. (1916), 34 W. L. R. 843; 12 Alta. L. R. 61.—CAN.*

b. — —.]—The ct. or judge may name a new officer of a co. to be examined for discovery under Rule 250, substitutionally or additionally to one already selected by the co. Where, however, a co. deft. had selected one of its officers for examination for discovery:—*Held*: the ct. should not grant an order for the examination of another officer in lieu of the one selected, where such other officer, who was also an individual deft., had defended in the name of a solr. who was not the solr. for the co. & had made admissions in his defence which the co. contended would be prejudicial to it if made by him on examination as the co.'s representative.—*PELICAN OIL & GAS CO., LTD. v. NORTHERN ALBERTA, ETC., LTD., [1918] 1 W. W. R. 957.—CAN.*

c. — Where company is employee of a party.]—An officer of a co., which is the employee to a party to an action, may be examined for discovery by the other party to the action, owing to the joint operation of Rules 3 & 234.—*MAGRATH v. COLLINS, [1917] 1 W. W. R. 462.—CAN.*

d. — When outside jurisdiction.]—An order cannot be made for examination for discovery *ex juris* of an officer of a litigant corpn.—*McMILLAN v. CANADIAN NORTHERN RY. CO., [1920] 2 W. W. R. 575.—CAN.*

e. — —.]—Under Rule of Ct. 272 an officer or servant of a litigant corpn. who is not in Saskatchewan may by order of the ct. or judge be examined *ex juris* for discovery.—*KAMSACK TOWN v. CANADIAN NORTHERN TOWN PROPERTIES CO., [1922] 1 W. W. R. 1167; 66 D. L. R. 790; 15 Sask. L. R. 535.—CAN.*

f. Public officers — Sheriff & bailiff.]—A mtgee. of chattels brought an action attacking an alleged sale thereof under his mtge. He joined as defts. the mtgor., the alleged purchaser, the sheriff & the sheriff's bailiff. Against the mtgor. & the purchaser he claimed that the chattels were not sold or, if they were, they were sold at a gross undervalue as a result of conspiracy between the mtgor. & purchaser to prevent bidding. Against the sheriff & bailiff he made an alternative claim for damages for negligence in the conduct of the sale should it be upheld:—*Held*: the

sheriff & bailiff were not examinable for discovery by the mtgor. purchaser under that part of R. 234 permitting the examination of a party by any person "adverse in interest"; but they were examinable under that part of R. 234 permitting the examination of "any person who is or has been employed by any party to an action & who appears to have some knowledge touching the questions in issue acquired by virtue of such employment"; they were not excluded from the operation of this Rule merely because they were public officers of the class whom the mtgee. under the Act Respecting Extra-Judicial & Other Seizures was obliged to employ.—*FRALECK v. JOHNSTONE, [1920] 3 W. W. R. 805.—CAN.*

1376 i. Liquidator of company.]—Where certain shareholders of an insolvent bank were suing the directors for negligence & misfeasance, & had made the bank defts. for conformity without asking any relief against them, an application by pltf. under rule 566 for leave to examine one of the liquidators for discovery before statement of claim was refused.—*HENDERSON v. BLAIN (1891), 14 P. R. 308.—CAN.*

PART IV. SECT. 4.

g. Before action brought—To disclose author of defamatory letter published in newspaper—Whether permitted.]—When no action had been begun the ct. refused to order an editor to disclose to the person defamed the name of the writer of an anonymous letter which had appeared in his paper & was alleged to be defamatory. *Semble*: no such disclosure will be ordered at any time except when there is no other appropriate remedy, as where the author hides behind an impecunious publisher.—*SPIES v. VORSTER (1910), 31 N. L. R. 205.—S. AF.*

h. Necessity for leave of court.]—Under the C. L. P. Act, s. 190 leave of the ct. or a judge is necessary to authorise interrogatories either with the declaration or pleas or at any other time.—*BANK OF UPPER CANADA v. RUTAN (1862), 3 P. R. 46.—CAN.*

k. Up to latest possible date.]—The affidavit on production is a substitute for discovery on interrogatories & a party is entitled to such discovery up to the latest possible date.—*KENNEDY v. ROYAL INSURANCE CO. (1871), 3 Ch. Ch. 489.—CAN.*

l. After pleadings delivered — Unless circumstances exceptional.]—An order for examination before the delivery of pleadings, whether for discovery or evidence, should only be granted under exceptional circumstances, & where absolutely necessary

against the exors. of a deceased trustee seeking to make his estate liable for breaches of trust. The exors. were personally ignorant of all the transactions in respect of which pltf. sought relief & applied for leave to interrogate pltf. before putting in the statement of defence, alleging that pltf.'s solr., who was partner in a firm of solrs. who had acted for the trustees during the trusteeship of testator, could furnish information which would enable them to defend the action successfully:—*Held*: leave must be refused, & the exors. must put in such statement of defence as they could, & then interrogate.—*DISNEY v. LONGBOURNE* (1876), 2 Ch. D. 704; 45 L. J. Ch. 532; 35 L. T. 301; 24 W. R. 663; 3 Char. Pr. Cas. 189.

Annotation:—*Reid. Philipps v. Philipps* (1879), 40 L. T. 815.

1381. ——— **Information not required for defence.**—The administratrix of A. by statement of claim in an action against the administratrix of G., alleged that an arrangement had been made between A. & G. that sums contributed by them for the purpose of being lent to or applied for the benefit of C., to enable him to carry on a litigation, should be treated as a joint transaction, & that as soon as C. had established his title to the property

for which he was suing, & could repay the advances made him, the advances made by A. & G. should be repaid out of the moneys recovered from him; that during the litigation A. advanced, in pursuance of this arrangement, sums amounting to about £27,000; that the advances made to C., were made through G., & in his name; that deft. had recovered a judgment against C. for the advances to him, & that a sum had been set apart in a suit in Ch. in satisfaction of this judgment. Pltf. claimed that it might be declared that the loans by G., in respect of which the judgment was recovered, were transactions for the joint benefit of A. & G. as partners, & to have the sums contributed by them respectively ascertained; & asked that pltf. might be declared entitled to a share in the benefit of the judgment, & in the fund set aside to satisfy it. Deft., before putting in a defence applied for an account with dates & items of the particulars of the £27,000 mentioned in the statement of claim, & the judge made an order accordingly:—*Held*: the action not being a mere legal demand for an ascertained sum, but an equitable claim for an amount to be ascertained by an account, the particulars asked for were not

in the interests of justice.—*THOMPSON v. GYE* (1889), 13 P. R. 273.—**CAN.**

m. After production of documents.—The proper mode in examination for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents shall be produced & have the examination adjourned for that purpose. The practice of enabling a party by means of a *subpoena duces tecum* to get production on a two-day notice of any documents he chooses to particularise is not to be encouraged, & a motion to commit for non-production was refused. It is desirable to postpone examinations for discovery until after production.—*LAVERY v. WOLFE* (1884), 10 P. R. 488.—**CAN.**

n. During extension of time for pleading.—On notifying court of intention to interrogate—*Effect of not notifying.*—Where a party to an action has obtained an extension of time to plead after expiration of the time allowed by the rules, he may deliver interrogatories to the opposite party; but if it be intended to do so, the ct. ought to be informed, at the time of the application to extend the time for pleading, that it is the intention of the person asking for an extension of time to exhibit interrogatories; & if this information be withheld from the ct., a summons to compel answers to interrogatories so exhibited will be refused.—*JORDAN v. MCREEDY & CARSON* (1889), 23 L. R. Ir. 421.—**IR.**

1380 i. Whether defendant may interrogate—Before defence delivered.—In an action for libel against the publishers of a newspaper, defts. on a motion under rule 285 O. J. Act, were allowed to examine pltf. for discovery with certain restrictions before defence filed.—*TATE v. GLOBE PRINTING CO.* (1886), 11 P. R. 253.—**CAN.**

1380 ii. ———.—An order was made by the judge in chambers giving deft. leave to deliver interrogatories to a number of officials of the pltf. bank. At the time the order was granted no defence to the action had been delivered:—*Held*: under Ord. 31, R. 1, the judge had a discretionary power to make such order before the delivery of the defence; & the objection to the order on the ground that it ordered discovery, & inspection as well as the delivery of interrogatories, could not be sustained.—*COMMERCIAL BANK OF WINDSOR v. BROCKWITH* (1887), 7 R. & G. 527; 8 C. L. T. 60.—**CAN.**

1380 iii. ———.—Rule 566 does not apply to examinations for dis-

covery. But if that rule was applicable, it was not "necessary for the purposes of justices," in the circumstances of this case an action for libel, to make an order allowing defts. to examine pltf. for discovery before delivering their statement of defence.—*BEATON v. GLOBE PRINTING CO.* (1894), 16 P. R. 281.—**CAN.**

1380 iv. ———.—Until the defence has been delivered deft. is not entitled to examine for discovery without leave.—*MITCHELL v. RENFREW*, [1918] 1 W. W. R. 942.—**CAN.**

1380 v. ———.—Leave granted to deliver interrogatories to pltf. before defence filed, & the time for pleading extended until two days after the interrogatories shall have been answered.—*WHITE v. GAHAGAN* (1860), 12 Ir. Jur. 173.—**IR.**

1380 vi. ———.—Leave granted to deft. (a public co.), on the affidavit of its attorney, to deliver interrogatories to pltf. before defence filed, & the time of pleading extended until the interrogatories should be answered.—*SHARP v. GREAT SOUTHERN & WESTERN RY. CO.* (1857), 8 I. C. L. R. App. 27, n.—**IR.**

o. — After issue joined & before cause down for hearing.—An application to set a cause down for hearing cannot be made until fourteen days after the cause is at issue, deft. having that time in which to file interrogatories.—*CHASE v. BRIGGS* (1880), (1825-97), N. B. Dig. 653.—**CAN.**

p. — Before particulars delivered—Of general damage.—In an action for damages for libelling pltf. in the way of their trade, pltf. did not allege special damage but alleged generally that their business & commercial reputation had suffered. Upon the examination of pltf. for discovery they refused to answer as to what business they had lost by reason of the alleged libels:—*Held*: no evidence of special damage would be admissible at the trial, but pltf. would have the right to place figures before the jury to show a general diminution of profits since the publication of the alleged libels; & if pltf. proposed to give this class of evidence at the trial, defts. were entitled on the examination for discovery to know how such diminution was made out & the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if pltf. did not propose to give such evidence, defts. were not entitled to the discovery. It was, therefore,

ordered that pltf. should give particulars of any damage intended to be claimed for diminution of profits; & if particulars given, that the examination should be continued & discovery afforded; but if particulars were not given, that evidence of diminution of profits should not be given at the trial.—*BLACHFORD v. GREEN* (1892), 14 P. R. 424.—**CAN.**

q. — Of plea justifying libel.—Action for libel in charging pltf. with not accounting for moneys received as agent for defts. Defts. pleaded privilege & set out certain circumstances which they alleged created the privilege. They also pleaded in justification of the libel. Pltf. applied for particulars & defts., while not denying his right to particulars, claimed the right to examine him for discovery before being compelled to deliver particulars. Pltf. however refused to attend for examination until after the delivery of particulars by defts.:—*Held*: pltf. should forthwith attend at his own expense for examination & defts. should deliver at once particulars of the grounds of their belief that the words complained of were true.—*TIMMONS v. NATIONAL LIFE ASSURANCE CO.* (1908), 18 Man. L. R. 465.—**CAN.**

r. — — — ——In an action for libel a plea of justification was made without stating full particulars thereof, & deft.'s solr. obtained from pltf.'s solr. an undertaking to produce pltf. for examination for discovery, & pltf.'s solr. obtained from deft.'s solr. two postponements of the time of said examination, & while the second period was current, pltf.'s solr. took out a summons for particulars & deft.'s solr. took out a summons to compel pltf.'s solr. to fulfil his undertaking:—*Held*: there was nothing in these circumstances justifying the ignoring of the principle that a deft. who has pleaded a general justification must furnish pltf. with the particulars of the facts before obtaining discovery from pltf.—*NELSON v. BRADSTREET*, [1917] 2 W. W. R. 1191.—**CAN.**

s. — Third party against whom right of indemnity alleged—Before order for directions.—A deft., who has served a third party with notice, under the rules, of a claim for contribution or indemnity in respect of pltf.'s claim, cannot proceed to examine such third party for discovery, although he has filed a defence to the notice, until after an order for direction as to the

Sect. 4.—At what stage of proceedings interrogatories administered. Sect. 5: Sub-sects. 1 & 2.]

required to enable deft. to frame her defence, & pltf. ought not to be ordered to furnish them.—*AUGUSTINUS v. NERINCKX* (1880), 16 Ch. D. 13; 43 L. T. 458; 29 W. R. 225, C. A.

Annotations:—Distd. Blackie v. Osmaston (1884), 28 Ch. D. 119. *Refd. Kemp v. Goldberg* (1887), 36 Ch. D. 505.

1382. — After pleadings closed.]—Though great delay had taken place, leave was given to file interrogatories after the close of the pleadings; costs of the application to be costs in the cause.—*LONDON & PROVINCIAL MARINE INSURANCE CO. v. DAVIES* (1877), 5 Ch. D. 775; 37 L. T. 67; 25 W. R. 876.

1383. Whether plaintiff may interrogate—Before defence delivered.]—*COTCHING v. HANCOCK* (1876), Bitt. Prac. Cas. 123; 2 Char. Cham. Cas. 52.

1384. — — —.]—Interrogatories delivered with the statement of claim were struck out as premature.—*FENWICK v. JOHNSTON* (1876), Bitt. Prac. Cas. 120; 2 Char. Cham. Cas. 51.

1385. — — — To save expense.]—In an action on a bill of exchange, deft. who sought to ascertain by interrogatories whether pltf. was a mere nominee of the drawer without consideration, was allowed to administer them before delivering a statement of defence as if pltf. proved to be a holder for value without notice no statement of defence would be put in.—*HAWLEY v. READE*, [1876] W. N. 64; Bitt. Prac. Cas. 130; 2 Char. Cham. Cas. 53.

1386. — — —.]—*DRAKE v. WHITELEY* (1876), Bitt. Prac. Cas. 122; 2 Char. Cham. Cas. 52.

1387. — — — Exceptional circumstances.]—Under R. S. C., Ord. 31, r. 1, pltf. may, before the statement of defence has been delivered, deliver interrogatories; but if he does, the interrogatories may be struck out under r. 5, unless sufficient reasons are given by pltf. why the interrogatories are necessary at that stage of the action.—*MERCIER v. COTTON* (1876), 1 Q. B. D. 442; 46 L. J. Q. B. 184; 35 L. T. 79; 24 W. R. 566; 3 Char. Pr. Cas. 182, C. A.

Annotations:—Expld. Disney v. Longbourne (1876), 24 W. R. 663; *Ochsley v. Redfern* (1876), 3 Char. Pr. Cas. 193; *Harbord v. Monk* (1878), 9 Ch. D. 616. *Folld. Beal*

mode of determining the questions arising between all the parties has been obtained by deft. under Rule 249 (a) of King's Bench Act.—*WARREN v. PETTINGILL* (1913), 25 W. L. R. 387; 23 Man. L. R. 747.—CAN.

t. Whether plaintiff may be surgically examined—Before defence delivered—When such examination equivalent to one for discovery.]—An examination of the person by a surgeon under Con. Rules 462, in an action for personal injuries, is an examination for discovery; & that rule must be applied in the same way as Con. Rule 442; therefore an order for such an examination, in an action where the liability is disputed will not, if opposed, be made before delivery of defence.—*BURNS v. TORONTO RY. CO.* (1907), 9 O. W. R. 277; 13 O. L. R. 404.—CAN.

1383 i. Whether plaintiff may interrogate—Before defence delivered.]—Rule 285, O. J. Act, applies to examinations for discovery before trial, & the examination of deft. may be had under it before defence filed. An examination may be obtained under it at any stage of the cause & though no motion is pending.—*FISKEN v. CHAMBERLAIN* (1882), 9 P. R. 283.—CAN.

1383 ii. — — —.]—Pltf. might be allowed to administer interrogatories before the defence is filed, but not where they are calculated largely to increase the costs.—*WHITE v. MCCABE* (1895), 40 N. S. R. 628.—CAN.

a. — Before particulars delivered—Of occasion on which libel published.]—Pltf. alleged that at a certain city, in a certain month & year, deft. falsely & maliciously spoke & published of pltf. certain specified words.—*Held*: deft. was entitled to some particulars as to the times when & the places where the defamatory words were used, & as to some of the persons in whose hearing they were alleged to have been spoken, & pltf. should have leave to examine deft. before delivering particulars, in order to enable him to furnish them.—*ROBINSON v. SUGARMAN* (1897), 17 P. R. 419.—CAN.

b. — Before statement of claim delivered—When claim cannot else be stated.]—Where pltf. had a good cause of action against deft., but was unable to frame his statement of claim unless he could examine for discovery deft. & his employer, who was not a party to the suit.—*Held*: he was entitled to such discovery under rule 285, O. J. Act, & an order for such examination by a local judge of the High Ct. had been properly made.—*GORDON v. PHILLIPS* (1886), 11 P. R. 540.—CAN.

c. — — —.]—In an action by creditors of deft. R. to set aside conveyances by him to deft. G. as fraudulent, pltf. swore that it was necessary to have an examination for discovery of defts. before delivering

v. Pilling, Pilling, Potter & Lowe (1878), 38 L. T. 486. *Distd. Quilter v. Heatly* (1883), 23 Ch. D. 42.

1388. — — —.]—The practice of delivering interrogatories with the statement of claim is a bad one borrowed from the Chancery practice of filing interrogatories on bill without knowing or caring what the answer will be. Interrogatories delivered after appearance & before statement of defence struck out.—*STRONG v. TAPPIN*, [1876] W. N. 22; Bitt. Prac. Cas. 99; 2 Char. Cham. Cas. 51.

Annotation:—Folld. Drake v. Whiteley (1876), Bitt. Prac. Cas. 122.

1389. — — — In Chancery Division.]—In an action in the Ch. Div. interrogatories may be delivered before the statement of defence; *Mercier v. Cotton*, No. 1387, *ante*, applies only to actions in the nature of common law actions.—*HARBORD v. MONK* (1878), 9 Ch. D. 616; 27 W. R. 164.

Annotation:—Refd. Union Bank of London v. Manby (1879), 28 W. R. 23.

1390. — — —.]—It is in the discretion of the judge at chambers whether he will strike out interrogatories delivered by pltf. before the statement of defence.

A. brought an action against B. for expenses incurred on his behalf & authorised by him in a letter sent to A. by C., B.'s solr. B. in his statement of defence denied the authority of C. to write the letter. A. joined C. as deft. & interrogates him before his statement of defence is delivered as to whether he had authority from B.:—*Held*: the interrogatories were not premature.—*BEAL v. PILLING, PILLING, POTTER & LOWE* (1878), 38 L. T. 486.

1391. — — — Patent action.]—*SEAVER v. BURLINGHAUS* (1908), cited in Halsbury's Laws of England, Vol. XI., p. 50.

1392. — — —.]—*THERMOS, LTD. v. ISOLA, LTD.*, No. 75, *ante*.

1393. — Before particulars delivered—Of alleged fraud.]—*LEITCH v. ABBOTT*, No. 275, *ante*.

1394. — — — Of alleged undue preference.]—*CLAYTON & SHUTTLEWORTH, LTD. v. GREAT CENTRAL RY. CO.*, No. 293, *ante*.

1395. — Before amended statement of claim delivered.]—Leave given to administer interro-

the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which he had no personal knowledge, & a local judge, upon the application of pltf. *ex parte*, made an order for such examination:—*Held*: the order should not at any rate have been made *ex parte*: & in this case the order should not have been made at all, the position of deft. resisting a claim as to which he has no personal knowledge, & of pltf. advancing such a claim, being vastly different.—*HOOEY v. GILBERT* (1887), 12 P. R. 114.—CAN.

d. — — —.]—In actions of slander when the ct. is satisfied of the *bona fides* of pltf., & is convinced that he cannot state fully & with sufficient particularity his various grounds of complaint, & when the knowledge required is within the possession & control of deft., an examination for discovery before statement of claim will be ordered under rule 566; but in such case a further examination after pleading will not be allowed except upon special grounds.—*CAMPBELL v. SCOTT* (1891), 14 P. R. 203.—CAN.

1395 i. — Before amended statement of claim delivered.]—After an order for amendment of a statement of claim, the amended claim must be delivered before an order for examination of deft. can be made.—*COOLEY v. FITZ-*

gatories before delivery of an amended statement of claim, the interrogatories appearing to be reasonable as they had for their object the eliciting of information necessary to enable pltf. to amend his statement of claim.—*OCHSLEY v. REDFERN* (1876), 3 Char. Pr. Cas. 193.

1396. — *After pleadings closed.*—*SWIRE v. REDMAN* (1876), 20 Sol. Jo. 584.

1397. — *Pltf. applied for leave to deliver interrogatories after having himself closed the pleadings, without explaining the reason for his delay. Leave was refused:—Held: on appeal, the ct. would not interfere with the discretion of the judge in chambers.*—*ELLIS v. AMBLER* (1877), 36 L. T. 410; 25 W. R. 557.

Interrogatories for accounts—Before right established.—*See Nos. 1429, 1486, 1489, 1493, post.*

In Admiralty.—*See ADMIRALTY, Vol. I., pp. 190, 191, Nos. 1044, 1049, 1053.*

In action transferred to High Court from county court.—*See COUNTY COURTS, Vol. XIII., p. 496, No. 456.*

SECT. 5.—WHAT INTERROGATORIES WILL OR WILL NOT BE ALLOWED.

SUB-SECT. 1.—TO OBTAIN ADMISSIONS.

1398. *To relieve from burden of proof.*—*A.-G. v. GASKILL*, No. 1314, *ante*.

1399. *To save expense.*—*Pltfs., who were traders, sued defts. for libel in respect of articles published in defts.' newspapers relating to the manner in which pltfs. were alleged to be carrying on their business. Defts. pleaded justification & fair comment, & pltfs. joined issue. Defts. administered to pltfs. the following interrogatory:—"Do you intend to set up that defts., in publishing the words complained of, were actuated by express malice towards pltfs.? If yea, state generally the facts & circumstances on which pltfs. rely as showing actual malice":—Held: the interrogatory was inadmissible.*

On the same principle, in order to prevent unnecessary expense, the ct. often allows interrogatories to be administered. But these are for the purpose of obtaining admissions as to facts & I have never understood that one party may be

allowed by means of an interrogatory to compel his opponent to state on oath what his conduct of the case at the trial is going to be (*FLETCHER MOULTON, L.J.*).—*LEVER BROTHERS v. ASSOCIATED NEWSPAPERS*, [1907] 2 K. B. 626; 76 L. J. K. B. 1141; 97 L. T. 530; 51 Sol. Jo. 606; *sub nom. LEVER BROTHERS, LTD. v. ASSOCIATED NEWSPAPERS, LTD., LEVER BROTHERS, LTD. v. PICTORIAL NEWSPAPERS, LTD.*, 23 T. L. R. 652, C. A.

SUB-SECT. 2.—AS TO STATEMENTS IN PLEADINGS.

1400. *Whether permissible.*—*JOHNS v. JAMES*, No. 1419, *post*.

1401. — *A.-G. v. GASKILL*, No. 1314, *ante*.

1402. — *Pltf. as extrix. of A., sued the exor. of H., alleging that H. had received £6,000 in trust for A., had invested it in securities producing at least £5 per cent per annum, & applied the interest to his own purposes. Pltf. claimed payment of the £6,000 with interest at £5 per cent. Deft. professed ignorance as to the matters alleged, & set up several alternative defences; that H. had not received the £6,000; that if he had, he paid it to A.; that if he received it A. agreed that he should retain it for his own use as a gift from her; that if he received it, it was agreed between him & A. that he should retain it in satisfaction of a claim which he had against her; that A. was at her death indebted to H. in an amount exceeding the £6,000. Pltf. delivered interrogatories for the examination of deft. By interrogatory 18 he asked particulars as to the way in which the £6,000 had been invested by H., & what was the rate of interest on the investments, & how the income had been disposed of. By interrogatory 23 he asked whether deft. was not the brother of H., & whether during the period of the transactions referred to in the statement of claim deft. had not been the solr. & agent of H., & lived with him, & acted as his confidential agent with respect to his property, & become acquainted with all his affairs. Deft. in answer to interrogatory 18, stated that H. had invested the £6,000, & applied the income to his own purposes, & declined to answer further, & he declined to*

STUBBS (1894), 3 B. C. R. 198.—**CAN.**

e. — *When defaulting in payment of allowance—Before defendant applies for discharge.*—*Pltf. may file interrogatories after his default in payment of the allowance, & before deft. has applied for his discharge.*—*ELWOOD v. MONK* (1840), (1823-1900), 1 Ont. Dig. 504-5.—**CAN.**

f. — *Before pleadings closed.*—*An action having been brought in the Ch. Div. to set aside a judgment as fraudulent, pltf. took out an appointment for the examination for discovery of deft. after the delivery of the defence, but before the close of the pleadings:—Held: the former Chancery practice must apply to actions in the Ch. Div. in the case of examinations for discovery.*—*DAVIS v. WICKSON* (1882), 9 P. R. 219.—**CAN.**

g. — *Before motion for summary judgment.*—*An application for summary judgment may be made at any time, & pltf. may, if he wishes, examine deft. for discovery before launching the motion.*—*FOSTER v. DLUGOS*, [1917] 3 W. W. R. 183; 10 Sask. L. R. 361.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 1.

1398 i. *To relieve from burden of proof.*—*The proper function of inter-*

rogatories is to obtain from the party interrogated admissions of fact which it is necessary for the party interrogating otherwise to prove in order to establish his case. Therefore, in an action for defamation where publication is admitted & neither justification nor privilege is pleaded, the only defence put forward being that the matter complained of is capable of the defamatory meaning alleged, interrogatories asking deft. what precautions were taken or inquiries made before publication, & from whom the information published was obtained, will not be allowed.—*HALL v. NEW ZEALAND TIMES CO., LTD.* (1907), 26 N. Z. L. R. 1324.—**N.Z.**

h. *In answer to defendant's case.*—*A pltf. may interrogate with a view to obtain information or admission in support of his own case, & this right extends not only to his original case but also to any answers which he has to make to deft.'s case, subject to the qualification (inter alia) that the interrogatories must be directed to a case on which pltf. has already determined, & to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in deft.'s case or suggest any answer to it.*—*ALI KADER SYUD HOSSAIN ALI v. GOBIND*

DASS (1890), I. L. R. 17 Calc. 840.—**IND.**

PART IV. SECT. 5, SUB-SECT. 2.

1400 i. *Whether permissible.*—*Where in an action by a shareholder of a contracting co. on behalf of himself & all the shareholders except defts., against a trust co., a securities co., certain individual shareholders, & the contracting co., the real complaint was based upon an alleged breach by the trusts co., & the securities co. of contracts with the contracting co., & the statement of claim sufficiently alleged that pltf. & those whom he represented were minority shareholders, & the offending cos. minority shareholders:—Held: the facts alleged were sufficient to bring the acts of defts. as shareholders of the contracting co. within the rule which requires that the acts complained of shall be of a fraudulent character or beyond the cos.' powers; & the officer of the trust co., on examination for discovery, was compelled to answer questions based upon the allegations of the statement of claims.*—*SHAW v. UNION TRUST CO., LTD.* (1915), 9 O. W. N. 278; 35 O. L. R. 146.—**CAN.**

k. — *When statements admitted.*—*Interrogatories directed to matters admitted in the pleadings are not allowable.*—*MCBRIDE v. SANDLAND*, [1917] S. A. L. R. 249.—**AUS.**

Sect. 5.—What interrogatories will or will not be allowed: Sub-sects. 2, 3, 4, 5 & 6.]

answer interrogatory 23 at all. On appeal:—*Held*: (1) as pltf. was not seeking to follow the investments of the £6,000, deft. was not bound to give the particulars of such investments; but that as deft. did not admit the receipt of £5 per cent interest, he was bound to answer as to the amount of interest that had been received, as it would enable the ct. at the hearing to make an immediate decree for payment of principal & interest if pltf. established the trust; (2) deft. was not bound to answer interrogatory 23, for that an interrogatory asking in substance whether deft. had not been in such a position that he must know whether the allegations in the statement of claim were true or false, did not relate to any matter in question in the cause within R. S. C., Ord. 31, r. 1. —*Re MORGAN, OWEN v. MORGAN* (1888), 39 Ch. D. 316; 60 L. T. 71; 37 W. R. 243, C. A.

SUB-SECT. 3.—AS TO FACTS IN ISSUE.

1403. To ascertain case to be met.]—BAYLEY v. GRIFFITHS, No. 1410, *post*.

1404. —.]—SAUNDERS v. JONES, No. 1493, *post*.

1405. —.]—The statement of claim alleged that defts. had advertised a worthless mine by means of private newspapers & circulars containing false statements, & that pltf. was thereby induced to take shares. Interrogatories were administered by defts. asking the grounds on which pltf. alleged the mine to be worthless, & that he should set out the particular papers by which he had been deceived:—*Held*: the interrogatories were simply directed to show what were the material facts upon which the issues in the case would be raised, & must be allowed. Deft., however, ought to have given pltf. an opportunity of submitting to put in a further answer in chambers without coming into ct. at all: the costs, therefore, in the ct. below would be costs in the action.—*ASHLEY v. TAYLOR* (1878), 38 L. T. 44, C. A.

1406. —.]—LYON v. TWEDDELL, No. 1613, *post*.

1407. —.]—Re BLUNT, BURRETT v. BURRETT, [1880] W. N. 193.

SUB-SECT. 4.—TO SUPPORT CASE OF PARTY INTERROGATING.

1408. General rule.]—Pltf. is entitled to interrogate deft. as to facts which support pltf.'s case or to impeach deft.'s case but not as to facts which

support deft.'s case (*BUCKLEY, L.J.*).—*HOOTON v. DALBY*, No. 1421, *post*.

1409. Although disclosing opponent's case.]—Under C. L. P. Act, 1854 (c. 125), s. 51, interrogatories, the answers to which may be reasonably expected to procure a discovery of what will advance the interrogating party's case, are legitimate; & it is not an objection that the answers may be expected at the same time to disclose the interrogated party's case. *Aliter*, if the answers may reasonably be expected to relate exclusively to the case of the interrogated party.—*WHATELEY v. CROWTER* (1855), 5 E. & B. 709; 119 E. R. 645; *sub nom.* *WHATELEY v. CRAWFORD, CAREW v. DAVIES*, 25 L. J. Q. B. 163; 26 L. T. O. S. 104; 2 Jur. N. S. 207; 4 W. R. 121.

Annotations:—*Consd.* *Saunders v. Jones* (1877), 7 Ch. D. 435. *Refd.* *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Mentd.* *Temperley v. Willett* (1856), 25 L. J. Q. B. 259.

1410. —.]—Where interrogatories are delivered, under C. L. P. Act, 1854 (c. 125), s. 51, which relate to the case of the party interrogating as well as that of the party interrogated, the latter is bound to answer them, although the answers may discover his case.—*BAYLEY v. GRIFFITHS* (1862), 1 H. & C. 429; 31 L. J. Ex. 477; 10 W. R. 798; 158 E. R. 953.

Annotations:—*Distd.* *Stern v. Sevastopulo* (1863), 14 C. B. N. S. 737. *Consd.* *Goodman v. Holroyd* (1864), 15 C. B. N. S. 839.

1411. When put bona fide.]—In an action against a corpn. for malicious arrest & false imprisonment, & a wrongful dismissal of pltf., pltf. proposed to administer interrogatories to the town clerk of the corpn. under C. L. P. Act, 1854, (c. 125), s. 51, asking him (1) whether he had caused pltf. to be arrested on a charge of felony, or had given instructions to anyone, & who, so to arrest pltf., or had taken any part, or was concerned in such arrest? (2) If so, by what authority he had acted in so doing? (3) Whether as town clerk or otherwise he was informed of the arrest of pltf., & notified the same to the town council of the borough, & were there any resolutions of the council relating to the said arrest? (4) Whether he had the management of, or took any & what part, or was concerned in the prosecution of pltf. before the magistrates or at the borough sessions, & if so, on whose behalf? (5) Whether the arrest & prosecution of pltf. was caused, procured, instituted, or carried on by the authority or direction, or with the sanction of defts., or of the town council, or of the town clerk himself? (6) Were there any resolutions or minutes relating to pltf.'s appointment or to his dismissal from his office? (7) Has the town clerk in his, or has the corpn. in its, possession, etc., any documents, letters, etc., in any way relating

PART IV. SECT. 5, SUB-SECT. 3.

1. Whether permissible.]—In an action for slander, uttered by deft. in an election campaign in which pltf. was a candidate, he having said that his appointment to the office of controller had been a degradation of the civic government:—*Held*: pltf. had chosen to make his fitness for the office sought an issue & could be examined upon it.—*BROWN v. ORDE* (1912), 22 O. W. R. 38; 3 O. W. N. 1230; 2 D. L. R. 562.—*CAN.*

m. —.]—A party is entitled to interrogate on facts directly in issue on the pleadings. In a suit for the recovery of the amount of a *hundi*, alleged to have been drawn & accepted by deft. in consideration of a loan:—*Held*: deft. was entitled to discovery of the form in which the loan was

alleged to have been made, & of the time & place the *hundi* was drawn & accepted, & the time & place & the names & addresses of the persons by whom it was presented.—*BAIJNATH KEDIA v. RAGHUNATH PRASAD* (1913), 1 L. R. 11 Cal. 6.—*IND.*

PART IV. SECT. 5, SUB-SECT. 4.

1409 i. Although disclosing opponent's case.]—In an action to recovery possession of land on the title, where the defence of possession is pleaded, pltf. is entitled to interrogate deft. upon matters tending to support his own case, & is not deprived of that right merely because the discovery has the tendency or effect of disclosing deft.'s case.—*MILLER v. KIRWAN*, [1903] 2 I. R. 118; 36 I. L. T. 236.—*IR.*

n. Facts essential to claim.]—In an action for an account in relation to partnership dealings between pltf. & deft., respecting the purchase & sale of a mine, & for payment of pltf.'s share, which was alleged to have been improperly received & retained by deft., pltf. after the commencement of the action, obtained an order requiring deft. to answer certain interrogatories. After receiving deft.'s answer, a further order was obtained requiring deft. to attend for further examination as to matters contained in certain of the interrogatories. Deft. appealed, on the ground that he was not obliged to answer until pltf. had first established their interest. It appearing that the facts sought to be elicited by the interrogatories, were essential to the pltf. case:—*Held*: there was no ground for interfering

to the matters interrogated upon, & does he object to produce them?—*Held*: the interrogatories appearing to the ct. to be material to pltf.'s case, & to be put *bond fide* should be allowed.—*McFADZEN v. LIVERPOOL CORPN.* (1868), L. R. 3 Exch. 279; 37 L. J. Ex. 193; 18 L. T. 611; 16 W. R. 1212.

Annotations:—*Consd.* *Fisher v. Owen* (1878), 8 Ch. D. 645. *Refd.* *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319. *Hill v. Campbell* (1875), L. R. 10 C. P. 222.

SUB-SECT. 5.—TO DESTROY OR IMPEACH OPPONENT'S CASE.

1412. When admissible.—*HOFFMANN v. POSTILL*, No. 1794, *post*.

1413. —.]—Deft. who files interrogatories for the examination of pltf. is entitled to an answer with respect to all matters which tend to destroy pltf.'s case; but not with respect to matters which tend to support pltf.'s case. Where, therefore, a bill was filed to establish a right of common, & deft. filed interrogatories requiring pltf. to set forth any instance in which the right claimed by the bill has been enjoyed:—*Held*: pltf. was not bound to answer.

Semble: pltf. would have been bound to answer interrogatories with respect to instances in which the right had been claimed & successfully resisted.—*LONDON SEWERS COMRS. v. GLASSE* (1873), L. R. 15 Eq. 302; 28 L. T. 433; 21 W. R. 520; *sub nom.* *LONDON SEWERS COMRS. v. GLASSE, EPPING FOREST CASE* (No. 2), 42 L. J. Ch. 345.

Annotations:—*Distd.* *Saunders v. Jones* (1877), 7 Ch. D. 435. *Consd.* *Bidder v. Bridges* (1885), 29 Ch. D. 29.

1414. —.]—*PLYMOUTH MUTUAL CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD. v. TRADERS' PUBLISHING ASSOCN., LTD.*, No. 1532, *post*.

1415. —.]—*HOOTON v. DALBY*, No. 1421, *post*.

SUB-SECT. 6.—AS TO CASE, EVIDENCE, OR WITNESSES OF OPPONENT.

1416. Names of witness.—*ANON.* (1681), 2 Cas. in Ch. 84; 22 E. R. 858, L. C.

with the discretion of the judge below, & deft. must answer as required.—*JENKINS v. TUPPER* (1886), 7 R. & G. 506; 8 C. L. T. 62.—*CAN.*

o. Whether possibility of support sufficient.—A party must, on his examination for discovery, answer questions which may, not which must, assist the examining party, & consequently, where an action was brought in certain mining stock questions relative to dealings between the same parties in respect of other mining stock of the same co., were permissible.—*PLAYFAIR v. CORMACK* (1913), 24 O. W. R. 56; 4 O. W. N. 817; 9 D. L. R. 455.—*CAN.*

p. —.]—On an application for leave to deliver interrogatories it is not enough that the answers sought may indirectly help the party applying in his case, if they relate to matters which need not be proved by him.—*WILKINS v. CONNELL* (1903), 22 N. Z. L. R. 961.—*N.Z.*

PART IV. SECT. 5, SUB-SECT. 6.

1416 i. Names of witnesses.—The general law applicable to discovery governs in patent cases. Deft. may be properly interrogated as to the ground of his attacking pltf.'s patent, & there should be a fair & full disclosure of the particular lines of attack, which are contemplated, but no such individualising of the persons who are alleged to be prior users as would enable pltf. to fix upon deft.'s witnesses.

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1417. —.]—In an action for libel imputing quackery & puffery, the ct. will not order deft., who pleads a justification, to give a list of his witnesses, or of the instances by which the alleged libel will at the trial be justified & proved.—*HUNTER v. SHARP* (1866), 13 L. T. 592; 30 J. P. 149.

—.]—Pltfs. sued as administrators to recover possession of certain hereditaments for breach of a covenant contained in a lease; deft. alleged that intestate verbally consented to the breach of the covenant:—*Held*: pltfs. were entitled to interrogate deft. as to when the consent was given & as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given.—*EADE v. JACOBS* (1877), 3 Ex. D. 335; 47 J. L. Q. B. 74; 37 L. T. 621; 42 J. P. 200; 26 W. R. 159, C. A.

Annotations:—*Consd.* *Johns v. James* (1879), 13 Ch. D. 370; *Lyon v. Tweddell* (1879), 13 Ch. D. 375. *Expld.* *A.-G. v. Gaskill* (1882), 20 Ch. D. 519. *Apld.* *Bradbury v. Cooper* (1883), 12 Q. B. D. 94. *Expld.* *Bidder v. Bridges* (1885), 29 Ch. D. 29. *Distd.* *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154. *Refd.* *Fisher v. Owen* (1878), 8 Ch. D. 645.

1419. —.]—In an action against two defts. by pltf. claiming to be a creditor of a late partner of one of the defts. for all of whose creditors it was alleged defts. were trustees under a deed of assignment of certain property, the defence in substance was, that the firm were never indebted to pltf., that the deed contained no trust for the payment of any debt of the late partner, but was an assignment by way of mtge. to secure repayment to defts. of a sum advanced by them to pay such of the late partner's debts as they should in their discretion think fit, that neither the late partner nor defts. ever recognised pltf. as a creditor, that pltf. was not a party nor privy to the deed, & that he was not aware of its existence until the bkpcy. of the late partner. The defence admitted a certain alleged interview, but denied the alleged purport of the conversation thereat. Pltf. stated that he had seen "some accounts" which showed that defts. had not properly discharged the debts. Interrogatories filed by defts. calling upon pltf. to

disclosure of the name of a witness. The answers to the question would not entail anything in the nature of oppression; & the exception of a case where the question is put for a purpose outside the action is applicable only to newspapers. Although the publication was admitted, the manner of it was relevant to the issue as to *bond fides* & upon the question of damages.—*HAYS v. WEILAND* (1918), 42 O. L. R. 637; 14 O. W. N. 146, 180; 43 D. L. R. 137.—*CAN.*

1416 iv. —.]—Pltf. having brought an action for damages for personal injuries through being bitten by a dog belonging to deft. & alleged to be, to deft.'s knowledge, of a fierce & mischievous nature, an order was made that if pltf. intended to give evidence of any specific occasion upon which the dog had bitten persons he should give particulars thereof. Pltf. accordingly gave particulars that on a stated day the dog had bitten a person in a certain street, & another person in another street. Subsequently deft. applied for leave to administer interrogatories, asking for the names of the persons bitten. The master granted the application & the judge in chambers affirmed his decision:—*Held*: these interrogatories were inadmissible, as they had been put merely to obtain the names of pltf.'s witnesses, & not for the purpose of better understanding the circumstances of the case which pltf. was going to set up.—*KNAPP v. HARVEY* (1912), 46 I. L. T. 29.—*IR.*

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set forth how the firm became collectively liable to pltf. when communication of the fact of the execution of the deed by defts. to pltf. was made. & what accounts they were which pltf. had seen, were allowed. An interrogatory as to the persons in whose presence communication of the above fact was made having been withdrawn, an interrogatory whether it was the fact that certain allegations made in the statement of claim were true, & whether it was not the fact that certain statements in the defence were true, was disallowed.—*JOHNS v. JAMES* (1879), 13 Ch. D. 370.

1420. —.—.]—*MARRIOTT v. CHAMBERLAIN*, No. 1526, *post*.

1421. —.—.]—(1) In an action for the seduction of the pltf.'s daughter, where deft. admitted carnal knowledge but traversed the allegation that he was the father of pltf.'s child, an interrogatory whether deft. alleged that carnal knowledge had taken place between the daughter & any other male person, &, if so, asking for the name & address of such person, is not allowable as tending to call for the names of witnesses whom deft. may desire to call, or the particular facts on which he means to rely, in support of his defence.

Pltf. is entitled to interrogate deft. as to facts which support pltf.'s case but not as to facts which support deft.'s case (*BUCKLEY, L.J.*).

(2) Interrogatories may extend beyond the facts directly in dispute (*BUCKLEY, L.J.*).—*HOOTON v. DALBY*, [1907] 2 K. B. 18; 76 L. J. K. B. 652; 96 L. T. 537, C. A.

Annotation:—As to (2) Apld. The Shropshire (1922), 127 L. T. 487.

1422. —.—.]—Interrogatories put for the mere purpose of obtaining information as to the evidence by which the opposite party intends to prove the facts which he alleges are inadmissible.

In an action brought by pltf. to recover damages in respect of personal injuries occasioned to him through being bitten by a dog belonging to deft., which was alleged by pltf. to have been, to the knowledge of deft., accustomed to bite mankind, an order was made that, if pltf. intended to give evidence of any specific occasion or occasions on which the dog had bitten persons, he should give particulars thereof, & pltf. accordingly gave particulars stating that a person was bitten by deft.'s dog in a certain street in or about June or July, 1908, & another person was bitten by the dog in another street in or about July or Aug. 1908. Deft. thereupon applied at chambers for leave to administer interrogatories asking the names of the persons alleged in pltf.'s particulars to have been so bitten. The Master granted the application, & on appeal the judge affirmed his decision:—*Held*: the interrogatories were inadmissible on the ground that they were put merely with the object of ascertaining the names of witnesses by whom pltf. proposed to establish his case.—*KNAPP v. HARVEY*, [1911] 2 K. B. 725; 80 L. J. K. B. 1228; 105 L. T. 473, C. A.

See, also, Nos. 1607, 1609, post.

1423 i. Opponent's case.—In an action for defamation against the proprietor of a newspaper, in the absence of special circumstances, deft. was not required to disclose the name of the writer of a letter containing the alleged defamatory matter, or to answer a series of searching interrogatories directed to test the truth of an assumed line of defence. The onus being on the pltf. to prove the absence of *bona fides* on the part of deft., interrogatories as to precautions taken & inquiries, after as

well as before publication, made by deft. were allowed.—*MEAGHER v. DAVIES BROTHERS, LTD.* (1919), 15 Tas. L. R. 57.—*AUS.*

1423 ii. —.—.]—The ct. will not permit pltf. to file interrogatories to discover deft.'s case; the right is limited to the discovery of matters bearing on the case of pltf. himself.—*M'CLINTOCK v. LANGAN* (1863), 15 Ir. Jur. 381.—*IR.*

1423 iii. —.—.]—Pltf. cannot be allowed to put fishing questions in order

1423. Opponent's case.—*WHATELEY v. CROWTER*, No. 1409, *ante*.

1424. —.—.]—In an action on a policy of insurance, on a cargo of wheat, claiming for a total loss, the pleas denying the policy, the interest, the loading & the loss, & also setting up an unreasonable delay in sailing, interrogatories were allowed, which went to support the latter plea, & also such as were directed to the question of damage; but not such as were merely calculated to disclose the case which pltf. would have to prove on the pleas in denial.—*ZARIFI v. THORNTON* (1857), 26 L. J. Ex. 214; 3 Jur. N. S. 92.

1425. —.—.]—The intention of C. L. P. Act, 1854 (c. 125), s. 51, in permitting parties to deliver interrogatories to their adversaries, was to prevent the necessity of going to a ct. of equity; & its provisions are applicable when either party to an action has a specific case which he wishes to set up, & some of the materials for making it out are in the possession of his adversary, but not when his object is to discover how his adversary is going to shape his case, or to see whether there are any defects in it, or to fish for a defence. Interrogatories, too, which are put for the purpose of contradicting a written instrument are inadmissible.—*MOOR v. ROBERTS* (1857), 2 C. B. N. S. 671; 26 L. J. C. P. 246; 3 Jur. N. S. 1221; 5 W. R. 693; 140 E. R. 580.

Annotations:—Refd. Stern v. Sevastopulo (1863), 14 C. B. N. S. 737; *Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70.

1426. —.—.]—B. & N., two landowners in the parish of M., brought an action for a declaration that a piece of land formed part of M. Common, & to establish commonable rights thereover. N. sued as owner in fee of a beerhouse & three cottages & pltf. pleaded the exercise of the rights claimed from time immemorial. Deft. was the lord of an adjacent manor & his defence was that the piece of land never formed part of M. Common but was common land forming part of his own manor; that if pltf. ever had any rights of common thereon such rights had been extinguished; that some of the rights claimed could only be used in respect of ancient tenements & that the beerhouse & three cottages in respect of which N. sued had no land therewith. After the defence had been delivered deft. administered interrogatories to pltf. asking in effect (1) How long pltf. had been owners or occupiers of their properties, & for what estates what was the tenure thereof & whether those lands were within the limits of any & what actual or reputed manors & whether any such premises were ancient messuages & whether the beerhouse & three cottages had any & what lands appurtenant thereto or held therewith. (2) Whether pltf. or their predecessors in title as proprietors or occupiers of any lands in M. or under any other alleged title had exercised the rights claimed upon any & what parts of M. Common or upon any & what part of the piece of land in question. (3) Pltf. were asked to set forth particulars of their exercise of such rights & whether they did so by any licence or in consideration of any & what payment. Pltf.

to try whether he can discover any flaw in deft.'s case or suggest any answer to it.—*ALI KADER SYUD HOSSAIN ALI v. GOBIND DASS* (1890), I. L. R. 17 Calc. 840.—*IND.*

g. — When disclosure unavoidable.—In answering questions plaintiff entitled to put.]—In an action to recover possession of land on the title, where the defence of possession is pleaded, pltf. is entitled to interrogate deft. upon matters tending to support his

objected to answer these interrogatories on the ground that they related exclusively to their own title & to the evidence they should adduce at the hearing. Upon a summons that pltf. might be ordered to make a sufficient answer:—*Held*: pltf. N. must answer so much of the first interrogatory as asked, whether the beerhouse & cottages had any lands appurtenant thereto or held therewith, because he had not pleaded that they had, & deft. had pleaded that they had not; but that the rest of the interrogatories need not be answered because they were in effect directed to the discovery of the evidence by which pltf. intended to prove their case at the hearing.

The questions which either pltf. or deft. can ask must be confined to those which establish his own substantive case, & do not contain questions relating to the evidence by which or the manner in which his adversary means to establish his case (*KAY, J.*).—*BIDDER v. BRIDGES* (1884), 29 Ch. D. 29; 54 L. J. Ch. 798; 51 L. T. 818; 33 W. R. 272; *on appeal* (1885), 29 Ch. D. 45, C. A. 1427. —.]—*RIDGWAY v. SMITH & SON* (1890), 6 T. L. R. 275, D. C.

Annotations:—*Refd. Elliott v. Garrett* (1902), 18 T. L. R. 498. *Mentd. Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170.

1428. *As to evidence of opponents.*]—In an action of trover by the assignees of an alleged bkpt., deft. obtained a rule *nisi* to administer interrogatories to pltf. to discover what case they intended to set up at the trial, & on what acts of bkpcy. they intended to rely:—*Held*: the interrogatories were inadmissible, at all events on the ground that they were fishing interrogatories, asking for a disclosure of the evidence in support of pltf.'s case.

Semble: the power to interrogate under C. L. P. Act, 1854 (c. 125), is confined to such discovery as might be obtained in equity on evidence, & does not extend to a discovery of the case itself, as distinguished from the evidence.—*EDWARDS v. WAKEFIELD* (1856), 6 E. & B. 462; 27 L. T. O. S. 201; 2 Jur. N. S. 762; 4 W. R. 710; 119 E. R. 937.

Annotations:—*Expld. Saunders v. Jones* (1877), 7 Ch. D. 435. *Refd. Philipps v. Philipps* (1879), 40 L. T. 815.

1429. —.]—In an action to restrain defts. from using a trade name & from selling their goods as the goods of pltf., the defts. by counterclaim claimed the like relief, & also an account of the goods sold by pltf. as & for the goods of defts., & of the profits of such sale. Both pltf. & defts. claimed to derive their title under a partnership

own case, & is not deprived of that right merely because the discovery has the tendency or effect of disclosing deft.'s case.—*MILLER v. KIRWAN*, [1903] 2 I. R. 118; 36 I. L. T. 236.—*IR.*

1428 i. *As to evidence of opponent.*]—Pltf. claimed commissions on insurance effected; deft. insurance co. pleaded that pltf.'s right to commission was dependent upon his abstaining from acting as agent for any other insurance co.; pltf. replied that the agreement under which he sued was a new one, made at the termination of his agency for deft. co., & that it was intended that the clause precluding him from acting for any other co., which formed part of his former agreement, should be dropped from the new one; & if this was not the construction of the document, he asked reformation; he also said that the alleged breaches of the agreement were brought about by defts. employing detectives to seduce him to violate the agreement:—*Held*: pltf. was not entitled to examination for discovery for the purpose of ascertaining how the case against him was

to be proved—he was entitled only to know what the case was.—*PEARLMAN v. NATIONAL LIFE ASSURANCE CO.* (1917), 39 O. L. R. 141; 12 O. W. N. 72.—*CAN.*

1428 ii. —.]—In an action to recover a debt alleged to have been due by deft. to pltf.'s deceased father, the claim for which was assigned to pltf. by her mother, as administratrix of the father's estate, pltf., on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying on an entry made in a book belonging to her father that he had lent deft. money on a certain day:—*Held*: she could not be obliged to tell what evidence she was going to use, nor what witnesses she meant to call: she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside those within her own knowledge which might tend to establish her case; & the action should not be dismissed.—*COYLE v. COYLE* (1899), 19 P. R. 97.—*CAN.*

that had been dissolved in 1861, & both had since that time carried on the same business. An interrogatory exhibited by defts. required pltf. to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—*Held*: the interrogatory was not for the ordinary purposes of discovery, but was directed to the details of pltf.'s evidence, & was rightly disallowed.—*BENBOW v. LOW* (1880), 16 Ch. D. 93; 50 L. J. Ch. 35; 44 L. T. 119; 29 W. R. 265, C. A.

Annotations:—*Consd. Bolokow v. Fisher* (1882), 10 Q. B. D. 161. *Refd. McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Re Strachan*, [1895] 1 Ch. 439.

1430. —.]—*HOOTON v. DALBY*, No. 1421, *ante*.

1431. —.]—Interrogatories which aim at furnishing pltf. with proof of a cause of action not alleged in the pleadings, or with knowledge of defts.' information on matters not required to be pleaded by them, are bad & will not be allowed.

Pltf. were the owners of the steamship "S." Defts. were two firms of ship repairers who were employed by pltf. to repair the "S." Whilst repairs were being carried out by defts. a fire broke out on board, & the "S." was damaged. In an action by pltf. to recover for the damage to the "S." it was alleged in the statement of claim that the fire was caused by unscreened candles used by defts.' workmen. By their defence defts. admitted that the "S." was in their hands & under their control for repairs. They also admitted that the fire took place & denied negligence, but put forward no explanation of the cause of the fire. Pltf. obtained leave to deliver interrogatories relating to the alleged use of the candles, but the registrar refused leave to deliver the following interrogatory: "What do you say was the cause of the fire?"—*Held*: as the interrogatory appeared to be framed with the object of compelling defts. to set up an affirmative case, or, alternatively, to disclose their defence to pltf.'s case, it was properly disallowed.—*THE SHROPSHIRE* (1922), 127 L. T. 487; 38 T. L. R. 667; 15 Asp. M. L. C. 603, C. A.

SUB-SECT. 7.—RELEVANCY AND MATERIALITY.

1432. *Material to case of interrogating party.*]—Whether an answer may be used or may be useful if used in a ct. of law is for the consideration of the ct. The true tests as to whether questions are to be answered or not are (1) whether the answers

1428 iii. —.]—Deft. in an action for libel sought to put the following interrogatory to pltf.: "On what facts do you rely to prove express malice?"—*Held*: the interrogatory should be disallowed, as a party should not be compelled to state what his conduct of the case is going to be.—*CANNING v. WILKIE* (1913), 32 N. Z. L. R. 641.—*N.Z.*

PART IV. SECT. 5, SUB-SECT. 7.

1432 i. *Material to case of interrogating party.*]—The examination of a party for discovery in the cause under rule 487 must be confined to matters which are relevant to the questions raised in the pleadings, but a fair amount of latitude is to be allowed. Questions which go only to credit are not admissible. In an action for a partnership account, where deft. denied the partnership & set up that pltf. had been his servant, under the same name as that in which he brought the action, during the period of the alleged partnership:—*Held*: it was not material to the issue that pltf. bore another name at a previous time, & deft. could not

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might lead to the crimination of deft. ; (2) whether they are relevant & may be material to the case of pltf.—*MANT v. SCOTT* (1817), 3 Price, 477 ; 146 E. R. 326.

1433. —.]—The original bill sought to set aside an appointment on the ground of fraud. Pltf. then amended his bill, & inquired as to the mode in which the appointment was executed & attested:—*Held*: pltf.'s case being one of legal validity & equitable invalidity, the inquiries were irrelevant, & therefore need not be answered.—*CODRINGTON v. CODRINGTON* (1830), 3 Sim. 519 ; 57 E. R. 1093.

1434. Relevancy to facts directly in issue.]—Under the usual decree in a creditors' suit, the master allowed an interrogatory to be exhibited for the examination of the administratrix, which was in very special terms, containing inquiries not suggested by the pleadings, as to moneys which she had not received, & why the same had not been received. The interrogatory was disallowed.—*HOPKINSON v. BAGSTER* (1841), 1 Y. & C. Ch. Cas. 13 ; 5 Jur. 1033 ; 62 E. R. 769.

1435. —.]—A decree having been made, directing certain accounts to be taken between pltf. & deft., the former exhibited certain interrogatories for the examination of the latter before the master in no way relevant to such accounts. The master in his finding stated, that, for the better taking the accounts directed by the decree, interrogatories had been exhibited before him by pltf. for the examination of deft., & that he had disallowed them. To this finding pltf. excepted:—*Held*: the master was right in disallowing the interrogatories, & the exceptions must be overruled.

(2) Interrogatories exhibited before the master for the examination of a party must be shown to be relevant to the subject matter with respect to which they purport to have been settled.

(3) Where a party excepts to the master's finding, & the exceptions are overruled, the costs follow as of course.—*WILLIAMS v. DOUGLAS* (1842), 6 Jur. 1010.

1436. —.]—After the common decree in a suit, instituted by some of the residuary legatees named in a will against the exor. & the other residuary legatees, the trustees of a post-nuptial settlement of a bond for £2,000 previously given by testator to his daughter E., the wife of H., carried in a state of facts before the master,

claiming payment of the total amount secured by the bond. That was met by a counter state of facts, on the part of the exor., who had paid to a creditor of H., H. having been in the possession of the bond, & handed it over to the creditor, a sum of £850, being the amount of the debt due to the creditor from H. The exor., on payment by him of that sum to the creditor of H., received the bond back from the creditor. It was sought before the master to examine H. on interrogatories, to prove that the exor. had notice of the previous assignment of the bond to the trustees of the settlement. The master refused to receive the interrogatories, on the ground that H.'s evidence was not admissible against the exor. On motion to the ct. by defts., the residuary legatees, for leave to examine the exor. on interrogatories before the master as to notice, the ct. refused the application with costs.

(2) In a legatees' suit, where the bill contains no notice of an alleged breach of trust, & nothing is said about it in the decree, the ct. will not permit the exor. to be examined on interrogatories before the master, touching the breach of trust, but the breach of trust must be established against the exor. by a distinct & independent suit.—*FORD v. BRYANT* (1846), 9 Beav. 410 ; 15 L. J. Ch. 261 ; 7 L. T. O. S. 134 ; 10 Jur. 484 ; 50 E. R. 401.

1437. —.]—Interrogatories refused to deft. which did not go to support any case set up on his part.—*TAMVACO v. LUCAS* (1862), 3 F. & F. 110.

1438. —.]—Deft. will be required to answer an interrogatory which is pertinent to the case made by the bill, though it is not founded on any specific allegation in the bill, where pltf. has no knowledge on which to found such allegation.—*M'GAREL v. MOON* (1870), L. R. 10 Eq. 22 ; 39 L. J. Ch. 367 ; 22 L. T. 355 ; 18 W. R. 568.

1439. —.]—*MOORE v. CRAVEN* (1870), 7 Ch. App. 94, n., L. C. & L. J.

*Annotations:—***Appld.** *Heugh v. Garrett* (1875), 44 L. J. Ch. 305. **Distd.** *Parnell v. Walter* (1890), 24 Q. B. D. 441. **Refd.** *Thompson v. Dunn* (1870), 5 Ch. App. 573 ; *Carver v. Pinto Leite* (1871), 41 L. J. Ch. 92.

1440. —.]—A bill was filed by a co. to make defts. account for a secret profit made on the sale to the co. of a colliery which defts. were alleged to have purchased on their own account in the name of the ostensible vendor, & resold to the co. at an advanced price while they were engaged in getting up the co., & acting in a fiduciary relation towards it. Defts. were interrogated as to the cheques drawn on a banking account opened for the pur-

examine him as to the details of his past life, long prior to the alleged partnership.—*MACK v. DOBIE* (1892), 14 P. R. 465.—**CAN.**

1432 ii. —.]—Action for return of a certain agreement of sale alleged to have been assigned to deft. by way of loan to enable him to raise money. Pltf. further alleged that deft. had voluntarily given him, as security for the return of the said agreement, certain shares of stock which he was willing to return. Deft. alleged that the transaction in question was not a loan, but an unconditional exchange of the stock for the agreement. On deft.'s examination for discovery he refused to answer questions as to whether the stock in question was paid up or not, claiming it was not relevant. The referee, on motion for pltf., ordered deft. to attend & answer at his own expense. The order was reversed, & this was an appeal from the latter decision:—*Held*: the proposed questions were irrelevant to the issue ; the answers would not assist pltf. to prove his case, & the questions, therefore, need not be answered.—*MORRISON*

v. RUTLEDGE (1912), 22 W. L. R. 364 ; 22 Man. L. R. 645 ; 3 W. W. R. 121 ; 8 D. L. R. 325.—**CAN.**

r. — *Answer involving forfeiture.*—In ejectment by the lessor against the alleged assignee or sub-lessee of the lessee, it was sought to administer to deft. interrogatories which could not be material to or assist the pltf.'s case, save so far as tended to show the execution of an assignment or sub-lease to deft. by the lessee which would amount to a forfeiture of the lessee's interest:—*Held*: such interrogatories ought not to be allowed.—*CORK (Bp.) v. PORTER* (1877), 11 C. L. 94.—**IR.**

1434 i. Relevancy to facts directly in issue.]—Interrogatories must be confined to facts which are relevant to some question at issue between the parties, & will not be allowed where they are in the nature of cross examination.—*STARRATT v. WHITE* (1913), 47 N. S. R. 162 ; 13 E. L. R. 8.—**CAN.**

1434 ii. —.]—To interrogate a party to a suit as to the construction

he puts on the meaning of the word "family" is not admissible, although to ask him who the persons are who are living in his household is so. The former question, if replied to, would only be of value as the opinion of a party to suit on what is really a question of law. Under the Civil Procedure Code, interrogatories for the purpose of eliciting facts bearing upon issues arising in a suit are limited in operation & are not permissible in case where the procedure provided by sect. 134 of the Code is applicable.—*NITTOYOYE DASSEE v. SOOBUL CHUNDER LAW* (1895), 1 L. R. 23 Cal. 117.—**IND.**

1434 iii. —.]—In an action brought against the county surveyor of a county & others for alleged trespass in cutting certain hedges & trees the property of pltf., the county surveyor in his defence denied *inter alia* that he had done or authorised the doing of the acts complained of:—*Held*: pltf. should have liberty to administer interrogatories, limited to this point, to the county surveyor.—*WINDER v. GLOVER* (1909), 43 I. L. T. 259.—**IR.**

poses of the purchase:—*Held*: the required discovery was immaterial to the real question in the suit & the ct. would not compel defts. to answer the interrogatory.—*GREAT WESTERN COLLIERY Co. v. TUCKER* (1874), 9 Ch. App. 376; 43 L. J. Ch. 518; 30 L. T. 731, L. JJ.

1441. —.]—In an action for specific performance of an agreement to sell the remainder of an underlease of house property to pltf., who were trustees for a married woman, interrogatories by deft., who had notice that they were trustees, but no notice of the actual trusts, for the purpose of establishing that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be struck out as irrelevant.—*MANSFIELD v. CHILDERHOUSE* (1876), 4 Ch. D. 82; 46 L. J. Ch. 30; 35 L. T. 590; 25 W. R. 68.

1442. —.]—In an action of ejectment by mtgees. against the mtgor., an application to strike out interrogatories as irrelevant was granted on the general ground that they had nothing to do with the matter as it appeared on the pleadings. The order was made without prejudice to fresh interrogatories, costs to be pltf.'s in any event.—*ANON.*, [1876] W. N. 39; Bitt. Prac. Cas. 110; 2 Char. Cham. Cas. 55.

1443. —.]—*Re MORGAN, OWEN v. MORGAN*, No. 1402, *ante*.

1444. —.]—An action was brought for a declaration that a piece of land which had been purchased by deft. & C. in 1873 was purchased by them as co-partners, & for accounts of the partnership & consequential relief. Deft. denied the partnership. Pltf. exhibited interrogatories to deft. asking for particulars of purchases of land by deft. & C. previous & subsequent to 1873, in order to prove that they had been co-partners in various

other purchases similar to that of 1873:—*Held*: the interrogatories were irrelevant to the issue in the action & oppressive, & they ought not to be allowed.

I entertain a strong opinion that interrogatories of this description, unless strictly relevant to the question at issue in the action, ought to be rigorously excluded (*LORD HERSHELL, C.*).

The legitimate use, & the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; & if the party goes farther, & seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case the interrogatories ought not to be admitted (*A. L. SMITH, L.J.*).—*KENNEDY v. DODSON*, [1895] 1 Ch. 334; 64 L. J. Ch. 257; 72 L. T. 172; 43 W. R. 259; 39 Sol. Jo. 216; 12 R. 92, C. A.

Annotation:—*Apld. Osram Lamp Works v. Gabriel Lamp Co.*, [1914] 1 Ch. 699.

1445. —.]—*THE SHROPSHIRE*, No. 1431, *ante*.

1446. Relevancy to facts indirectly in issue.]—*MARRIOTT v. CHAMBERLAIN*, No. 1526, *post*.

1447. —.]—*HOOTON v. DALBY*, No. 1421, *ante*.

1448. —.]—*NASH v. LAYTON*, No. 1703, *post*.

—.]—*OSRAM LAMP WORKS, LTD. v. GABRIEL LAMP CO.*, No. 1643, *post*.

1450. —.]—*BLAIR v. HAYCOCK CADLE CO.*, No. 1680, *post*.

SUB-SECT. 8.—ANSWERS OBTAINABLE BY CROSS-EXAMINATION—QUESTIONS TO CREDIT.

1451. Questions admissible in cross-examination.]—The ct. will allow any interrogatories to be

1446 i. *Relevancy to facts indirectly in issue.*]—In an action against a newspaper publishing co. for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, & in which action defts. pleaded justification:—*Held*: no sufficient foundation was laid for his examination for discovery; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification.—*MURRAY v. MAIL PRINTING CO.* (1892), 14 P. R. 405.—*CAN.*

1446 ii. —.]—*MCKENZIE v. McLAUGHLIN* (1902), 22 C. L. T. 92; 1 O. W. R. 58, 80.—*CAN.*

1446 iii. —.]—In an action for damages alleged to have been sustained by reason of the sending out by defts. of a circular stating that they had been advised that pltf. had decided to discontinue their separator business, defts.' manager was ordered to give on his examination for discovery the names of the persons to whom the circular had been sent & the name of the person who had "advised" defts. of the fact alleged, this information being relevant to & important on the pleaded defences of *bona fides* & privilege.—*MASSEY-HARRIS Co. v. DE LAVAL SEPARATOR CO.* (1906), 11 O. L. R. 227; 7 O. W. R. 59.—*CAN.*

1446 iv. —.]—The pleadings in this case raised an issue whether or not pltf., in order to induce defts. to enter into the agreement sued on, falsely represented to them that, by virtue of his own interest & the interest of others represented by him, he controlled a certain co. & could determine whether the co. would accept defts.' offer or not. A letter had been written by pltf. to one of defts. before the acceptance of the offer in which

he spoke of other parties as interested in the sale & holding out for a larger sum:—*Held*: interrogatories put by defts. to pltf. under Rule 407 B added to King's Bench Act, by 5 & 6 Edw. VII., c. 17, s. 2, asking for information as to the names of the other parties referred to, & as to all communications between them & pltf. relating to the proposed sale, were relevant to the issue & should be fully answered.—*AFFLECK v. MASON* (1911), 21 Man. L. R. 759.—*CAN.*

1446 v. —.]—Everything that is relevant to the allegations by pltf. in his claim & tends to prove their truth must be disclosed by deft. as well by production of documents as by answering questions on examination for discovery.—*LINDSEY v. LESUEUR* (1912), 3 O. W. R. 851; 3 O. W. N. 486; 1 D. L. R. 61.—*CAN.*

1446 vi. —.]—Pltf., the widow of C., sought to set aside the will of her husband, of which defts. had, as exors., obtained probate, alleging want of testamentary capacity & that the will was not executed & attested as required by statute: & also an account of defts.' dealings with the estate, & delivery of the estate to herself:—*Held*: all matters which would throw any light upon testator's mental condition at the time he executed the will, or from which the ct. might legitimately draw inferences as to his mental condition, as well as the circumstances leading up to & surrounding the execution & attestation of the will, were relevant to the issues raised & proper subjects of inquiry upon the examination of defts. for discovery. But the various steps taken by the exors. to obtain probate, & their subsequent dealings with deceased's estate, were not relevant to any issue raised.—*CARNEY v. CARNEY* (1913), 26 W. L. R. 398; 6 Sask. L. R. 373.—*CAN.*

1446 vii. —.]—The greatest lati-

tude should be allowed to a party who is examining an adverse party for discovery so that the fullest inquiry may be made as to all matters which can possibly affect the issues between the parties. In examination for discovery in an action alleging execution of an assignment & power of attorney in favour of deft. in fraud of pltf. & other creditors deft. was asked: "You state that you did receive some securities at that time will you tell us what those securities were?" which deft. refused to answer except as to the documents specifically attacked in the statement of claim. Pltf. did not know, when he instructed action, what securities were assigned to deft. nor the nature of such assignment:—*Held*: deft. should answer the question & give information relating to the securities.—*MOUNT HOPE No. 279, RURAL MUNICIPALITY v. FINDLAY*, [1919] 1 W. W. R. 397.—*CAN.*

1446 viii. —.]—In an action for damage for injury to the health & property of pltf., occasioned by smoke, smells, dust, & noise from defts.' factory, the issues were whether the factory was a nuisance as against pltf., & if so, what were the damages to be awarded:—*Held*: upon the examination for discovery of an officer of defts., questions as to the placing of outside windows upon the factory, & as to the effect thereof, were irrelevant, unless limited to the period before action.—*HAMILTON v. QUAKER OATS CO.* (1920), 46 O. L. R. 309.—*CAN.*

1446 ix. —.]—On an application for leave to deliver interrogatories it is not enough that the answers sought may indirectly help the party applying in his case, if they relate to matters which need not be proved by him.—*WILKINS v. CONNELL* (1903), 22 N. Z. L. R. 961.—*N.Z.*

PART IV. SECT. 5, SUB-SECT. 8.

1451 i. *Questions admissible in cross-examination.*]—Interrogatories must be

t. 5.—What interrogatories will or will not be allowed: Sub-sects. 8, 9, 10, 11 & 12.]

administered under C. L. P. Act, 1854 (c. 125), s. 51, which are relevant to the matter in issue, & which the party interrogated would be bound to answer if in the witness box.—*ZYCHLINSKI v. MALTBY* (1861), 10 C. B. N. S. 838 ; 142 E. R. 683.

Annotations:—Consd. Stern v. Sevastopulo (1863), 14 C. B. N. S. 737. *Apld. Stewart v. Smith* (1867), L. R. 2 C. P. 293. *Refd. Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70.

1452. —.].—*STEWART v. SMITH* (1867), L. R. 2 C. P. 293 ; 15 L. T. 580.

Annotation:—Refd. Edmunds v. Greenwood (1868), L. R. 4 C. P. 70.

1453. —.].—In an action brought to recover the price of certain horses alleged to be sold by plffs. to deft., the statement of defence, among other things, alleged that the prices charged were exorbitant & excessive, & that they had been ordered by deft.'s wife, who had no authority to pledge her husband's credit for them. Reply, that the horses were necessaries suitable to the wife's estate. Interrogatories asking plffs. the date at which they purchased the horses, & the prices they had given for them, were held material & relevant ; but interrogatories asking how & where the horses had come into plffs.' possession & control, if they were not the owners, were disallowed as too remote from the issue.

You cannot interrogate as to every matter upon which the party may be cross-examined (*GROVE, J.*).—*SHEWARD v. IONSDALE* (LORD) (1879), 5 C. P. D. 47 ; 42 L. T. 54 ; 28 W. R. 324, D. C. ; *affd.*, 42 L. T. 172, C. A.

1454. Questions to credit.]—In an action by a principal against his agent for money received, the defence was a denial of agency. Interrogatories which went to shake plff.'s character sought to be administered by deft. to plff. were disallowed.—*BAKER v. NEWTON* (1875), Bitt. Prac. Cas. 80 ; 1 Char. Cham. Cas. 107.

1455. —.].—*LABOUCHERE v. SHAW* (1877), 41 J. P. Jo. 788, D. C.

1456. —.].—A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the ct., specify those to which he objects. Questions which go merely to the credit of the witness & might be put in cross-examination cannot be put as interrogatories to a party, & are as such irrelevant. Where the answer to an interrogatory might tend to criminate the person interrogated he may refuse to answer but the interrogatory is not therefore objectionable.—*ALLHUSEN v. LABOUCHERE* (1878), 3 Q. B. D. 654 ; 47 L. J. Ch. 819 ; 39 L. T. 207 ; 42 J. P. 742 ; 27 W. R. 12, C. A.

Annotations:—Apld. Anstey v. North & South Woolwich Subway Co. (1879), 27 W. R. 575. *Consd. Harvey v. Lovekin* (1884), 10 P. D. 122 ; *Oppenheim v. Sheffield*, [1893] 1 Q. B. 5. *Apld. Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. *Consd. National Asscn. of Operative Plasterers v. Smithies*, [1906] A. C. 434. *Refd. Lamb v. Munster* (1882), 10 Q. B. D. 110.

SUB-SECT. 9.—AS TO CONVERSATIONS.

1457. How far admissible.]—It is no objection to interrogatories under C. L. P. Act, 1854 (c. 125),

confined to facts which are relevant to some questions at issue between the parties, & will not be allowed where they are in the nature of cross-examination.—*STARRATT v. WHITE* (1913), 47 N. S. R. 162 ; 13 E. L. R. 8.—CAN.

1454 i. Questions to credit.]—The examination of a party for discovery in the cause under Rule 487 must be confined to matters which are relevant to the questions raised in the pleadings,

but a fair amount of latitude is to be allowed. Questions which go only to credit are not admissible. In an action for a partnership account, where deft. denied the partnership & set up that plff. had been his servant, under the same name as that in which he brought the action, during the period of the alleged partnership :—*Held* : it was not material to the issue that plff. bore another name at a previous time, &

s. 51, that they seek to obtain from plff. admissions of conversations relating to the subject matter of the action with a servant or agent of defts.—*REW v. HUTCHINS* (1861), 10 C. B. N. S. 829 ; 142 E. R. 679.

Annotation:—Expld. & Distd. Stern v. Sevastopulo (1863), 14 C. B. N. S. 737.

1458. —.].—*EADE v. JACOBS*, No. 1418, *ante*.

1459. —.].—*A.-G. v. GASKILL*, No. 1314, *ante*.

SUB-SECT. 10.—WHEN NOT NECESSARY OR USEFUL.

See, now, R. S. C., Ord. 31, r. 2.

1460. When not necessary—Information within knowledge of interrogating party.]—The ct. will not allow interrogatories, under C. L. P. Act, 1854 (c. 125), s. 51, for the purpose of obtaining from plff. information which deft. has the means of obtaining from his own agents.—*BIRD v. MALZY* (1856), 1 C. B. N. S. 308 ; 140 E. R. 128.

Annotation:—Refd. Rew v. Hutchins (1861), 10 C. B. N. S. 829.

—].—In an action against a bank to recover damages for refusing to honour plff.'s acceptance, a cross-interrogatory was administered to plff., who resided abroad, asking whether plff. agreed with the particulars stated therein respecting the state of plff.'s balance, to which plff. simply replied, " I do not admit this to be correct." An application was made that the cause might be postponed until the following term, on the ground that the answer was not satisfactory :—*Held* : the information sought was within the knowledge of defts., & could be shown by their own books, & the application was therefore refused.—*DE FARIA v. LAWRIE* (P. O. OF UNION BANK OF LONDON) (1867), 17 L. T. 296.

1462. —.].—For fairly disposing of case—Or saving costs.]—Interrogatories disallowed as not being necessary either for fairly disposing of the case or for saving costs within R. S. C., Ord. 31, r. 2.—*COCHRANE v. SMITH* (1895), 12 T. L. R. 78.

1463. When not useful.]—Under C. L. P. Act, 1854 (c. 125), s. 51, the ct. or judge should exercise the discretion thereby given so as to take care that interrogatories should be useful as well as relevant.

On application to the ct. for leave to administer interrogatories the affidavit must show, with greater particularity than is always requisite at chambers, the object for which the questions are to be asked.—*ALEXANDRA* (NEWPORT) DOCK CO. v. *ELLIOT* (1871), 23 L. T. 847.

1464. —.].—Interrogatories as to foreign law—Party not an expert.]—In an action for non-acceptance of patent button fastening machines interrogatories as to the French law on the subject were struck out, also interrogatories to show plff. had bought the goods cheaply.—*PHILLIPS v. BARRON*, [1876] W. N. 54 ; Bitt. Prac. Cas. 119 ; 2 Char. Cham. Cas. 56.

1465. —.].—An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law.—*PERLAK PETROLEUM MAAT-*

deft. could not examine him as to the details of his past life, long prior to the alleged partnership.—*MACK v. DOBIE* (1892), 14 P. R. 465.—CAN.

PART IV. SECT. 5, SUB-SECT. 10.

s. When not useful—Opinion of opponent on question of law.]—To interrogate a party to a suit as to the construction he puts on the meaning of the word " family " is not admissible,

PART IV.

SCHAPPIJ v. DEEN, [1924] 1 K. B. 111; 68 Sol. Jo. 81, C. A.

1466. — Answer of no assistance to interrogating party.]—LANGDALE'S CHEMICAL MANURE Co. v. KNILL & GRANT (1890), 6 T. L. R. 236.

1467. — —.]—In an action for wrongful detention of certain copper which had been bailed by pltf. to defts., as warehousemen, to hold to pltf.'s order, defts. sought to administer interrogatories as to whether pltf. had not since the date of the bailment sold the copper to M., & been paid the price, & whether they had not indorsed & handed to M. delivery orders in respect of the copper. It appeared that M. were claiming the copper from defts.; but it was admitted by defts. that they were defending the action for their own interest alone, & not under the authority of M.:—*Held*: defts. could not as against their bailors set up the title of third parties, under whose authority they did not claim to defend, & that consequently the facts to which the interrogatories were directed not affording any defence to the action, the interrogatories must be disallowed.—ROGERS & Co. v. LAMBERT & Co. (1890), 24 Q. B. D. 573; 59 L. J. Q. B. 259; 62 L. T. 694; 54 J. P. 501; 38 W. R. 542, D. C.

SUB-SECT. 11.—FISHING INTERROGATORIES.

1468. General rule.]—In an action for the wrongful detention of a document, pltf. applied for liberty to deliver interrogatories with the declaration, upon a suggestion that deft. must have obtained a copy of the original from pltf.'s clerk, as he had shown it only to him; & a paragraph had appeared on the following day in deft.'s newspaper, containing matter leading to the inference that the writer had used the document in writing the paragraph:—*Held*: there was no sufficient foundation for the application.

We cannot allow interrogatories merely for the purpose of trying to fish out a case (*per CUR.*).—ATTER v. WILLISON (1859), 32 L. T. O. S. 285; 7 W. R. 265.

1469. What amounts to "fishing."]—Pltf. wishes to maintain his questions & to insist upon answers to them in order that he may find out something of which he knows nothing now which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories it seems to me that they come within the description of "fishing" interrogatories & on that ground

although to ask him who the persons are who are living in his household is so. The former question, if replied to, would only be of value as the opinion of a party to suit on what is really a question of law.—NITTOMOYE DASSEE v. SOOBUL CHUNDER LAW (1895), 1. L. R. 23 Calc. 117.—IND.

PART IV. SECT. 5, SUB-SECT. 11.

1468 i. General rule.]—Interrogatories will not be allowed where the application is of a fishing character, to ascertain whether pltf. has in fact any cause of action against deft., or for the purpose of fishing out information of a penal character, nor where the interrogatories are such that the answers would, as in case of libel, tend to criminate the person interrogated.—MCKENZIE v. CLARK (1867), 4 P. R. 95.—CAN.

1468 ii. —.]—The mere fact that questions would be admissible in cross-examination of a witness, does not make them good as interrogatories.

Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case. The ct. will, in cases where the defence of waging is set up, refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case.—BHAGWANDAS PARASHRAM v. BURJORJI RUTTONJI (1912), 1. L. R. 37 Bom. 847.—IND.

1469 i. What amounts to "fishing."]—Interrogatories are not, in this country, to be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. Where the pleading of either party is too vague, the ct. may call for a further or fuller

cannot be allowed. The moment it appears that questions are asked & answers insisted upon in order to enable the party to see if he can find a case either of complaint or defence of which at present he knows nothing & which will be a different case from that which he now makes the rule against "fishing" interrogatories applies (ESHER, M.R.).—HENNESSY v. WRIGHT (No. 2) (1888), 24 Q. B. D. 445, n.; 36 W. R. 879; 4 T. L. R. 662, C. A.

Annotations.—Consd. Dawson v. Dover & County Chronicle (1913), 108 L. T. 481. *Appld.* Russell v. Stubbs (1908), [1913] 2 K. B. 200, n. *Reid.* Gibson v. Evans (1889), 23 Q. B. D. 384; Parnell v. Walter (1890), 38 W. R. 270; Hope v. Brash, [1897] 2 Q. B. 188; Elliott v. Garrett, [1902] 1 K. B. 870; Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Assocn., [1906] 1 K. B. 403; Maas v. Gas, Light & Coke Co. (1911), 80 L. J. K. B. 1313; Adam v. Fisher (1914), 110 L. T. 537; Griebart v. Morris, [1920] 1 K. B. 659; Lyle-Samuel v. Odhams, [1920] 1 K. B. 135.

1470. —.] — BARHAM v. HUNTINGFIELD (LORD), No. 1553, *post*.

SUB-SECT. 12.—OPPRESSIVE INTERROGATORIES.

1471. Interrogatories must not be prolix or oppressive—Difficulty in answering.]—The ct. will not allow interrogatories to be administered under O. L. P. Act, 1854 (c. 125), s. 51, which, though relevant to the matter in issue, are much more complicated than any questions the person interrogated could be required to answer if in the witness box.—HUSTLER v. FREELAND (1863), 2 New Rep. 396.

1472. — —.]—In an action of fraud against the directors of a co., interrogatories which were so framed that it would be almost impossible to answer them were ordered to be reformed so that deft. could answer "Yes" or "No" to them.—ARMITAGE v. FITZWILLIAM (1876), Bitt. Prac. Cas. 126; 2 Char. Cham. Cas. 57.

1473. — Answer no use to plaintiff unless successful.]—Where deft.'s answering an interrogatory cannot help pltf. to obtain a decree, but will only be of use to him if he obtains a decree, the ct. has a discretion whether to oblige deft. to answer it before trial, & will not do so where compelling such discovery would be oppressive. Pltf. alleged that G. had deposited money with deft. E. in trust for S. & A., both since deceased, successively for their lives, & then for pltf. & another person absolutely; that E. had employed it in trade & made large profits, & had paid the interest to S. & A. for their lives, but now refused to pay over the principal. E., by his defence, admitted

written statement, or may frame & record issues until the case raised by the pleadings is ascertained with sufficient clearness. Pltf. may interrogate with a view to obtain information or admission in support of his own case, & this right extends not only to his original case but also to any answers which he has to make to deft.'s case, subject to the qualification (*inter alia*) that the interrogatories must be directed to a case on which pltf. has already determined, & to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in deft.'s case or suggest any answer to it.—ALI KADER SYUD HOSSAIN ALI v. GOBIND DASS (1890), 1. L. R. 17 Calc. 840.—IND.

PART IV. SECT. 5, SUB-SECT. 12.

i. Interrogatories must not be oppressive.]—When the examination for discovery sought is in aid of something which does not form part of what pltf. must prove at the hearing,

Sect. 5.—What interrogatories will or will not be allowed: Sub-sects. 12, 13, 14 & 15, A.]

the deposit, but denied the trust, & stated that he had only held the money for G. to draw upon, & had many years ago paid it away by G.'s directions; he denied payment of interest to S. & A. Pltf. delivered, amongst others, interrogatories requiring E. to set out: first, the dates & particulars of the payments made by him out of the deposit sum; secondly, an account of the profits made by the employment of the money in trade; thirdly, whether E. had not paid to S. & A. quarterly sums by way of interest on the moneys, & if not, then he was asked whether he had not during some & what years paid to S. & A. certain & what moneys, & whether or not quarterly, or at some & what dates & under what agreement, or for what reason or in respect of what matters; & was required to set out an account of all moneys paid by him since 1854 to S. & A., or either of them. E. filed an affidavit verifying his defence & denying the trust, denying the payment of any interest to S. & A. on the deposited sum, denying pltf.'s title, & declining to make any further answer:—*Held*: (1) E. was not bound to answer the first interrogatory, as an answer to it could not furnish evidence to establish the alleged trust, & could not be of any use to pltf. except by discrediting E.'s evidence if he made erroneous statements as to the particulars of his payments, & it would be oppressive to require him to go through his books for a number of years for that purpose; (2) E. ought not to be compelled to answer as to the profits, for that it would be oppressive to call upon him to enter into a difficult account, which could not help pltf. to obtain a decree & would be useless if a decree was not obtained; (3) the third interrogatory was too wide, as it extended to payments not connected with the sums to which the action related, & pltf. was not entitled to a full answer; (4) as pltf. had not in the ct. below asked for a qualified order but had insisted on a full answer, the order for a further answer ought simply to be discharged.—*PARKER v. WELLS* (1881), 18 Ch. D. 477; 45 L. T. 517; 30 W. R. 392, C. A.

Annotations:—As to (1) *Refd.* *Bolckow v. Fisher* (1882), 10 Q. B. D. 161. As to (2) *Apld.* *Lister v. Norton* (1885), 2 R. P. C. 68. *Distd.* *Re Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316.

1474. ———.]—*FENNESSY v. CLARK*, No. 83, *ante*.

See, also, No. 1429, *ante*, No. 1493, *post*.

1475. ———.]—Where interrogatories are unreasonably prolix, it is the duty of the ct. to strike them out under R. S. C., Ord. 31, r. 7.—*GRUMBRECHT v. PARRY* (1884), 32 W. R. 558, C. A.

Annotation:—*Mentd.* *Marriott v. Chamberlain* (1886), 54 L. T. 714.

1476. ——— *Material in part.*]—*PETERS v. BRADLAUGH* (1888), 4 T. L. R. 440, D. C.

1477. ———.]—R. S. C., Ord. 31, r. 7, applies to interrogatories administered with leave as well as to those administered without leave; & under its terms all or any of a set of interrogatories may be set aside as being unreasonably or vexa-

tiously exhibited, or may be struck out as being prolix, oppressive, unnecessary, or scandalous.

If the ct. are of opinion, looking at a set of interrogatories as a whole, that they are unreasonably or vexatiously exhibited, or are prolix, oppressive, unnecessary or scandalous, they may be set aside or strike out the whole of the interrogatories, although there may be interrogatories among them which, taken alone, would be unobjectionable.—*OPPENHEIM & Co. v. SHEFFIELD*, [1893] 1 Q. B. 5; 62 L. J. Q. B. 167; 67 L. T. 606; 41 W. R. 65; 37 Sol. Jo. 24; 4 R. 111, C. A.

1478. ———.]—*KENNEDY v. DODSON*, No. 1444, *ante*.

1479. ——— *Limited interrogatories allowed.*]—*A.-G. v. NORTH METROPOLITAN TRAMWAYS Co.*, No. 51, *ante*.

SUB-SECT. 13.—SCANDALOUS INTERROGATORIES.

1480. *Compared with relevancy.*]—*FISHER v. OWEN*, No. 1841, *post*.

1481. *Inadmissible.*]—*KEMBLE v. HOPE* (1894), 10 T. L. R. 371, C. A.

SUB-SECT. 14.—CRIMINATING INTERROGATORIES.

See Sect. 8, sub-sect. 4, B., post.

SUB-SECT. 15.—IN PARTICULAR CASES.

A. Accounts.

1482. *Administration action—Administrator discharged.*]—In a creditor's suit against the administrator of a deceased intestate, a decree was made in the usual form. Deft.'s discharge, in which he claimed a right to retain certain moneys of the intestate, come to his hands as administrator, was allowed by the master. Subsequently, the master declined to review the discharge but, by his certificate, allowed certain special interrogatories exhibited by pltf. for the examination of deft., in respect to his right of retainer:—*Held*: the interrogatories ought not to have been allowed.—*THOMPSON v. COOPER* (1844), 1 Coll. 81; 2 L. T. O. S. 419; 8 Jur. 164; 63 E. R. 330.

1483. ——— *Duty of executor to render account.*]—The ct. will not give discovery where it would be oppressive & vexatious, & of no use to the person asking for it; but each case must depend on its particular circumstances, & having regard to the status of an exor., there can seldom be a case in which he will be protected from a discovery of his accounts.

A bill was filed against an exor. to establish a lien on testator's estate for administration & an account, & the usual interrogatories as to accounts, were administered. The exor. submitted that he ought not to answer as to the accounts till the lien was established:—*Held*: he must answer at once, but he need not go into minute details, & a fair general account would be sufficient.—*THOMPSON*

but it is merely consequential to it, the ct. has a discretion to compel answers when it would not be oppressive to do so.—*VANDERLIP v. MCKAY* (1906), 3 W. L. R. 232.—CAN.

a. ———.]—Questions which, if answered, might result in oppressive or vexatious conduct on the part of pltf. will not be permitted. The answer to the question "Do you believe that pltf. stole the tools?" would disclose

what was in deft.'s mind at the very time of the putting of the question, & not what his belief was at the time of the alleged publication. The answer to the question "Do you believe that L. stole the tools?" could not tend to prove malice or wrong motive to have been in deft.'s mind when he uttered the words complained of.—*KLENMAN v. SCHMIDT* (1911), 18 W. L. R. 393; 4 Sask. L. R. 366.—CAN.

PART IV. SECT. 5, SUB-SECT. 15.—A.

b. *Action against banker—State of account with co-defendants material—Attempt by bank to evade notice of plaintiff's prior equity.*]—Where pltf. claimed that a certain option for purchase of land was taken by deft. W. for pltf.'s benefit & that deft. bank & deft. co. had notice of such claim, & that to secure an indebtedness of W. to the bank, the option was assigned

v. DUNN (1870), 5 Ch. App. 573; 18 W. R. 854, L. C. & L. J.

Annotations :—*Folld.* *Re Sutcliffe, Alison v. Alison* (1881), 50 L. J. Ch. 574. *Refd.* *Newry v. Kilmorey* (1870), 24 L. T. 15; *Elmer v. Creasy* (1873), 42 L. J. Ch. 807.

1484. —.]—In an administration action the persons beneficially entitled have a right to call upon an exor. deft. before the hearing or the close of the pleading to answer interrogatories, by which he is required to make discovery on oath of the accounts of the estate. This rule has not been abrogated or altered by the Judicature Acts & Rules. *Semble* : in such a case, if an account has been already rendered, it would be a sufficient answer to verify such an account.—*Re SUTCLIFFE, ALISON v. ALISON* (1881), 50 L. J. Ch. 574; 44 L. T. 547; 29 W. R. 732.

1485. Action against banker—Dealings with third parties.—(1) Where an allegation is made by a bill with respect to bankers, but positively denied by the answer, & where third parties are implicated, pltf. is not entitled to discovery as to dealings between the bankers & such third parties.

(2) A pltf. is entitled to discovery as to securities held by third parties, to which he may be entitled.

(3) Where an answer refers to a sched. as setting out full particulars of account, an entry of "value given or passed" is not sufficient.

(4) Where there is accidental inconsistency between the answer & the sched. defts. will be compelled to put in a further answer.—*BRIDGEWATER v. DE WINTON* (1863), 3 New Rep. 24; 33 L. J. Ch. 238; 9 L. T. 568; 9 Jur. N. S. 1270; 12 W. R. 40.

Partnership account.—*See* Sub-sect. 6, I., *post*.

1486. Patent action—Title disputed.—Upon a bill charging deft. with infringing pltf.'s patent & asking for an account of his dealings & transactions, & seeking to make him answerable for the profits received by him in consequence of the infringement :—*Held* : deft. must answer the interrogatories, though he disputed the title of pltf., & insisted that the discovery would be an act of oppression upon him, & that there was little probability that the ct. at the hearing, would direct an account upon the facts if disclosed.—*SWINBORNE v. NELSON* (1853), 16 Beav. 416; 22 L. J. Ch. 331; 1 W. R. 155; 51 E. R. 839.

Annotations :—*Appld.* *Wood v. Surr* (1853), 1 W. R. 189. *Folld.* *Clegg v. Edmonson* (1856), 22 Beav. 125; *Great Luxembourg Ry. v. Magnay* (1857), 23 Beav. 646. *Refd.* *Elmer v. Creasy* (1873), 9 Ch. App. 69. *Mentd.* *Gridley v. Swinborne* (1888), 52 J. P. 791.

1487. Profits—Action to set aside sale of business.—A suit having been instituted by a co. of proprietors of iron works to set aside the contract under which they had purchased the iron works of deft., & the decree having directed an inquiry as to the net profits made by the co. :—*Held* : it was competent for deft., who had not been in possession for some years, to exhibit interrogatories before the master, for the purpose of ascertaining in what manner the co. had managed the concern, without setting forth any specific statement of facts.—*SMALL v. ATTWOOD* (1836), 2 Y. & C. Ex. 101; 6 L. J. Ex. Eq. 30; 160 E. R. 328.

1488. — Before title established.]—*PARKER v. WELLS*, No. 1473, *ante*.

1489. — —.]—*HEMERY v. WORSSAM* (1882), 26 Sol. Jo. 296, C. A.

1490. Redemption suit—First mortgagee—Ac-

counts taken in previous actions.]—In a suit by a first mortgagee & mortgagor the first mortgagee refused to set out the accounts between himself & the mortgagor on the ground that they had been taken in a previous suit & the pltf. (who claimed under the mtgor.) was bound by them :—*Held* : the rule under which a deft. who submits to answer must answer fully applied & deft. must set out the accounts.—*WOOD v. SURR* (1853), 1 W. R. 189.

1491. — Mortgagee in possession—Rents & profits.—A mtgee. in possession, deft. to a bill for redemption, admitting himself by his answer to be redeemable, cannot decline to answer interrogatories requiring him to set forth an account of the rents & profits of the mortgaged hereditaments, the rule being that when a party answers he is bound to answer fully.—*ELMER v. CREASY* (1873), 9 Ch. App. 69; 43 L. J. Ch. 166; 29 L. T. 632; 22 W. R. 141, L. C. & L. J.

Annotations :—*Folld.* *West of England & South Wales Bank v. Nickolls* (1877), 6 Ch. D. 613. *Refd.* *Great Western Colliery Co. v. Tucker* (1874), 9 Ch. App. 376; *Saull v. Browne* (1874), 9 Ch. App. 364; *Grumbrecht v. Parry* (1883), 49 L. T. 570; *Field v. Gordon Bennett* (1885), 2 T. L. R. 91.

1492. — Second mortgagee—Security held for debt.—In a redemption suit by a second mtgee. against the first mtgee. deft. is bound to state in answer to interrogatories not only the amount due upon his security but also what securities he holds for his debt.—*WEST OF ENGLAND & SOUTH WALES BANK v. NICKOLLS* (1877), 6 Ch. D. 613.

1493. Sales—Whether oppression.—Dft. employed pltf. as manager of his business under a written agreement at a salary & a commission on the gross amount of sales. Disputes having arisen, deft. summarily dismissed pltf. Pltf. commenced an action for wrongful dismissal. Dft. by his defence alleged specific acts of misconduct against pltf., & also alleged in general terms other acts of misconduct justifying the dismissal. Pltf. exhibited four interrogatories, of which the substance was to ask deft. to specify the acts of misconduct on which he relied, & a fifth interrogatory asking for the total amount of the gross proceeds of sale during the period for which pltf. claimed remuneration. Dft. refused to answer the first four interrogatories, on the ground that they related to the case of deft., not of pltf., & the fifth interrogatory, on the ground that, as the right to an account of commission was disputed, deft. was not bound to give such account at that stage of the action :—*Held* : the interrogatories must be answered.

It would be impossible to differ from the Vice-Chancellor in holding this is not one of those cases in which it is oppressive or hard or might lead to great inconvenience for a party called on to give an account (*JAMES, L.J.*).

In an action where general allegations were made in the pleadings, either by pltf. or by deft., either party could obtain particulars, the object of which was to limit the generality of those pleadings & enable the other party to know accurately what was the case to be brought against him (*THESIGER, L.J.*).—*SAUNDERS v. JONES* (1877), 7 Ch. D. 435; 47 L. J. Ch. 440; 37 L. T. 769; 26 W. R. 226, C. A.

Annotations :—*Consd.* *Fisher v. Owen* (1878), 8 Ch. D. 645. *Folld.* *Ashley v. Taylor* (1878), 38 L. T. 44; *Lyon v. Tweddell* (1879), 13 Ch. D. 375. *Expld.* *Benbow v. Low* (1880), 16 Ch. D. 93. *Refd.* *Hemery v. Worssam* (1882), 26 Sol. Jo. 296; *Bidder v. Bridges* (1885), 52 L. T. 455; *Marriott v. Chamberlain* (1886), 54 L. T. 714.

by W. to S. Co., & the purchase completed in its name & financed by the bank & that the co. & its business was owned & controlled by the bank, & alternatively that the transaction was

an acquiring of land by the bank contrary to the Bank Act, pltf. was allowed on examination for discovery of officers of the bank, & of the co. to examine concerning the state of

account between the co. & the bank, not limited to the matter of the purchase of the particular land in question.—*JOHNSON v. WALCH LAND CO.*, [1919] 2 W. W. R. 713.—*CAN.*

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, A., B., C., D. & E. (a).]

1494. — Materiality to case of party interrogating.]—*BENBOW v. LOW*, No. 1429, *ante*.

1495. Settled estates—Action between tenants for life—Statement of acreage & rentals.]—A. was tenant for life, with remainder to his children, remainder to B. A. being unnamed, B. has a right to compel A. to set out a full description & particulars of the settled estates.

The interrogatories had asked for a statement of acreage, rental & particulars.—*BEYNON v. MORRIS* (1864), 10 L. T. 710; 12 W. R. 1023.

B. Bills of Exchange.

See, generally, BILLS OF EXCHANGE, Vol. VI., pp. 9 et seq.

1496. As to consideration.]—Upon a bill of discovery in aid of a defence to an action on a bill of exchange, if deft. in equity is interrogated as to the consideration given for the bill, he must answer not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given.—*GLENGALL (LORD) v. EDWARDS* (1836), 2 Y. & C. Ex. 125; 160 E. R. 338.

Annotation:—Reid. Sloman v. Kelly (1840), 4 Y. & C. Ex. 169.

1497. Action against acceptor—Partnership dealings between acceptors.]—In an action by the drawer against A. & B., acceptors of a bill of exchange, A. pleaded that the bill was accepted by B. without his knowledge & in fraud of A., with the knowledge of pltf. Pltf. sought to exhibit interrogatories to A. as to whether there had ever been a partnership between him & B., & if so, as to the business & the particular terms of the partnership. The application was supported by the common affidavits only:—*Held*: such questions were too large. *Semble*: the inquiry should have been limited to a specific time & place, or to the specific facts from which a partnership might be inferred.—*ROBSON v. CRAWLEY* (1858), 2 H. & N. 766; 30 L. T. O. S. 290; 6 W. R. 260; 157 E. R. 316; *sub nom.* *ROBSON v. COOKE*, 27 L. J. Ex. 151; 4 Jur. N. S. 75.

Annotations:—Reid. Tupling v. Ward (1861), 6 H. & N. 749; *Alexandra (Newport) Dock Co. v. Elliot* (1871), 23 L. T. 847.

1498. — Denial of acceptance—Interrogatory as to former bill.]—In an action by an indorsee against the acceptor of a bill of exchange, to which deft. had pleaded a denial of the acceptance, & had made an affidavit that it was a forgery, pltf. was not allowed to interrogate deft. upon interrogatories under Common Law Procedure Act, 1854 (c. 125), as to the payment by the latter on another occasion of a bill drawn on him by the same drawer, & purporting to be accepted in like manner as the bill sued on, pltf. not interrogating deft. as

to his having given any one any general authority to accept bills for him, or producing evidence to that effect.—*MORRIS v. BETHELL* (1869), L. R. 4 C. P. 765; 38 L. J. C. P. 377; 17 W. R. 736.

C. Breach of Promise of Marriage.

See, generally, HUSBAND & WIFE.

1499. As to means.]—In an action for breach of promise of marriage interrogatories as to deft.'s means are pertinent & will be allowed.—*ANON.* (1875), 20 Sol. Jo. 122; Bitt. Prac. Cas. 59; 1 Char. Cham. Cas. 105.

1500. As to expectation of means.]—In an action for breach of promise of marriage interrogatories were struck out, the object of which was to prove mere expectations of means by deft. & which inquired as to the means of his relations & any settlement made by them on his wife.—*ANON.* (1876), 20 Sol. Jo. 242; Bitt. Prac. Cas. 98; 2 Char. Cham. Cas. 55.

D. Damages.

See, generally, DAMAGES, Vol. XVII., pp. 78 et seq.

1501. Damage admitted—Plaintiff's title or interest disputed.]—*BARRACK v. MACKENZIE* (1858), 31 L. T. O. S. 72.

1502. — Amount to be paid into court.]—Interrogatories may be put to a pltf. to ascertain the true measure of the damages he has sustained, & so guide deft. as to the amount he may fairly pay into ct.—*WRIGHT v. GOODLAKE* (1865), 4 H. & C. 540; 6 New Rep. 123; 34 L. J. Ex. 82; 13 L. T. 120; 13 W. R. 349; 159 E. R. 643.

Annotations:—Consd. Jourdain v. Palmer (1866), L. R. 1 Exch. 102; *Clarke v. Bennett* (1884), 32 W. R. 550.

1503. — Particulars of damage.]—Where deft.'s object is to pay money into ct. in satisfaction of pltf.'s cause of action, he will be allowed to interrogate pltf. as to the particulars of the damage sustained by him.—*HORNE v. HOUGH* (1874), L. R. 9 C. P. 135; 43 L. J. C. P. 70; 22 W. R. 412.

1504. Payment made into court—Interrogatory as to extent of damage.]—In an action for breach of contract whereby pltf.'s patent became void, laying as damages loss of profits, deft. paid money into ct., & applied for leave to deliver interrogatories directed to ascertain the probable value of the patent:—*Held*: the application must be refused.—*JOURDAIN v. PALMER* (1866), L. R. 1 Exch. 102; 4 H. & C. 171; 35 L. J. Ex. 69; 13 L. T. 600; 12 Jur. N. S. 214; 14 W. R. 283.

Annotation:—N.F. Dobson v. Richardson (1868), L. R. 3 Q. B. 778.

1505. — — —.]—In an action claiming £20,000 damages for the breach of an agreement to deliver certain bills of exchange of a co. as to which defts. had paid one shilling into ct., the ct. allowed interrogatories to be exhibited to pltf.

PART IV. SECT. 5, SUB-SECT. 15.—D.

c. Action by executors for negligence—Causing death of testator—Form of questions.]—In an action by executors for damages for the death of testator caused by deft.'s alleged negligence, defts. proposed putting certain interrogatories to pltf.'s after issue joined, as bearing upon the question of damages:—*Held*: it may be material to defts. to have the information which the answers may give them & a rule was granted, permitting defts., to put such questions in a more general form, & apply again in chambers to have them allowed.—*FERRIE v. GREAT WESTERN RY. CO.* (1858), 15 U. C. R. 513.—*CAN.*

d. General damage in libel—Loss

of particular customers.]—In an action for damages for libelling pltf. in the way of their trade, pltf. did not allege special damage but alleged generally that their business & commercial reputation had suffered. Upon the examination of pltf. for discovery they refused to answer as to what business they had lost by reason of the alleged libels:—*Held*: no evidence of special damage would be admissible at the trial, but pltf. would have the right to place figures before the jury to show a general diminution of profits since the publication of the alleged libels; & if pltf. proposed to give this class of evidence at the trial, defts. were entitled on the examination for discovery to know how such diminution was made out, & the figures by which it

was proposed to support it, but not to seek information as to the loss of any particular custom; but if pltf. did not propose to give such evidence, defts. were not entitled to the discovery.—*BLACHFORD v. GREEN* (1892), 14 P. R. 424.—*CAN.*

e. To show how damage apportioned—Between several contributory factors.]—Pltf. were shipowners, & defts. were proprietors of a graving-dock. Pltf.'s ship was docked under the supervision of the officials of deft. Board, but the shoring of the vessel was undertaken by a private contractor, upon a contract between himself & pltf. While the dock was in process of being unwatered the blocks collapsed, resulting in the vessel being crushed & injured. By order of

as to the solvency of the co. & the amount of damages which he had sustained by the non-delivery of the bills.—*DOBSON v. RICHARDSON* (1868), L. R. 3 Q. B. 778; 9 B. & S. 516; 37 L. J. Q. B. 261; 16 W. R. 1010.

1506. ———.]—*FROST v. BROOKE*, No. 1603, *post*.

1507. ———.]—Interrogatories as to the amount of the damages claimed are only admissible, as a rule, where deft. does not directly traverse all pltf.'s claim, but has either paid money into ct. or can show that such claims are *prima facie* extortionate.—*CLARKE v. BENNETT* (1884), 32 W. R. 550, D. C.

1508. Special damage in slander—Names of customers lost.]—In slander, with special damage, particulars refused of the persons to whom the words were spoken, but interrogatories of the persons whose patronage pltf. was supposed to have lost, allowed.—*WOOD v. JONES* (1858), 1 F. & F. 301.

1509. Damages already recovered in respect of same libel.]—*TUCKER v. LAWSON*, No. 1543, *post*.

1510. Mitigation of damages in defamation—R. S. C. Ord. 36, r. 37.]—Where deft. has within the time limited by above rule furnished particulars to the pltf. as to the evidence he intends to give in mitigation of damages in an action for defamation, deft. can administer interrogatories as to the matters referred to in the particulars.—*SCAIFE v. KEMP & Co.*, [1892] 2 Q. B. 319; 61 L. J. Q. B. 515; 66 L. T. 589.

Annotation :—*Reid. Mangena v. Wright*, [1909] 2 K. B. 958.

———.]—*See, also*, No. 324, *ante*.

———.]—*See, generally*, LIBEL & SLANDER.

1511. To show that no damage in fact suffered.]—Upon bill filed by canal co. to restrain diversion of their water by waterworks co., & for damages, the waterworks co. filed interrogatory seeking information as to sale of their surplus water by canal co. The canal co. having declined to answer on grounds of irrelevancy, & the waterworks co. having excepted thereto :—*Held* : the information sought was material as showing whether the canal co. had used the water for the proper purposes of their canal, or suffered damage by its withdrawal, & the interrogatory must be answered.—*WILTS & BERKS CANAL NAVIGATION Co. v. SWINDON WATERWORKS Co.* (1872), 20 W. R. 353.

E. Defamation.

(a) Libel.

See, generally, LIBEL & SLANDER.

1512. Names of witnesses—To prove justification.]—*HUNTER v. SHARP*, No. 1417, *ante*.

the Customs officials she was not allowed to leave port until she had been re-docked after the accident. This involved a delay of several weeks before she could take up her usual running. Pltfs. brought an action against deft. Board, alleging that losses had been incurred in consequence of this delay, & for these losses & the damage which their ship had sustained in the dock they claimed the gross sum of £15,000, without itemising or apportioning the amount in any way :—*Held* : defts. were entitled to deliver interrogatories, with a view to eliciting information as to the proportion of damages alleged to have been sustained in respect of the several elements of damage.—*MAMARI, SHAW, SAVILL, & ALBION Co. v. AUCKLAND HARBOUR BOARD* (No. 2) (1907), 26 N. Z. L. R. 1035.—N.Z.

PART IV. SECT. 5, SUB-SECT. 15.—
E. (a).

1514 i. To discover name of proprietor

1513. To enable compliance with order for particulars of justification.]—An order having been made for the delivery by deft. of particulars of the several matters he intended to rely on under his pleas of justification, stating the substance of each case, with the dates of the several matters relied on, or, in default, that the pleas should be struck out :—*Held* : deft. would not be allowed to administer interrogatories to pltf. for the purpose of enabling him to comply with the order, in the absence of an affidavit disclosing circumstances to warrant a departure from the general rule.—*GOURLY v. PLIMSOLL* (1873), L. R. 8 C. P. 362; 42 L. J. C. P. 244; 29 L. T. 130; 21 W. R. 683.

1514. To discover name of proprietor of newspaper.]—Under 6 & 7 Will. 4, c. 76, s. 19, re-enacted by 32 & 33 Vict. c. 24, a person complaining of a libel in a newspaper may file a bill against the printer & publisher, to ascertain the names of the proprietors, for the purpose of bringing his action against the proprietors alone.—*DIXON v. ENOCH* (1872), L. R. 13 Eq. 394; 41 L. J. Ch. 231; 26 L. T. 127; 20 W. R. 359.

Annotation :—*Expld. & Apld. Orr v. Diaper* (1876), 4 Ch. D. 92.

1515. To discover printer & publisher of newspaper.]—(1) In an action for libel, discovery of the names of the printer & publisher of a newspaper can now be had by interrogatories in any Division of the High Ct.

(2) Effect of the Jud. Acts on mode of procedure discussed (*see* No. 2, *ante*).—*RAMSDEN v. BREARLEY* (1875), 33 L. T. 322; 20 Sol. Jo. 30; 1 Char. Cham. Cas. 96.

———.]—In an action for libel interrogatories were disallowed which asked whether deft. was editor of the paper in which the alleged libel appeared & whether he had anything to do with the writing of the offending passage. Interrogatories were allowed to stand which asked whether deft. was publisher of the paper & as to his position & duty of supervision & how the documents came into the office of the paper.—*CARTER v. LEEDS DAILY NEWS Co. & JACKSON* (1876), 20 Sol. Jo. 218; Bitt. Prac. Cas. 91; 1 Char. Cham. Cas. 101.

1517. To discover authorship.]—*CARTER v. LEEDS DAILY NEWS Co. & JACKSON*, No. 1516, *ante*.

1518. ———.]—Where a deft. sued for libel attempted to fill up a general plea of justification by interrogatories :—*Held* : he ought to know that pltf. had written the articles upon which he sought to justify & not have to fish for a defence by interrogating about the matter; he might ask, Did you write such & such articles? but not,

of newspaper.]—Since Jud. Act, 1877, the right to discovery as to the proprietorship of a newspaper, conferred by 6 & 7 Wm. 4, c. 76, s. 19, & 32 & 33 Vict. c. 24, may be enforced by interrogatories in an action against the alleged proprietor for a libel published in the newspaper; & deft. in such action cannot protect himself from answering the interrogatories, on the ground that a criminal prosecution for the alleged libel is pending against deft., & that the interrogatories tend to criminate him.—*LEFROY v. BURNSIDE* (1879), 4 L. R. Ir. 340.—IR.

1514 ii. ———.]—In libel, after defence denying the writing or publication, the ct., in the exercise of its discretion, & on the common affidavit, allowed pltf. to deliver to deft. interrogatories as to the authorship & publication of the libel, which, in the opinion of the ct., was not one which would justify the institution of criminal proceedings.—*M'LOUGHLIN v. DWYER* (1875), 1 R. 9 C. L. 170.—IR.

1517 i. To discover authorship.]—In an action for libel brought against a newspaper proprietor, deft. will not, as a general rule, & in the absence of special reasons, be ordered to disclose the writer's name, of an anonymous letter which appeared in deft.'s newspaper & contained the libel complained of. In an action for libel contained in an anonymous letter published in deft.'s paper, defts. on discovery refused to disclose the writer's name. They later gave notice of their intention to give in mitigation of damages, evidence that the words complained of were contained in a letter forwarded to the editor by a member of the public, & published in the ordinary course of business & *bona fide*. On pltf.'s application for further discovery :—*Held* : defts. had by their notice, made the name of the correspondent material to the issue of damages, & it must be disclosed.—*WATT v. SYME & Co.* (1914), V. L. R. 639.—AUS.

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What articles did you write?; he must put particular circumstances to pltf. & ask whether it was under those circumstances.—*BUCHANAN v. TAYLOR* (1876), 20 Sol. Jo. 298; Bitt. Prac. Cas. 131; 2 Char. Cham. Cas. 57.

1519. —.]—Interrogatories asking deft. whether he has composed or published an alleged libel are objectionable, & will be struck out without requiring deft. to object to them by way of answer.—*ATHERLEY v. HARVEY* (1877), 2 Q. B. D. 524; 46 L. J. Q. B. 518; 36 L. T. 551; 41 J. P. 661; 25 W. R. 727, D. C.

*Annotations:—*Consd. *Fisher v. Owen* (1878), 8 Ch. D. 645; *Webb v. East* (1879), 28 W. R. 229.

1520. —.]—In order to prove that deft. was the writer of a libellous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person—as leading up to a matter in issue in the cause, & therefore relevant.—*JONES v. RICHARDS* (1885), 15 Q. B. D. 439; 1 T. L. R. 660, D. C.

1521. —.]—Where in an action for libel against a newspaper proprietor deft. admits the publication of the words complained of, pltf. cannot interrogate deft. as to the name of the author of the alleged libel, unless the identity of such author becomes a material fact in the action.—*GIBSON v. EVANS* (1889), 23 Q. B. D. 384; 58 L. J. Q. B. 612; 61 L. T. 388; 54 J. P. 104; 5 T. L. R. 589, D. C.

*Annotations:—*Refd. *Parnell v. Walter* (1890), 24 Q. B. D. 441. *Mentd.* *Hulton v. Jones*, [1910] A. C. 20.

1522. Whether words intended to apply to defendant.]—*WILTON v. BRIGNELL*, [1875] W. N. 239.

*Annotations:—*Consd. *Heaton v. Goldney* (1910), 102 L. T. 451. *Distd.* *Spiers & Pond v. John Bull & Odhams* (1916), 114 L. T. 641.

1523. —.]—Pltfs., who were the managers of a hotel in London, brought an action for libel against defts., the proprietors of a weekly periodical, alleging that defts. had printed & published of pltfs. a statement in the newspaper which suggested that a certain London hotel, the name of which was known to defts., employed enemy servants, who on the occasion of a recent air raid upon London had helped to guide the hostile aircraft. Pltfs. administered to defts. an interrogatory, which asked whether the statement did not refer to pltfs.:—*Held*: the interrogatory was inadmissible, but pltfs. would be entitled to administer to defts. an interrogatory which asked whether the name of the hotel referred to in the statement & which the defts. said was known to them was not that of pltfs.' hotel.—*SPIERS & POND, LTD. v. JOHN BULL, LTD.* (1916), 85 L. J. K. B. 992; 114 L. T. 641; 32 T. L. R. 317; 60 Sol. Jo. 353, C. A.

1524. As to credibility of defendant—Defence of counter libels.]—*LABOUCHERE v. SHAW* (1877), 41 J. P. Jo. 788, D. C.

1525 Contents of libel.]—In order to be able to interrogate deft. as to the contents of an alleged libel, it is necessary that pltf. should show, first, that defamatory matter has been published; & secondly, that pltf. has been injured thereby.

The pltf. in leaving the employ of the deft., of whose school he had acted as German master, was furnished by deft. with a testimonial describ-

ing him as "an able painstaking master," who had always "conscientiously fulfilled all the duties which had devolved upon him." Upon the strength of this, among other testimonials, pltf. was appointed private secretary to R. Deft., hearing of the appointment, wrote a letter to R.'s wife, withdrawing the testimonial, whereupon R. dismissed pltf., without other cause assigned:—*Held*: pltf. could not interrogate deft. as to the contents of the letter to R.'s wife.—*STEIN v. TABOR* (1874), 31 L. T. 444, D. C.

1526. Name of informant.]—In an action for libel deft. pleaded that the libel was true. The substance of the libel was that pltf. had fabricated a story to the effect that a certain circular letter purporting to be signed by deft. had been sent round to deft.'s competitors in business. Pltf. had in speeches & letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers & a firm of manufacturers at Birmingham, & that his informant in the matter was a solr. of high standing at Birmingham. In interrogatories administered by deft. pltf. was asked to state the name & address of his informant, in whose hands he had seen the copy of the letter, & the names & addresses of the persons to whom the letter had been sent, & in whose possession the two letters existed, but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial:—*Held*: (1) deft. was entitled to discovery of the names & addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification.

(2) It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call & their names not forming any substantial part of the material facts; & I think we may go as far as to say that it is not permissible to ask what is mere evidence of the facts in dispute but forms no part of the facts themselves (*LORD ESHER, M.R.*).

(3) The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue (*LORD ESHER, M.R.*).—*MARRIOTT v. CHAMBERLAIN* (1886), 17 Q. B. D. 154; 55 L. J. Q. B. 448; 54 L. T. 714; 34 W. R. 783; 2 T. L. R. 640, C. A.

*Annotations:—*As to (1) Consd. *Gibson v. Evans* (1889), 23 Q. B. D. 384; *Nash v. Layton*, [1911] 2 Ch. 71. *Apld.* *Osram Lamp Works v. Gabriel Lamp Co.*, [1914] 2 Ch. 129. *Refd.* *Hennessy v. Wright* (1888), 4 T. L. R. 662; *Humphries v. Taylor Drug Co.* (1888), 39 Ch. D. 693; *Heaton v. Goldney*, [1910] 1 K. B. 754. As to (2) Consd. *Nash v. Layton*, [1911] 2 Ch. 71. *Refd.* *Knapp v. Harvey* (1911), 80 L. J. K. B. 1228. As to (3) *Apld.* *Osram Lamp Works v. Gabriel Lamp Co.*, [1914] 2 Ch. 129. *Refd.* *Meek v. Witherington* (1892), 67 L. T. 122; *Hooton v. Dalby*, [1907] 2 K. B. 18; *Blair v. Haycock Cadle Co.* (1917), 34 T. L. R. 39.

1527. —.]—*M'COLLA v. JONES* (1887), 4 T. L. R. 12, D. C.

1528. —.]—In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent & in a leading article thereon the defence was that the libel consisted of an accurate report of certain public proceedings & fair comment thereon:—*Held*: pltf. was not entitled to interrogate deft. as to names of persons

1526 i. Name of informant.]—In a libel action against a newspaper which assumes full responsibility for what it publishes, the ct. should not except in special circumstances, compel it to disclose the names of its contributors or informants.—*DE SCHEL-*

KING v. CROMIE, [1918] 3 W. W. R. 1038.—*CAN.*

i. Whether words intended to apply to plaintiff.]—In a libel action neither justification nor privilege nor fair comment was pleaded. Pltf.

sought to interrogate deft. as to whether the alleged defamatory statement was intended to apply to pltf.:—*Held*: the interrogatory should not be allowed, it being unnecessary to prove such intention, & the question of malice not being in issue.—*SIMSON v*

on whose information the reports were based, or the names of the correspondent who wrote the letter or as to the original manuscript of the letter.

—*HENNESSY v. WRIGHT* (No. 2) (1888), 24 Q. B. D. 445, n.; 36 W. R. 879; 4 T. L. R. 662, C. A.

Annotations:—*Folld. Gibson v. Evans* (1889), 23 Q. B. D. 384; *Parnell v. Walter* (1890), 38 W. R. 270. *Apld. Hope v. Brash*, [1897] 2 Q. B. 188. *Folld. Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Assocn.*, [1906] 1 K. B. 403. *Consd. Lyle-Samuel v. Odhams*, [1920] 1 K. B. 135. *Refd. Elliott v. Garrett*, [1902] 1 K. B. 870; *Russell v. Stubbs* (1908), [1913] 2 K. B. 200, n.; *Maass v. Gas Light & Coke Co.* (1911), 80 L. J. K. B. 1313; *Dawson v. Dover & County Chronicle* (1913), 108 L. T. 481; *Adam v. Fisher* (1914), 110 L. T. 537; *Griebart v. Morris*, [1920] 1 K. B. 659.

1529. —.]—In an action for libels contained in a newspaper & a pamphlet, accusing pltf. of being the author of certain discreditable letters copies of which were printed in the libels, the only defence being payment into ct. of 40s., which defts. alleged to be enough to satisfy pltf.'s claim, pltf. delivered interrogatories, asking, by the first & second, as to the extent of the circulation of the newspaper & pamphlet, & by the others, as to the names of the persons from whom the letters were obtained, what was paid for them, & what inquiries were made, & what steps taken, to test & verify the information supplied to defts. Defts. answered, as to the first two interrogatories, admitting a large circulation, but declining to answer further, on the ground that the information required could not be obtained without a difficult & troublesome inquiry, that the answer would not involve disclosure of defts.' business transactions, & that the precise number of copies issued was not material or relevant, & declining to answer the other interrogatories on the grounds that they were irrelevant & not material, & that their object was to discover the evidence to be adduced in support of defts.' case, & that they were unreasonable, unnecessary, & vexatious, & not put *bonâ fide* for the purposes of the action, but for the purpose of criminating third parties, not parties to the action, & that the matters inquired into related solely to defts.' case. On an application by pltf. for an order for a further answer:—*Held*: as to the first & second interrogatories, defts. were bound to answer further, stating approximately the extent of the circulation, but that the other interrogatories were not sufficiently relevant or material to entitle pltf. to an answer.—*PARNELL v. WALTER* (1890), 24 Q. B. D. 441; 59 L. J. Q. B. 125; 62 L. T. 75; 54 J. P. 311; 38 W. R. 270; 6 T. L. R. 138, D. C.

Annotations:—*Folld. Mackenzie v. Steinkoff* (1890), 54 J. P. 327; *Rumney v. Walter & Wright* (1891), 61 L. J. Q. B. 149. *Dbtd. & N.F. Whittaker v. Scarborough Post Newspaper Co.*, [1896] 2 Q. B. 148. *Refd. James v. Carr* (1890), 7 T. L. R. 4; *Elliott v. Garrett*, [1902] 1 K. B. 870.

1530. —.]—In an action for libel contained in a private letter written by deft., pltf. cannot interrogate as to the person, or persons, from whom he received the *data* in the letter.—*MACKENZIE v. STEINKOFF* (1890), 54 J. P. 327; 6 T. L. R. 141, D. C.

1531. — Not *bonâ fide* for purposes of action.]—In an action for libel, in which the defence of privilege was set up, pltf. sought to administer to defts. an interrogatory inquiring what information defts. received which induced them to make the statement complained of, &

from whom that information was derived. The ct. being of opinion from correspondence which had passed between the parties that the interrogatory as framed was not put *bonâ fide* for the purposes of the pending action, but in order to enable the pltf. to bring an action against a person or persons from whom the information was derived:—*Held*: the part of the interrogatory which asked from whom the information was derived must be disallowed.—*EDMONDSON v. BIRCH & Co., LTD.*, [1905] 2 K. B. 523; 74 L. J. K. B. 777; 93 L. T. 462; 54 W. R. 52; 21 T. L. R. 657, C. A.

Annotation:—*Distd. Chapman v. Leach*, [1920] 1 K. B. 336.

1532. —.]—In an action of libel against the publishers of a trade periodical, in respect of an article contained in an issue of their periodical defts. pleaded by way of defence that, in so far as the words complained of consisted of expressions of opinion they were fair comment made in good faith, & without malice on a matter of public interest, & in so far as they consisted of allegations of fact, they were true in substance & in fact. Pltfs. administered to defts., among others, interrogatories which were substantially as follows: (5) What information had you, when you published the said words which induced you to believe that the expressions of opinion in the said words contained, & which you alleged to be fair comment made in good faith & without malice, were true? Did you in fact believe that the said opinions were true? (7) From whom did you obtain the information on which you relied in publishing the said expressions of opinion? Defts. objected to answer these interrogatories:—*Held*: the fifth interrogatory was admissible, & must therefore be answered, but that, according to the general rule of practice in actions of libel against the publishers of newspapers in respect of matter published in their newspapers the seventh interrogatory was, in the absence of special circumstances inadmissible, & defts. ought not to be compelled to answer it.

Interrogatories by one party are therefore generally admissible if they are directed to matters which would tend to destroy the other party's case (*STIRLING, L.J.*).—*PLYMOUTH MUTUAL CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD. v. TRADERS' PUBLISHING ASSOCN., LTD.*, [1906] 1 K. B. 403; 75 L. J. K. B. 259; 94 L. T. 258; 54 W. R. 319; 22 T. L. R. 266, C. A.

Annotations:—*Consd. Thomas v. Bradbury, Agnew*, [1906] 2 K. B. 627; *Adam v. Fisher* (1914), 110 L. T. 537. *Apld. Lyle-Samuel v. Odhams*, [1920] 1 K. B. 135. *Refd. Maass v. Gas Light & Coke Co.* (1911), 80 L. J. K. B. 1313.

1533. —.]—Pltf. had been member of Parliament for W. to Dec. 1910, when he was not re-elected. Deft. was responsible for the organisation of metropolitan constituencies in his political party's interest. Rumours affecting pltf.'s character had appeared in newspapers published near W., & in two of them deft. was alleged in Feb. 1913 to have published a letter stating that after the election of 1910 certain information had been conveyed to him which led him to believe that pltf. would not regain his lost seat for W., but that such information did not proceed from any member of the local political assocn. at W. Pltf. claimed damages in the action for the alleged libel. Deft. pleaded that

THE TRIBUNE, LTD. (1911), 31 N. Z. L. R. 953.—N.Z.

g. To ascertain defendant's position
—In relation to newspaper containing
[libel.]—Deft. was interrogated as to
whether he printed or published certain

alleged libels, & whether he had anything
to do with the printing or publishing of
the issues of the newspaper in which the
alleged libels appeared:—*Held*: the
interrogatories must be allowed.

Deft. was further interrogated as to
whether he was editor or manager of

the newspaper at the time the alleged
libels appeared, & if he wrote them
& as to what position he held on the
paper at the date of their publication:
—*Held*: these interrogatories must be
struck out.—*PALMER v. FRASER* (1888),
7 N. Z. L. R. 76.—N.Z.

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, E. (a) & (b).]

the words used had no defamatory meaning, were published without malice, & as allegations of fact were true & fair comment on a matter of public interest. In his reply pltf. alleged malice.

Pltf. obtained an order that deft. should answer interrogatories as to what information he had before publishing the letter of Feb. 1, 1913, & by whom such information was conveyed to him, & whether pltf. made inquiries to ascertain whether such information was true, & what answers & by whom were made to such inquiries. On appeal from a reversal of the order:—*Held*: although in these cases the ct. had a discretion, & in proper circumstances the interrogatories might be allowed in the circumstances of this case applt. was not entitled to disclosure of the names of persons giving the information.—*ADAM v. FISHER* (1914), 110 L. T. 537; 30 T. L. R. 288, C. A.

Annotation:—*Consd.* Lyle-Samuel v. Odhams, [1920] 1 K. B. 135.

1534. — Special circumstances.]—Where pltf. in a libel action against a newspaper applies for leave to administer interrogatories to the editor as to the source of his information & the name of his informant, it is necessary to show special circumstances to exclude the rule recognised in *Plymouth Mutual Co-operative & Industrial Society v. Traders' Publishing Association*, No. 1532, *ante*. Allegations that an undertaking has been given not to take legal proceedings against any person whose name is disclosed, that the alleged libel was directed not only against the public character of pltf. as a Parliamentary candidate, but also in respect of his private & domestic life, & that the alleged libel is obviously founded on untrustworthy information will not be sufficient for the purpose.—*LYLE-SAMUEL v. ODHAMS, LTD.*, [1920] 1 K. B. 135; 88 L. J. K. B. 1161; 122 L. T. 57; 35 T. L. R. 711; 63 Sol. Jo. 748, C. A.

1535. Persons to whom libel published.]—*TANGYES v. INMAN S.S. Co.* (1889), 88 L. T. Jo. 32, D. C.

1536. —.]—(1) In an action of libel brought against a trade protection society in respect of statements published by them in a book with regard to pltf.'s solvency, defts. pleaded privilege. Pltfs. then applied for leave to administer to defts. two interrogatories. By the first interrogatory they asked whether defts had before publication made any & what inquiries as to the truth of the statements complained of, & from whom had defts. obtained the information on which they relied in making such statements:—*Held*: this interrogatory ought to be allowed.

(2) By the second interrogatory pltfs. required defts., by reference to their books or otherwise, to give the names of the cos., firms, & persons to whom deft.'s book had been supplied or shown by or through defts. or their agents:—*Held*: this interrogatory was oppressive & ought not to be allowed.—*WHITE & Co. v. CREDIT REFORM ASSOCN. & CREDIT INDEX, LTD.*, [1905] 1 K. B. 653; 74 L. J. K. B. 419; 92 L. T. 817; 53 W. R. 369; 21 T. L. R. 337; 49 Sol. Jo. 364, C. A.

Annotations:—As to (1) *Consd.* Edmondson v. Birch, [1905] 2 K. B. 523; *Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Asscn.*, [1906] 1 K. B. 403. *Reid*. Thomas v. Bradbury, Agnew, [1906] 2 K. B. 627; *Adam v. Fisher* (1914), 110 L. T. 537.

1537. —.]—A statement of claim in a libel action alleged that the libel had been published

to certain persons named & to others whose names were unknown to pltfs., but known to defts., & pltf. would rely upon the publication thereof to every person to whom they might discover it was published. Defts. moved that the statement of claim should be struck out so far as it referred to the publication of the libel to persons unknown to pltfs. on the ground that it was embarrassing because they knew not how to plead to it; & further, that it gave pltf. an opportunity of administering "fishing interrogatories" with the object of ascertaining whether in fact he had been so libelled:—*Held*: there was jurisdiction, & it was a matter of discretion whether interrogatories could be administered when a statement of claim was so drawn.—*RUSSELL v. STUBBS, LTD.* (1908), [1913] 2 K. B. 200, n., 205, n.; 82 L. J. K. B. 756, n.; 108 L. T. 706, n.; 52 Sol. Jo. 580, H. L.

Annotations:—*Consd.* Barham v. Huntingfield, [1913] 2 K. B. 193; *Re* Whitworth, O'Rourke v. Darbishire, [1919] 1 Ch. 320. *Mentd.* Leng v. Langlands (1916), 114 L. T. 665.

1538. Circulation of newspaper.]—*JAMES v. CARR* (1890), 7 T. L. R. 4, D. C.

Annotation:—*Expld.* Whittaker v. Scarborough Post Newspaper Co., [1896] 2 Q. B. 148.

1539. —.]—*PARNELL v. WALTER*, No. 1529, *ante*.

1540. —.]—In an action for libel against *The Times* pltf. interrogated as to the numbers of copies sold. Defts. refused to state any number, while admitting it was large:—*Held*: pltf. was entitled to a further & better answer.—*RUMNEY v. WALTER & WRIGHT* (1891), 61 L. J. Q. B. 149; 65 L. T. 757; 40 W. R. 174; 8 T. L. R. 96; 36 Sol. Jo. 94, D. C.

Annotation:—*Expld.* Whittaker v. Scarborough Post Newspaper Co., [1896] 2 Q. B. 148.

1541. —.]—Pltf. in an action for libel against the proprietors of a local newspaper having administered an interrogatory to defts. asking how many copies were printed & circulated of the issue of the newspaper which contained the alleged libel, defts. answered that a considerable number of copies of that issue were printed & published:—*Held*: the answer was sufficient.—*WHITTAKER v. SCARBOROUGH POST NEWSPAPER Co.*, [1896] 2 Q. B. 148; 65 L. J. Q. B. 564; 74 L. T. 753; 44 W. R. 657; 12 T. L. R. 488; 40 Sol. Jo. 598, C. A.

1542. As to meaning of words.]—In an action of libel in which the statement of claim attributed by an innuendo certain meanings to the words complained of, pltf. sought to administer to deft. interrogatories, asking, in substance, whether the deft. intended by the use of those words the meanings attributed to them by the innuendo:—*Held*: such interrogatories were inadmissible.—*HEATON v. GOLDNEY*, [1910] 1 K. B. 754; 79 L. J. K. B. 541; 102 L. T. 451; 26 T. L. R. 383; 54 Sol. Jo. 391, C. A.

1543. Damages recovered in respect of same libel.]—Interrogatory disallowed in an action for libel asking for particulars of sums already recovered in respect of other publications of libel.—*TUCKER v. LAWSON* (1886), 2 T. L. R. 593, D. C.

1544. Mitigation of damages.]—*SCAIFE v. KEMP & Co.*, No. 1510, *ante*.

Criminating interrogatories.]—See Sect. 8, sub-sect. 4, B., *post*.

(b) Slander.

See, generally, LIBEL & SLANDER.

1545. Special damage—Loss of subscribers.]—*WOOD v. JONES*, No. 1508, *ante*.

PART IV. SECT. 5, SUB-SECT. 15.— E. (b).

As to source of information on which slander based—

Whether supplied by third person.]—In common for slander, pltf. may, on the affidavit, have leave to administer to deft. interrogatories

asking whether he uttered the words complained of & whether they, or the substance of them, had been communicated to him by a third person.—

1546. As to words used—Information refused by parties present.]—In an action of slander, it being shown that deft., at a certain place in the presence of certain persons, had made imputations against pltf. to the effect that he had committed forgery, but that the persons present refused to give pltf. any further particulars, the ct. allowed interrogatories to be put to deft. as to the precise words which he had used.—*ATKINSON v. FOSBROKE* (1866), L. R. 1 Q. B. 628; 7 B. & S. 618; 35 L. J. Q. B. 182; 14 L. T. 553; 30 J. P. 503; 12 Jur. N. S. 810; 14 W. R. 832.

Annotations:—Distd. Stein v. Tabor (1874), 31 L. T. 444. *Consd.* Hill v. Campbell (1875), L. R. 10 C. P. 222. *Refd.* Edmunds v. Greenwood (1868), L. R. 4 C. P. 70.

1547. — No application made to parties present.]—*STRANGE v. DOUDNEY* (1874), 38 J. P. Jo. 757.

1548. Whether words spoken or similar words.]—In an action for slander, the ct. refused to allow the following interrogatories to be administered to deft.—“1. Did you speak & publish the words laid in the declaration, or any & which of them, or any & what other words conveying the same or similar imputations against pltf.?”—“2. When, where, & to whom did you speak & publish the words laid in the declaration?”—*STERN v. SEVASTOPULO* (1863), 14 C. B. N. S. 737; 2 New Rep. 329; 32 L. J. C. P. 268; 10 Jur. N. S. 317; 11 W. R. 862; 143 E. R. 634; *sub nom.* STERN v. SEVASTOPULO, 8 L. T. 538.

Annotations:—Distd. Atkinson v. Fosbroke (1866), L. R. 1 Q. B. 628. *Consd.* Fisher v. Owen (1878), 8 Ch. D. 645. *Refd.* Baker v. Lane (1865), 13 W. R. 293; Edmunds v. Greenwood (1868), L. R. 4 C. P. 70; Stein v. Tabor (1874), 31 L. T. 444; Hill v. Campbell (1875), L. R. 10 C. P. 222.

1549. —.]—In an action for slander pltf. administered the following interrogatories to deft.: “Did you on or about Mar. 1, or when, speak the following words of pltf.” (setting out the words alleged in the statement of claim to have been spoken by deft. of pltf.), “or words to that effect?” “Were the said words spoken in the presence of” (two persons named in the statement of claim) “& other persons, or any & which of them?”—*Held*: these were proper interrogatories, & deft. must answer them.

Deft. must take each question by itself, & if he objects to answer any question he must say why. He cannot decline to answer one question because there is some other question to which he may object (*LINDLEY, M.R.*).—*DALGLEISH v. LOWTHER*, [1899] 2 Q. B. 590; 68 L. J. Q. B. 956; 81 L. T. 161; 48 W. R. 37; 43 Sol. Jo. 718, C. A.

1550. —.]—*SAUNDERSON v. VON RADECK (BARON)* (1905), 119 L. T. Jo. 33, H. L.

1551. Names of persons to whom slander uttered.]—*STERN v. SEVASTOPULO*, No. 1548, *ante*.

1552. — Alleged slander by third party at instigation of defendant.]—A statement of claim alleged that T., “at the request & by the direction of deft., falsely & maliciously spoke & published of & concerning pltf.” certain slanderous words, which were set out:—*Held*: deft. was entitled to particulars of the persons to whom the words were uttered.—*BRADBURY v. COOPER* (1883), 12 Q. B. D.

94; 53 L. J. Q. B. 558; 48 J. P. 198; 32 W. R. 32, D. C.

Annotation:—Refd. Gouraud v. Fitzgerald (1888), 5 T. L. R.

1553. —In an action for slander, imputing immoral conduct to pltf., a married woman, the statement of claim alleged publication to one named person, & publication also during three specified years to various other persons unnamed. Pltf. sought to administer to deft. interrogatories asking whether deft. had in any of the three years uttered the words complained of or words to the same effect to any persons, other than the person named, & the names of the persons, if any:—*Held*: the interrogatories were inadmissible.

It appears to me that they are fishing interrogatories administered with the intention of ascertaining by minute examination whether pltf. can find out some cause of action against deft. other than the specific cause of action alleged in the statement of claim (*KENNEDY, L.J.*).—*BARHAM v. HUNTINGFIELD (LORD)*, [1913] 2 K. B. 193; 82 L. J. K. B. 752; 108 L. T. 703, C. A.

Annotation:—Refd. *Re* Whitworth, O'Rourke v. Darbishire, [1919] 1 Ch. 320.

1554. Names of persons supplying information on which slander based.]—In an action of slander in which the defence of privilege was pleaded, pltf. sought to administer an interrogatory to deft., asking him what information he had before speaking the words complained of which induced him to believe that the words were true, & what inquiries he made before speaking & publishing the words to ascertain whether they were true or not, & “when, where, & of whom were such inquiries made?” Before action a correspondence passed in which pltf.'s solrs. wrote to deft. asking him to retract the slander & apologise; “at the same time we must ask you to give us the name of your informant & furnish us with such evidence as will enable our client to bring an action against him. If you do that our client will be satisfied so far as you are concerned, but if you are not prepared to comply with our request in every particular please furnish us with the name of a solr. who will accept service of a writ on your behalf.” In reply, deft. wrote that he had seen the gentleman who gave him the verbal information, & found that he, deft., was misinformed, & tendered an apology. The solrs. wrote to deft. in reply refusing to accept the apology, & stating that they had offered “to let you off, provided you gave us the name of your informant & assisted us in reaching him by your evidence.” The present action was thereupon brought. Deft. objected to the interrogatory so far as it asked him “of whom” were such inquiries made, upon the ground that the letters showed that the name of deft.'s informant was not asked for *bonâ fide* for the purpose of the action, but to enable pltf. to bring an action against him:—*Held*: on the assumption that the interrogatory asked the name of the informant, (1) the correspondence merely showed that pltf. did not desire to bring an action against deft. if the latter would disclose the name of his

DAILY TELEGRAPH NEWSPAPER Co., LTD. v. BERRY (1879), 5 V. L. R. 343.—AUS.

k. — — Whether precaution taken to verify.]—In an action for defamation against the warden of a municipality for words spoken by him at a council meeting, pltf. sought leave to deliver interrogatories requiring deft. to disclose the information on which he based the statement complained of, & the steps, if any, which he had taken to verify the same.

The statement imputed to pltf. improper intimacy with an officer of the council. Deft. pleaded qualified protection:—*Held*: the circumstances that such information might have been communicated to deft. in his official capacity of Warden would afford no reason for exempting him from answering the interrogatories.—*LUCOCK v. PIERCE* (1919), 15 Tas. L. R. 73.—AUS.

l. — As to time & place of utter-
—*ROBINSON v. SUGARMAN* (1897),

17 P. R. 419.—CAN.

m. — As to whom words intended to apply.]—In an action for slander, where the defence raises pleas of justification & of fair comment, the following questions are admissible upon examination for discovery: “Will you say you didn't intend to include C. (ptf.)?” “Who were the men you meant, was C. one of them?” Such questions are admissible, even when the above defences are not raised.—*CLARKE v. STEWART*, [1917]

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, E. (b)

informant, & it did not show that pltf. was going to bring an action for the purpose of obtaining the name of the informant so that he might sue him, & therefore the interrogatory asking the name of the informant was admissible; (2) the interrogatory did not in form ask for the name of the informant, & it could not be objected to on the ground that pltf. might be able thereby indirectly to obtain the name, unless it was shown that the question in that form was not put *bonâ fide*.—*CHAPMAN v. LEACH*, [1920] 1 K. B. 336; 89 L. J. K. B. 155; 122 L. T. 421; 64 Sol. Jo. 207, C. A.

1555. To prove truth of statements in slander.—When fair comment pleaded.—Deft., in an action for slander, alleged to have been uttered in a speech made by him as chairman at a licensing meeting, pleaded a defence of fair comment in the following terms: "In so far as the words complained of consist of statements of fact the same are in their natural & ordinary signification true in substance & in fact. In so far as they consist of comment the same are fair & *bonâ fide* comment upon matters of public interest." There was no plea of justification. Upon an application by deft. for leave to administer interrogatories to pltf., directed to proving the truth of the statements of fact in his speech & in the particulars delivered by him of the materials upon which his defence of fair comment was based:—*Held*: deft. was entitled, notwithstanding the absence of a plea of justification to administer interrogatories with the object of obtaining admissions of the truth of the material statements of fact in the speech & particulars alleged to be defamatory.—*WALKER (PETER) & SON, LTD. v. HODGSON*, [1909] 1 K. B. 239; 78 L. J. K. B. 193; 99 L. T. 902; 53 Sol. Jo. 81, C. A.

1556. Allegation that words spoken at invitation of plaintiff.—Interrogatories as to circumstances of invitation.—(1) Where a bishop issues a commission under Pluralities Act, 1838 (c. 106), s. 77, as amended by Pluralities Acts Amendment Act, 1885 (c. 54), s. 3, to inquire as to whether the incumbent of a benefice has inadequately performed his ecclesiastical duties, evidence given be-

fore the commissioners comes within the rule under which evidence given in a ct. of justice is exempt from being made the subject-matter of an action of slander. Therefore in an action of slander, in which pltf. complains of such evidence, deft. cannot be interrogated as to whether he spoke the words complained of.

(2) In an action of slander deft. pleaded that he did not speak the alleged words, & in the alternative that if he spoke them he did so upon the invitation of pltf. Pltf. administered interrogatories to deft. asking whether he did not speak the alleged words, & how & when pltf. invited him to speak them. Deft. answered that he did not speak the alleged words, but that he did speak certain other words which he set out, & further that, as the alleged words were not the words he spoke, he was not called upon to answer the interrogatory as to how & when pltf. invited him to speak the alleged words:—*Held*: deft. must answer the last-mentioned interrogatory.—*BAR-RATT v. KEARNS*, [1905] 1 K. B. 504; 74 L. J. K. B. 318; 92 L. T. 255; 53 W. R. 356; 21 T. L. R. 212, C. A.

Annotations:—*Mentd.* Co-partnership Farms v. Harvey-Smith, [1918] 2 K. B. 405; Slack v. Barr (1918), 82 J. P. 91.

Criminating Interrogatories.—See Sect. 8, sub-sect. 1, B., *post*.

(c) Where Malice in Issue.

See, generally, LIBEL & SLANDER.

1557. Matters relied on to show malice.—Where a pltf. seeks to go back to previous matters long before an alleged libel to show malice, deft. is entitled to interrogate him as to the matters he is going to rely upon as showing malice.—*COOPER v. BLACKMORE* (1886), 2 T. L. R. 746.

Annotation:—*Expld.* Lever v. Associated Newspapers, [1907] 2 K. B. 626.

1558. —.—*LEVER BROTHERS v. ASSOCIATED NEWSPAPERS*, No. 1399, *ante*.

1559. Steps taken to ascertain contents of newspaper—Sale by newsvendors.—*RIDGWAY v. SMITH & SON* (1890), 6 T. L. R. 275, D. C.

Annotations:—*Mentd.* Elliot v. Garret (1902), 18 T. L. R. 498. *Refd.* Vizetelly v. Mudie's Select Library, Ltd [1900] 2 Q. B. 170.

1 W. W. R. 845; 13 Alta. L. R. 393.—*CAN.*

to actual words used.—Unless there is some real reason for it, interrogatories ought not to be granted in a slander action, requiring deft. to state the actual words used by him.—*CROSSEY v. CRABBE* (1896), 14 N. Z. L. R. 713.—*N.Z.*

o. By defendant—As to names of persons to whom slander uttered—Time & place of uttering.—Deft. in an action for slander is entitled to interrogate pltf. as to the time & place when & where the alleged slander was uttered, but not as to the person or persons to whom it was uttered.—*ANDERSON v. STRODE* (1885), 4 N. Z. L. R. 13.—*N.Z.*

PART IV. SECT. 5, SUB-SECT. 15.—E. (c).

1557 i. Matters relied on to show malice.—In an action for slander, the words complained of being to the effect that pltf. had stolen tools, in which deft. denied the publication & set up a qualified privilege, he was asked, upon examination for discovery, at the instance of pltf. whether he had repeated his slanderous statement to M., a person not named in the statement of claim nor in the particulars, or to any other persons; & he was also asked whether he believed that pltf. had stolen the tools, & whether he

believed that another man had stolen the tools:—*Held*: an order of the local master at Moosomin, refusing to require deft. to answer the questions, the master had exercised a proper discretion, which should not be interfered with upon appeal. In the event of the trial judge holding the occasion privileged, it would be open to pltf., on the trial, in proof of the fact of malice, to show repeated publication of the slanderous matter to persons other than those named in the particulars. But it does not follow that an affirmative answer to the questions put to deft. would prove malice or even amount to evidence of malice.—*KLENNAN v. SCHMIDT* (1911), 18 W. L. R. 393; 4 Sask. L. R. 366.—*CAN.*

1557 ii. —.—The deft. in an action for libel sought to put the following interrogatory to pltf.: "On what facts do you rely to prove express malice":—*Held*: the interrogatory should be disallowed, as a party should not be compelled to state what his conduct of the case is going to be.—*CANNING v. WILKIE* (1913), 32 N. Z. L. R. 641.—*N.Z.*

1557 iii. —.—In an action for libel alleged to have been contained in a letter published in deft.'s newspaper, the gravamen of which was that pltf. had put forward a book of which he was neither author nor editor as the basis of an application for a degree,

defence was a denial that the matter complained of was capable of a defamatory meaning:—*Held*: (1) owing to the fact that money had been paid into ct. with a denial of liability, & to the nature of the obligations in the statement of defence, a general objection to the whole of the interrogatories that they were directed to show actual malice was unsustainable; (2) interrogatories directed to show that deft. had when the letter was published information in his possession that should have led him to disbelieve the charges made in the letter were allowable; (3) interrogatories as to whether alterations had been made in the letter complained of, before publication were allowable; (4) interrogatories as to the existence & purport of any other letters accompanying the said letter to deft. should not be allowed; (5) interrogatories as to precautions taken & enquiries made by deft., & as to the number of copies printed & published of the paper in which the letter appeared, should not be allowed.—*MCNAB v. WELLINGTON PUBLISHING Co., LTD.* (1914), 33 N. Z. L. R. 1362.—*N.Z.*

p. Matters relied on to disprove malice.—In an action for libel, in which deft. has pleaded qualified privilege, to which pltf. has replied malice, deft., although he has not pleaded justification, is not precluded,

PART IV.—INTERROGATORIES.

1560. Matters relied upon in support of plea of justification.]—FOSTER v. PERRYMAN (1891), 8 T. L. R. 115.

Annotation:—Consd. Heaton v. Goldney, [1910] 1 K. B. 754.

1561. How libellous book obtained—Negligence.]—MARTIN v. BRITISH MUSEUM TRUSTEES & THOMPSON (1893), 10 T. L. R. 215, D. C.

Annotations:—Apld. Elliott v. Garrett, [1902] 1 K. B. 870. Apprvd. Dawson v. Dover & County Chronicle (1913), 108 L. T. 481. Mentd. Vizetelly v. Mudie's Select Library, [1900] 2 Q. B. 170.

1562. What inquiries made before publication.]—In an action for slander in imputing to pltf. that, being a member of a metropolitan borough council, he had accepted a bribe in connection with a matter that came before the council for decision, deft., who was also a member of the council, pleaded that the words were spoken, if at all, in good faith, without malice towards pltf., & in the discharge of his duty as councillor, & on an occasion which was privileged. Pltf. applied for leave to administer to deft. an interrogatory asking what information deft. had which induced him to believe that the words spoken by him were true, & what steps he had taken before speaking the words to ascertain whether they were true. On appeal from an order disallowing the interrogatory:—*Held*: the interrogatory should

on examination of pltf. for discovery, from asking questions which are relevant to the issue of deft.'s honest belief, as tending to show the absence of malice, although they may incidentally prove the truth of the libel.—MCKERGOW v. COMSTOCK (1906), 11 O. L. R. 637; 7 O. W. R. 197, 273, 449, 558.—CAN.

1560 i. Matters relied on in support of plea of justification.]—Defts. published in their newspaper an article referring to the expected appointment of a chief of police for the district of C., & stating that the first move to secure N.'s appointment was made by pltf., "of the notorious Cafeteria, & later the pioneer of the still more notorious South Coulee." Pltf. sued for libel, charging that the words meant that pltf. was endeavouring unduly to influence members of the council to obtain N.'s appointment, & that pltf. was the founder of & was financially interested in a district inhabited by prostitutes. Defts. denied the innuendo, & said that, so far as the words consisted of allegations of fact, they were true in substance & in fact; & that they were fair comment upon matters of public interest, made in good faith & without malice, in so far as they were expressions of opinion:—*Held*: the alleged libel did not state any specific facts; & the defts. could interrogate the pltf. only as to specific acts alleged by them; therefore, pltf. should, on his examination for discovery, have answered the question whether he had taken part in endeavouring to secure N.'s appointment, because it was specifically alleged in the article complained of that he had so endeavoured; but he was not bound to answer questions directed to matters of fact as to which there was no specific allegation in the alleged libel.—REID v. ALBERTAN PUBLISHING CO. (1913), 23 W. L. R. 330; 3 W. W. R. 919; 10 D. L. R. 495; 5 Alta. L. R. 486.—CAN.

1562 i. What enquiries made before publication.]—In an action for defamation against the proprietor of a newspaper, in the absence of special circumstances, deft. was not required to disclose the name of the writer of a letter containing the alleged defamatory matter, or to answer a series of searching interrogatories directed to test the truth of an assumed line of defence. The *onus* being on pltf. to prove the absence of *bona fides* on the part of deft., interrogatories as to

precautions taken & inquiries, after as well as before publication, made by deft. were allowed.—MEAGHER v. DAVIES BROTHERS, LTD. (1919), 15 Tas. L. R. 57.—AUS.

1562 ii. —.]—In an action for libel against the proprietors of a newspaper, defts. pleaded by way of defence that in so far as the words complained of consisted of allegations of fact, they were true in substance & in fact, & that in so far as they consisted of expressions of opinion, they were fair comment, made without malice, on a matter of public interest. Pltf. applied for liberty to administer to the editor & chief reporter of defts.' newspaper interrogatories asking substantially what inquiries they had made as to the truth of the statements complained of before publishing them, & from whom they obtained the information upon which they relied in publishing those statements:—*Held*: the interrogatories were inadmissible.—MURRAY v. NORTHERN WHIG, LTD. (1911), 46 I. L. T. 77.—IR.

1562 iii. —.]—In actions for libel, other than actions against newspapers, where defence is publication on privileged occasion, an interrogatory asking for the names of persons on whose information deft. acted in publishing the words complained of, will in general be permitted & deft. ordered to disclose with names. In the absence of circumstances showing that the information asked for is sought for some ulterior purpose, such interrogatory is relevant to the issue of malice, & material to pltf.'s case. In an action for libel deft. having pleaded publication on a privileged occasion, pltf. administered, *inter alia*, the following interrogatories: "What information had you when you published the said words which induced you to believe that the allegations in the said words were true, or what steps (if any) did you take before writing the words to ascertain they were true?" & "From whom did you obtain the information on which you relied on in publishing the matters complained of?" Deft. answered the first half of the former interrogatory, but refused to answer the second half or the latter interrogatory:—*Held*: both interrogatories were proper, as to the former, the language left it in doubt as to whether it was alternative in former, & deft. was entitled to answer it as he had done; the latter interrogatory was

be allowed as being relevant to the issue of malice raised by the pleadings & directed to support pltf.'s case.—ELLIOTT v. GARRETT, [1902] 1 K. B. 870; 71 L. J. K. B. 415; 86 L. T. 441; 50 W. R. 504; 18 T. L. R. 498, C. A.

Annotations:—Foll'd. White v. Credit Reform Asscn. & Credit Index, [1905] 1 K. B. 653. Ref'd. Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Asscn., [1906] 1 K. B. 403; Barham v. Huntingfield, [1913] 2 K. B. 193; Dawson v. Dover & County Chronicle (1913), 108 L. T. 481; Adam v. Fisher (1914), 110 L. T. 537. Mentd. Thomas v. Bradbury, Agnew (1906), 95 L. T. 23.

1563. —.]—SAUNDERSON v. VON RADECK (BARON), No. 1550, *ante*.

1564. —.]—WHITE & CO. v. CREDIT REFORM ASSOCN. & CREDIT INDEX, LTD., No. 1536, *ante*.

1565. Information on which defendant relied.]—PLYMOUTH MUTUAL CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD. v. TRADERS' PUBLISHING ASSOCN., LTD., No. 1532, *ante*.

1566. —.]—ADAM v. FISHER, No. 1533, *ante*.

1567. —.]—CHAPMAN v. LEACH, No. 1554, *ante*.

1568. Previous publication of libel.]—In an action of libel pltf. complained of the publication of libels, some of which had been previously printed in a newspaper & charged him with having used grossly blasphemous language. Deft. sought to interrogate him as to the previous publication

relevant to the issue of malice & material to pltf.'s case, & should be answered by deft.—FITZGERALD v. WATSON, [1918] 2 I. R. 411.—IR.

1562 iv. —.]—The proper function of interrogatories being to obtain from the party interrogated admissions of fact which it is necessary for the party interrogating otherwise to prove in order to establish his case, in an action for defamation where publication is admitted & neither justification nor privilege is pleaded, the only defence put forward being that the matter complained of was not capable of the defamatory meaning alleged, interrogatories asking deft. what precautions were taken or inquiries made before publication, & from whom the information published was obtained, will not be allowed. Where privilege is pleaded interrogatories asking what precautions were taken or inquiries made before publication will be allowed, the question of actual malice being then in issue.

Semble: in actions against newspapers, even where privilege or fair comment is pleaded & malice is directly in issue, interrogatories asking from whom the information was obtained, will not be allowed, except in special circumstances justifying such disclosure; but in actions upon libels published otherwise than in newspapers where privilege is pleaded such interrogatories will be allowed unless it can be shown that their real object is not to assist pltf. in his action, but to enable him to obtain evidence against a third person.—HALL v. NEW ZEALAND TIMES CO., LTD. (1907), 26 N. Z. L. R. 1324.—N.Z.

1562 v. —.]—Where fair comment is pleaded as a defence to an action for libel, pltf. is entitled to administer interrogatories to deft. for the purpose of ascertaining what inquiries were made & what information deft. had obtained before publishing the matter complained of, but in the absence of special circumstances deft. ought not to be compelled to disclose the names of the persons from whom the information was obtained. An interrogatory as to whether the defamatory matter complained of was intended to apply to pltf. will not be allowed. Interrogatories as to the circulation of a well-known newspaper will not be allowed.—GORDON v. NEW ZEALAND TIMES CO., LTD. (1912), 31 N. Z. L. R. 1060.—N.Z.

Sect. 5.—What interrogatories or will not be allowed:

of some of the libels, & as to whether or not he had taken any steps to contradict them, & further as to whether or not he had used language similar to & equally blasphemous with that in the libels:—*Held*: pltf. was not bound to answer such interrogatories, on the ground that they were vexatious & irrelevant.—*PANKHURST v. HAMILTON* (1886), 2 T. L. R. 682, D. C.

1569. —.]—In an action for libel against a newspaper, where the only defence set up is fair comment, interrogatories directed to show that other newspapers published statements similar to the one complained of will not be allowed, nor will interrogatories tending to establish the truth of the libels.—*HINDLIP (LORD) v. MUDFORD* (1890), 6 T. L. R. 367.

1570. —.]—In an action for damages for libel in respect of a criticism, published in defts.' paper, of an opera composed by pltf., defts. pleaded that the words complained of were fair & *bonâ fide* criticism of & comment on the opera, & were published without malice. Pltf. applied for leave to deliver interrogatories to defts. asking them whether they had not previously published an incorrect statement about pltf., what information they had which induced them to believe that statement was true, from whom they derived such information, whether it was derived from the same source as the article complained of, & what steps they had taken to verify it:—*Held*: leave to deliver the interrogatories had been properly refused as not being relevant to the question of malice.—*CARYLL v. DAILY MAIL PUBLISHING CO.* (1904), 90 L. T. 307, C. A.

Annotation:—*Reid*. *Adam v. Fisher* (1914), 110 L. T. 537.

1571. *Information supplied by plaintiff—Fair comment only pleaded.*—Pltf. having advertised publicly for a partner who would advance money towards the promotion & become a member of a syndicate, a correspondent of defts., who were proprietors & publishers of a newspaper, wrote to pltf. for particulars relating to the syndicate & the objects for which it was formed. Pltf. sent him a number of particulars & documents, which he forwarded to defts., who then set out the substance of the particulars & documents & made comments thereon in an article in their newspaper, which pltf. complained of as a libel for which he brought an action, laying an innuendo of dishonesty. Defts. denied the innuendo & pleaded that the article was not libellous, & that in so far as it consisted of statements of fact the same were in their general & ordinary signification true in substance & in fact, & that in so far as it consisted of comment it was fair & *bonâ fide* comment. Pltf. took out a summons for particulars as to whether defts. alleged that any of the statements made in the particulars & documents sent by pltf. to defts.' correspondent were untrue, & if so, which of them:—*Held*: the defence being one of fair comment alone & not of justification, pltf. was not entitled to the particulars.—*DIGBY v. FINANCIAL NEWS, LTD.*, [1907] 1 K. B. 502; 76 L. J. K. B. 321; 96 L. T. 172; 23 T. L. R. 117; 51 Sol. Jo. 98, C. A.

Annotations:—*Consd.* *Walker v. Hodgson* [1909] 1 K. B. 239. *Reid*. *Lyons v. Financial News* (1909), 63 Sol. Jo. 671.

Criminating interrogatories.—*See Sect. 8, subsect. 4, B., post.*

F. Documents.

Discovery of documents.—*See Part II., ante.*
Production & inspection of
Part III., ante.

1572. *As to contents of documents—When possession admitted.*—A pltf., under C. L. P. Act, 1854 (c. 125), s. 51, delivered interrogatories asking of deft. whether he had in his possession certain letters, specifying them, & concluding, "If yea, set forth copies or the contents thereof." Deft.'s answer was that he had such documents, but he submitted to the ct. that he was not bound to set forth a copy or the contents thereof. On a motion for an attachment:—*Held*: the proper course was for pltf. to apply for an order to inspect the documents, under sect. 50: & the rule for the attachment was refused.—*SCOTT v. ZYGOMALA* (1855), 4 E. & B. 483; 24 L. J. Q. B. 129; 1 Jur. N. S. 63; 3 W. R. 163; 119 E. R. 176.
Annotation:—*Reid*. *Herschfeld v. Clarke* (1856), 11 Exch. 712.

1573. —.]—An application for a discovery of documents under C. L. P. Act, 1854 (c. 125), s. 50, must be made upon the affidavit of a party to the cause.

Under sect. 51 of the Act a party cannot interrogate as to the contents of written documents.—*HERSCHELD v. CLARKE* (1856), 11 Exch. 712; 25 L. J. Ex. 113; 26 L. T. O. S. 247; 2 Jur. N. S. 239; 4 W. R. 292.

Annotations:—*Consd.* *Wolverhampton, etc., Waterworks Co. v. Hawksford* (1859), 5 Jur. N. S. 736. *Reid*. *Christopherson v. Lotinga* (1864), 15 C. B. N. S. 809. *Mentd.* *Frederici v. Van Der Zee* (1877), 35 L. T. 844.

1574. — *Document lost.*—Interrogatories under C. L. P. Act, 1854 (c. 125), as to the contents of a lost document supposed to have been executed by the party interrogated, allowed, upon a *prima facie* case of loss being made out by affidavit,—subject to the probably unnecessary condition that the answers were not to be used at the trial unless such evidence was given of the loss of the document as to make secondary evidence of its contents admissible.

In an action for calls by a public co., pltf. was allowed to interrogate deft. as to "whether & when he received from A. any writing relating to his becoming a director or shareholder, & what had become of it, & when & where he last saw it,"—the description of the writing being nothing more than was necessary for its identification.—*WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKSFORD* (1859), 5 C. B. N. S. 703; 28 L. J. C. P. 198; 32 L. T. O. S. 296; 5 Jur. N. S. 736; 7 W. R. 244; 141 E. R. 283.

1575. — *Right of party interrogated to inspect document.*—*DALRYMPLE v. LESLIE*, No. 1736, *post*.

1576. *Before discovery of documents obtained.*—Deft., in answer to an interrogatory as to production of documents, submitted that, as pltf. might obtain discovery & production of documents by means of summons at chamber, he forebore, on account of expense, to answer that interrogatory. Upon exceptions to the answer to this interrogatory; the ct. refused to make any order, except that deft.'s costs should be costs in the cause—the ct. discouraging exceptions to answer to interrogatory for production of document.—*KIDGER v. WORSWICK* (1859), 32 L. T. O. S. 269; 5 Jur. N. S. 37.

Annotation:—*Apld.* *Piffard v. Beeby* (1866), 14 W. R. 302.

1577. —.]—A deft. may decline to answer the usual interrogatory as to documents. It is sufficient if he expresses his willingness to make the affidavit prescribed by the new practice, & it makes no difference whether the exception as to documents is a single exception or is included among others. But if a deft. professes to answer the interrogatory he must do so fully.

The introduction of interrogatories as to docu-

ments should now be avoided.—*PIFFARD v. BEEBY* (1866), L. R. 1 Eq. 623; 35 L. J. Ch. 258; 14 L. T. 8; 12 Jur. N. S. 117; 14 W. R. 302.

Annotations:—*Apprvd. Hall v. Truman, Hanbury* (1885), 29 Ch. D. 307. *Reid. Newall v. Telegraph Construction Co.* (1866), L. R. 2 Eq. 756.

1578. —.]—*BANNICOT & FRITH (EXECUTORS) v. HARRIS* (1876), 20 Sol. Jo. 217; Bitt. Prac. Cas. 85; 1 Char. Cham. Cas. 95.

1579. —.]—An objection to an interrogatory as to documents that an order for discovery of documents has not been obtained is a good answer.—*JACOBS v. GREAT WESTERN RY. Co.*, [1884] W. N. 33; Bitt. Rep. in Ch. 77.

1580. *After affidavit of documents filed.*—It is not sufficient in answering an interrogatory as to particular documents to refer pltf. to the general affidavit of documents filed in the case.

A deft. who declines to produce documents in his possession as being privileged cannot refuse to answer an interrogatory as to whether or not such documents refer to matters in question in the suit, & as to the grounds on which he claims the privilege.—*CATT v. TOURLE* (1870), 22 L. T. 775; 18 W. R. 966; *subsequent proceedings*, 23 L. T. 485. *Annotation*:—*Distd. Hall v. Truman, Hanbury* (1885), 29 Ch. D. 307.

1581. —.]—*ROBINSON v. BUDGETT & Co.*, [1884] W. N. 94; Bitt. Rep. in Ch. 79.

1582. —.]—*HALL v. TRUMAN, HANBURY & Co.*, No. 399, *ante*.

1583. — *Document not included in affidavit.*—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)* (1885), 80 L. T. Jo. 66, D. C.

1584. —.]—Pltfs. in an action for alleged infringement of patent, being a co. formed by the amalgamation of two cos., which in a previous action had between themselves contested the validity of the patent, filed an affidavit of documents containing no reference to the pleadings in the previous action. Defts. applied for leave to administer interrogatories, which was refused. Defts. then applied for leave to administer further interrogatories, both generally & more particularly with regard to specific documents not referred to in pltfs.' affidavit of documents. The judge refused leave. Defts. appealed. The summons was by leave amended so as to ask leave to administer particular interrogatories as to particular documents:—*Held*: defts. were entitled to leave to administer an interrogatory with regard to the particulars of objections delivered in the previous action.

The practice with regard to applications for leave to administer interrogatories with reference to documents supposed to be in possession of an opposite party who has given discovery was stated. The ct. may reasonably require an affidavit that the application is made *bond fide*

for the purpose of obtaining discovery, but *Qu.*: whether an affidavit as to the existence & nature of the documents is admissible.—*EDISON & SWAN UNITED ELECTRIC LIGHT Co. v. HOLLAND* (1888), 5 R. P. C. 213, C. A.

1585. —.]—*ROSS & Co. v. HOLMAN & SONS* (1889), 5 T. L. R. 505, D. C.

1586. —.]—In an action for the recovery of land deft. claimed that certain documents mentioned in his affidavit of documents were privileged from production, on the ground that they supported his title & did not contain anything impeaching his defence or supporting pltf.'s case. Deft.'s affidavit was sufficient on the face of it. Pltfs. proposed to administer interrogatories to deft. for the purpose of showing that the documents in question supported pltf.'s title, & therefore that they were not privileged from production:—*Held*: the interrogatories were inadmissible.—*NICHOLL v. WHEELER* (1886), 17 Q. B. D. 101; 55 L. J. Q. B. 231; 34 W. R. 425; 2 T. L. R. 375, C. A.

Annotation:—*Consd. Morris v. Edwards* (1889), 23 Q. B. D. 287.

1587. *Where privilege claimed*—As to grounds of privilege.]—*CATT v. TOURLE*, No. 1580, *ante*.

1588. — *To show no privilege.*]—*NICHOLL v. WHEELER*, No. 1586, *ante*.

1589. —.]—*MORRIS v. EDWARDS*, No. 363, *ante*.

1590. *Document in hands of third party.*]—*NEW ZEALAND SHIPPING Co. v. TYSER & Co.* (1892), 8 T. L. R. 276, D. C.

1591. *Document held jointly as partner.*]—*RATTENBERRY v. MONRO*, No. 333, *ante*.

1592. *Documents held as servant.*]—*BALFOUR v. TILLET*, No. 1125, *ante*.

1593. *Whether document in handwriting of party interrogated*—To prove authorship of libellous letter.]—*JONES v. RICHARDS*, No. 1520, *ante*.

G. Malicious Prosecution and False Imprisonment.

See, generally, MALICIOUS PROSECUTION; TRESPASS.

1594. *General rule.*]—In an action for malicious prosecution, the pltf. having been committed for trial & acquitted upon a charge of stealing gas brought against him by defts., pltf. sought to administer the following interrogatories, among others, to defts.: "4. What information, if any, had you that induced you to prosecute pltf. for stealing gas? What steps, if any, had you taken before commencing the said prosecution to ascertain whether the charge was true or not? What grounds, if any, had you for supposing that pltf. had committed the offence charged? Did you before you commenced the said prosecution take any & what precautions or make any & what

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1580 i. *After affidavit of documents filed.*]—Further interrogatories as to documents will not be allowed when a sufficient affidavit of documents has been already made.—*CUMING v. BAILEY* (1895), 30 I. L. T. 11.—IR.

1583 i. — *Document not included in affidavit.*]—The practice in Alberta is more favourable than the English practice to the party seeking discovery. The opposite party may, upon an examination for discovery, be asked as to what relevant documents are in his custody or power, leaving, if necessary, the question of their production & inspection to the determination of a judge, notwithstanding that he may previously have made an affidavit of document in which no reference is made to the document

forming the object of the examination.—*STAPLEY v. CANADIAN PACIFIC RY. Co.* (1912), 22 W. L. R. 85; 6 D. L. R. 97; 2 W. W. R. 1010; 5 Alta. L. R. —CAN.

1583 ii. —.]—Motion by defts. for an order that pltf. do attend a further examination for discovery & answer certain questions relating to his mother's marriage certificate & produce the same & for a further affidavit on production. The action was on a policy of insurance on the life of pltf.'s mother, & one of the issues raised was as to her correct age, on which her marriage certificate might have thrown some light. Pltf. on his examination refused to answer if such a document existed on the ground that an attempt was being made to cross-examine him on his affidavit on production:—*Held*: as it had not been

shown that the certificate was in existence, the motion for a further affidavit was premature; but pltf. should answer the question as to the existence of the certificate.—*MACMAHON v. RAILWAY PASSENGERS INSURANCE Co.* (No. 2) (1912), 22 O. W. R. 196; 3 O. W. N. 1301; 26 O. L. R. 430; 5 D. L. R. 423.—CAN.

q. *In action for rent*—As to person having custody of lease.]—In an action for rent reserved under a lease, & for the production of the lease, when the possession of the lease & counter part was traced to deft., interrogatories whether deft. had not possession of the lease, & whether he could not set out in whose custody it was, were allowed to be served with the summons & plaint, & an absolute order granted.—*LAMBERT v. PEYTON* (1857), 9 Ir. Jur. 459.—IR.

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inquiries as to the truth of the said charge, & what was the result of each such inquiry? 5. What are the facts & circumstances on which you rely as showing that you had reasonable & proper cause for the said prosecution?" Both interrogatories were disallowed by the master & judge in chambers:—*Held*: the fifth interrogatory ought not to be allowed; in the absence of special circumstances, such an interrogatory as the fourth interrogatory ought not to be allowed in an action for malicious prosecution, in which class of action there were special reasons for caution in allowing interrogatories to be administered to a deft.—*MAASS v. GAS LIGHT & COKE CO.*, [1911] 2 K. B. 543; 80 L. J. K. B. 1313; 104 L. T. 767; 27 T. L. R. 473; 55 Sol. Jo. 566, C. A.

Annotations:—*Reid. Barham v. Huntingfield*, [1913] 2 K. B. 193; *Dawson v. Dover & County Chronicle* (1913), 108 L. T. 481.

1595. As to possession of books—Subject of charge of theft.—Interrogatories under C. L. P. Act, 1854 (c. 125), s. 51, will not be allowed where they relate wholly to matter which tends to support the case of the opposite party. In an action for a malicious prosecution on a charge of stealing books, the ct. allowed interrogatories requiring pltf. to state whether or not certain books described were in his possession, & when, where, & from whom he bought them, & the price he paid for them.—*STEWART v. SMITH* (1867), L. R. 2 C. P. 293; 15 L. T. 580.

Annotation:—*Distd. Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70.

1596. As to authority for arrest.—*McFADZEN v. LIVERPOOL CORPN.*, No. 1411, *ante*.

1597. As to source of information.—Pltf. had been arrested on a charge of felony by a police superintendent without a warrant, & brought before a magistrate who dismissed the charge. In an action brought by her against the superintendent for false imprisonment & malicious prosecution, the following interrogatories were administered: "What was the information you received? How, & from whom did you receive it?"—*Held*: deft. was bound to answer the first of the two questions: with regard to the question as to the name of the informer, no decision was given thereon, the point not having been specially raised at chambers.—*LOWE v. GOODMAN* (1878), 42 J. P. 825.

1598. As to grounds of suspicion.—*MAASS v. GAS LIGHT & COKE CO.*, No. 1594, *ante*.

H. Negligence.

See, generally, NEGLIGENCE.

1599. General rule—Running down cases.—

There is no general rule of practice in the K. B. Div. that interrogatories are not to be allowed in a running down case. Only such interrogatories however should be allowed as may be necessary for disposing fairly of the cause or matter or for saving costs within R. S. C., Ord. 31, r. 2.

Pltf. brought an action against deft. to recover damages for personal injuries caused by the alleged negligent driving of deft.'s motor car. The statement of claim alleged that deft.'s servant so negligently drove the motor car that it knocked down & severely injured pltf. who was crossing the road after alighting from an omnibus travelling in the opposite direction to that in which the motor car was being driven. The particulars of negligence stated the car was being driven on the wrong side of the road & at an excessive speed, & passed too close to the stationary omnibus from which passengers were alighting, no warning being given of its approach. The defence denied negligence, & alleged contributory negligence. Pltf., who was unable to find any witnesses on her behalf who saw the accident, & who in consequence of her injuries had a faulty recollection on the matter, applied for leave to deliver interrogatories asking in substance what were the positions of the omnibus & motor car at the time of the accident & how far pltf. was from the omnibus & from the kerb on either side of the road. The master refused leave on the ground that there was general rule of practice not to allow interrogatories in running down cases except for special reasons. The judge affirmed the refusal, but gave leave to appeal:—*Held*: there was no such rule of practice as suggested, & the interrogatories were necessary for disposing fairly of the action within R. S. C., Ord. 31, r. 2, & should be allowed.—*GRIEBART v. MORRIS*, [1920] 1 K. B. 659; 89 L. J. K. B. 397; 122 L. T. 736; 64 Sol. Jo. 275, C. A.

1600. Against nominal defendant—To prove negligence of superior.—Interrogatories allowed against deft. in an action against the clerk to commrs. for negligence by the comrs.—*MASON v. WYTHE* (1862), 3 F. & F. 153.

1601. Circumstances in which injury occurred.—In an action for injuries sustained by reason of deft.'s alleged negligence, deft. is not entitled to administer interrogatories to pltf. as to how or to the circumstances under which the accident happened, the time, or persons present, the extent of the personal injury, the amount & nature of

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1596 i. As to authority for arrest.—*O'CONNELL v. BARRY* (1868), 1 R. 2 C. L. 648.—*IR.*

1597 i. As to source of information.—In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on a information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained.—*HUMPHREY v. ARCHIBALD* (1893), 20 A. R. 267.—*CAN.*

r. To justify charges made against pltf. & others—In respect of which prosecution instituted.—In an action for damages for falsely & maliciously & without reasonable & probable cause preferring a charge of perjury, & also a charge of obtaining a valuable security by false pretences, deft. averred that pltf. & one J. conspired together to obtain two promissory

notes from deft. by false pretences; that pltf. first visited deft., & by fraud & falsehood induced him to enter into a contract to purchase hayforks, & that J. followed him in course of time, in pursuance of their fraudulent scheme, & by fraud & falsehood & false pretences obtained the notes:—*Held*: upon examination of pltf. for discovery deft. should be permitted to inquire into the dealings between pltf. & J., fully & freely to ascertain whether J. & pltf. were acting in concert, & whether any false pretence by J. was in fact a false pretence by pltf., & for this purpose might investigate all sales of forks made by pltf. or J., or either of them, under any agreement or arrangement, & the history of all notes received in carrying out such sales, & all entries in the pltf.'s bill books & all other books relating to such transactions.—*COLTER v. McPHERSON* (1888), 12 P. R. 630.—*CAN.*

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s. Circumstances warning defendants of danger—Indications of defect in electric wires.—Upon the examination for discovery of an officer of an incorporated co., in an action brought against the co. by a person whose building they supplied with electrical power, to recover damages for injury by fire which he alleged to have been caused by their negligence, deponent, being asked whether on the date of the fire there was any indication at the power house or deft.'s works that there was any trouble or breakage in the wires on the circuit by which power was supplied to pltf., answered that there were such indications:—*Held*: he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; & if he had not such knowledge, but could obtain it from a servant of defts. who acquired the knowledge in the course of his employment, he was bound to

the medical attendance, or the sums paid for such attendance.—*PEPPIATT v. SMITH* (1864), 3 H. & C. 129; 33 L. J. Ex. 239; 11 L. T. 139; 159 E. R. 476.

Annotation:—*Reid*. *Baker v. Lane* (1865), 13 W. R. 293.

1602. —[.]—A judge at chambers refused, before declaration, to allow the following interrogatory to be put to the secretary of a railway co., in an action for negligence: "If you say that there was a collision, what was it that the train in which pltf. was a passenger came into collision with? Were defts. possessed thereof? Was it under the care of themselves or any one or more of their servants? Was it on the same rails with the said train? Was it standing still or moving? If moving, was it moving towards H., or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision or other accident beyond what you have stated, what was it?" The ct. refused a rule to vary his order.—*BECHERVAISE v. GREAT WESTERN RY. CO.* (1870), L. R. 6 C. P. 36; 19 W. R. 229; *sub nom.* *BECKERVAISE v. GREAT WESTERN RY. CO.*, 40 L. J. C. P. 8; 23 L. T. 808.

Annotations:—*Reid*. *Alexandra (Newport) Dock Co. v. Elliot* (1871), 23 L. T. 847; *Bolekow v. Fisher* (1882), 10 Q. B. D. 161.

1603. —[.]—When money has been paid into ct. by deft. in an action to recover damages for personal injuries caused by deft.'s negligence, interrogatories as to the nature & extent of the injuries sustained, & generally as to the damages are permissible.—*FROST v. BROOKE* (1875), 32 L. T. 312; 23 W. R. 260.

1604. —[.]—Pltf. in an action for personal injuries may interrogate defts. as to the circumstances of the accident & as to the reports by their servants.—*JONES v. LONDON ROAD CAR CO.*, [1883] W. N. 196; *Bitt. Rep.* in Ch. 71.

1605. Particulars of alleged negligence.—[.]—Interrogatories will not be allowed where the information could be obtained by particulars.—*O'MEARA v. STONE*, [1884] W. N. 72; *Bitt. Rep.* in Ch. 73.

1606. Who alleged by defendant to be responsible.—[.]—In an action for damages for injuries alleged to have been caused by the fall of a piece of wood through the negligence of deft.'s servants, pltf. in the course of interrogatories asked the following question: "If you allege that the piece of wood was not knocked down by one of your servants, state the name & address of the person or firm in whose employ the person was, & the name of the person by whom & how it was so knocked down, & for what he was on your premises." Deft. in his answer stated that the wood was knocked down, without the knowledge or consent of himself or his servants, by some person who was upon his premises as a customer, & declined to give the name & address of such person on the ground that the information was not relevant & not required *bonâ fide* for the purpose of the action:—*Held*: on an application for a further & better answer, the question went

obtain it so as to enable him to answer the question; & even if the information which deponent had was obtained for the purpose of enabling counsel to advise, & he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purposes of discovery.—*HARRIS v. TORONTO ELECTRIC LIGHT CO.* (1899), 18 P. R. 285.—*CAN.*

t. Safeguarding dangerous place—After injury sustained.—[.]—Where an injury is alleged to have been caused by the negligence of deft. in not furnishing

danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of showing his prior negligence; & upon an examination for discovery deft. is justified in declining under advice to answer questions relative to such subsequent placing.—*COLE v. CANADIAN PACIFIC RY. CO.* (1900), 19 P. R. 104.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 15.—I.
a. As to partnership articles—& interest of one of plaintiffs in firm.—[.]

beyond the sphere of interrogatories, & deft.'s objection to answer was good.—*MEEK v. WITHERINGTON* (1892), 67 L. T. 122; 57 J. P. 7.

1607. Names of servants—Seeing plaintiff home.—[.]—A passenger on the railway of defts. having been hurt by a train, was accompanied to her home by two of their servants under the direction of a third, an inspector. Subsequently bringing an action for damages in respect of the injury received, she sought to administer certain interrogatories to deft. co.:—*Held*: they might be interrogated as to the names of their inspector, of their other servants who accompanied pltf. home & of the driver of the engine drawing the train by which she was a passenger, but might not be asked whether any of the servants of the co. witnessed the accident, & if so, what were their names.—*POTTER v. METROPOLITAN DISTRICT RY. CO.* (1873), 28 L. T. 231.

1608. —[.]—*Witnessing accident.*—*POTTER v. METROPOLITAN DISTRICT RY. CO.*, No. 1607, *ante*.

1609. —[.]—In an action for personal injuries against a railway co. an interrogatory was disallowed which was directed to ascertaining which of the co.'s servants saw pltf. at the time of the accident, & what pltf.'s position then was.—*MARSKELL v. METROPOLITAN DISTRICT RY. CO.* (1890), 7 T. L. R. 49, C. A.

Annotation:—*Reid*. *Griobart v. Morris*, [1920] 1 K. B. 659.

1610. Alleged negligent valuation—Basis of valuation.—[.]—Deft. was engaged as valuer on the part of pltf. to ascertain the sum to be paid by the latter on the purchase of the goodwill, etc., of a business. In an action against him for alleged negligence & want of reasonable skill in the conduct of the valuation:—*Held*: pltf. was entitled, under C. L. P. Act, 1854 (c. 125), s. 51, to interrogate deft. as to the basis of his valuation.—*TURNER v. GOULDEN* (1873), L. R. 9 C. P. 57; 43 L. J. C. P. 60.

Annotation:—*Mentd.* *Re Hammond & Waterton* (1890), 62 L. T. 808.

In action for collision.—[.]—*See* *ADMIRALTY*, Vol. I., pp. 190, 191, Nos. 1044–1053.

I. Partnership.

1611. Profit made by one partner.—[.]—Where, by an interrogatory founded on a charge in the bill—that deft., during a partnership with pltf. as solrs., had discounted bills, whereby he had made profit, pltf. required him to set forth the names of persons with whom, etc., & the amount of such profits—although deft. in his answer noticed the charge, & admitted the transactions to which it referred, yet he refused to answer as to the particulars inquired of; because, as deft. alleged, pltf. was not interested in such transactions:—*Held*: deft. was not bound to answer the interrogatory.—*JOHN v. DACIE* (1824), 13 Price, 632; 147 E. R. 1105.

1612. Amount brought into business by partner.—[.]—A suit was instituted by one of two partners against the other, praying for a dissolution of the

the H. Co., brought an action in the firm name against deft. co. for the price of certain carloads of wheat. Defts. alleged that they purchased the wheat from F. & G., who also carried on business under another firm name, & that F. & G. owned the wheat, or that Y. & G. had permitted F. & G. to deal with the same:—*Held*: defts. were entitled to have answered questions put to Y., who claimed to be a special partner, as to the articles of partnership & their contents, the relationship between Y. & the others interests in the firm.—*MEDICINE*

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partnership, & for the usual partnership accounts. The bill set out the partnership deed, which stated that a sum of £6,000 had been brought into the business by deft., & alleged that the statement to that effect was erroneous; but there was no prayer that the account as to the £6,000 should be opened or the deed set aside. Deft. by his answer stated that the account, as regarded the £6,000, was treated as a settled account at the date of the partnership deed, & he declined to set out the items of which it was composed, & claimed the benefit of his defence as if he had pleaded or demurred:—*Held*: the discovery sought as to how the £6,000 was made up was not relevant to the relief prayed, & deft. was not bound to answer the whole bill, but might refuse to give the discovery without being required to plead to the bill.—*WIER v. TUCKER* (1872), L. R. 14 Eq. 25; 41 L. J. Ch. 471; 26 L. T. 719; 20 W. R. 586.

1613. Misconduct of partner—Accounts of partnership.]—In an action for dissolution of partnership in the business of surgeons, pltf. alleged that deft. “for some time past & since from about” a certain date “so behaved & conducted himself towards pltf. in the presence of many of the patients of the partnership,” as to make it impossible for pltf. to carry on practice with him. An interrogatory by deft. calling upon pltf. to set forth the particulars & circumstances of the occasions on which deft. had so behaved & conducted himself was allowed. An interrogatory as to the names of the persons in whose presence deft. had so behaved & conducted himself, disallowed. An interrogatory calling upon pltf. to set forth accounts disallowed as being premature.

The principle of the cts. has been always the same, the right is the right of an accused person to extract from his accuser what his charges are, & what the facts are upon which he intends to rely (*BACON, V.-C.*).—*LYON v. TWEDDELL* (1879), 13 Ch. D. 375.

1614. Partnership accounts—Rights of administrator of deceased partner.]—*WARD v. FITZHUGH* (1834), 7 Sim. 42; 3 L. J. Ch. 236; 58 E. R. 753.

1615. ———.]—A., a partner in a bank with B. & C., died, leaving D. his residuary legatee, & B., E. & F. his exors. E. was afterwards admitted a partner in the bank. D. filed a bill against B., E. & F. for the administration of A.’s estate, & interrogated them as to the accounts of the partnership, etc.:—*Held*: defts. were not bound to answer these interrogatories, as they were put by the bill.—*SIMPSON v. CHAPMAN* (1850), 20 L. J. Ch. 88; 17 L. T. O. S. 70; 15 Jur. 714.

1616. ———.]—*AMBLER v. BOLTON*, [1871] W. N. 12.

HAT WHEAT Co. v. NORRIS COMMISSION CO., LTD. (1916), 34 W. L. R. 1019; 10 W. W. R. 1092; 10 Alta. L. R. 19.—CAN.

b. *As to profit made by one partner—Discretion of court before right of plaintiff to share established.]*—Here deft., in an action between partners for an accounting & discovery of partnership assets, asserts that the partner a certain transaction had of passively excepted from the profits, & on examination for been exorc a special examiner, partnership questions tending to discovery beunt of the profits in refuses to answer exercise a judicial discover the am illing him to give question, the ct. wis of that trans-discretion as to compue of pltf.’s discovery of the profitsbeen deter-action before the main i.

mined. This discretion arises under K. B. Rule 436 (Man.) by virtue of which the ct. has power to postpone consequential discovery until the main issue has been decided. The Rule, however, is not absolute, & where it does not appear to the ct. that it would be unfair or unreasonable that the discovery should be made, deft. may be ordered to answer the questions before a special examiner at his own expense.—*MCDONALD v. SANDERSON*, [1923] 3 W. W. R. 237; 33 Man. L. R. 289.—CAN.

c. *As to fact of agreement—& entries relating thereto in firm’s books.]*—In an action for breach of agreement to enter into a partnership, whether such an agreement had been entered into, & whether the partnership books of defts. contain any entries relating to

J. Patents.

(a) *In General.*

See, generally, PATENTS.

1617. Jurisdiction of court—Patent Law Amendment Act, 1852 (c. 83), s. 41.]—In a patent action where pltf. or deft., as the case may be, makes out a proper case the ct. has jurisdiction to order interrogatories to be answered notwithstanding the provision in the above Act for the delivery of particulars.

Pltf. is also entitled under the above sect. to the names & addresses of the persons by whom prior user is alleged to have been made as well as the places where the prior user has taken place.—*BIRCH v. MATHER* (1883), 22 Ch. D. 629; 52 L. J. Ch. 292; 31 W. R. 362.

1618. ——— Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26.]—*Re HADDAN’S PATENT*, No. 74, *ante*.

1619. Plea that plaintiff not first inventor—Opinions of scientists.]—Pltfs., who were patentees of a chemical invention, filed their bill against defts. to restrain them from pirating the invention. The bill contained statements setting out the letters patent & the opinions of scientific men that the invention was original & important, & also statement for the purpose of obtaining a discovery as to the process used by defts. in their manufacture. Defts. pleaded that pltfs. were not the first inventors, & supported their plea by an answer, but they did not answer the interrogatories relating to the letters patent & the opinions of the scientific men, nor those which sought a discovery of deft.’s process:—*Held*: defts. were not bound to answer either class of interrogatories, inasmuch as the former class were based upon statements which, if true, would not be evidence to invalidate the plea, & the latter class were immaterial to the issue raised by the plea.—*YOUNG v. WHITE* (1853), 17 Beav. 532; 2 Eq. Rep. 213; 23 L. J. Ch. 190; 22 L. T. O. S. 231; 18 Jur. 277; 2 W. R. 88; 51 E. R. 1141.

Annotations:—Mentd. Braham v. Bustard (1863), 11 W. R. 1061; *Ward v. Hill* (1903), 18 R. P. C. 481.

1620. Cause of action more than six years old—Delivery before declaration refused.]—In an action for infringement of a patent, the ct. refused to allow pltf. to administer interrogatories to deft. before declaration, it appearing that the cause of action arose more than six years before the action was commenced.—*JONES v. PRATT* (1861), 6 H. & N. 697; 30 L. J. Ex. 365; 4 L. T. 411; 7 Jur. N. S. 978; 9 W. R. 696; 158 E. R. 288.

Annotation:—Refd. Philipps v. Philipps (1879), 40 L. T. 815.

1621. Oppressive—Details of manufacture for past twelve months.]—In a suit for infringing pltf.’s patent for preparing a violet colouring matter, & the specification of which stated that

it, are proper interrogatories. *Semble*: the order to exhibit is an absolute order.—*LEVY v. M’SWINEY* (1857), 9 Ir. Jur. 380.—IR.

PART IV. SECT. 5, SUB-SECT. 15.—J. (a).

d. *Defence of prior user—Names of persons using.]*—The general law applicable to discovery governs in patent cases. Deft. may be properly interrogated as to the ground of his attacking pltf.’s patent, & there should be a fair & full disclosure of the particular lines of attack, which are contemplated, but no such individualising of the person who are alleged to be prior users as would enable pltf. to fix upon deft.’s witnesses.—*SMITH v. GREY* (1884), 10 P. R. 482.—CAN.

e. *Form & extent.]*—*THOMAS v.*

the inventor used substance A. in combination with substances B. O. D., etc., deft. was required by an interrogatory to state what quantities of A. B. O. & D. he had used in his business as a dyer, the names & addresses of the persons who delivered them, what manufactures of colouring matter he had carried on during the last twelve months, & all the substances he had used in the manufacture of each colouring matter. Deft. stated in his answer what quantities of substance A. he had used, but that he had never used B. O. & D., & except as aforesaid, declined to answer the interrogatory:—*Held*: the interrogatory was oppressive, & exceptions to the answer should be overruled with costs.—*SIMPSON v. CHARLESWORTH* (1866), 14 L. T. 699; 14 W. R. 857.

1622. — How far process carried on in England—*Patents & Designs Act, 1907* (c. 29), ss. 24, 27.]—In an action for infringement of a patent defts. raised by way of defence the above sects., & sought to administer to pltf's. certain interrogatories as to the extent of the carrying on the patented process in the United Kingdom, as to supplying the public demand for articles made thereunder, & as to pltf's. works. The interrogatories were disallowed. Defts. appealed, & contended that there was no other form in which the interrogatories could be usefully framed, & that therefore it would be impossible to administer any other interrogatories under the sects.:—*Held*: the interrogatories were both oppressive & fishing & could not be allowed, but, although it was not the function of the Ct. of Appeal to settle interrogatories, a modification of the last interrogatory would be allowed.—*VIDAL DYES SYNDICATE, LTD. v. READ, HOLLIDAY & SONS, LTD.* (1911), 28 R. P. C. 323, C. A.

1623. Defence of prior user—*Particulars of prior user.*]—In a suit to restrain an infringement of a patent which is contested on the ground of anticipation by prior user, pltf. is not entitled to discovery from deft. in answer to a general interrogatory as to the instances of prior user on which he relies.—*BOVILL v. SMITH* (1866), L. R. 2 Eq. 459.

Annotation:—*Consd. Crossley v. Tomey* (1876), 2 Ch. D. 533.

1624. — — —.]—The practice in equity in regard to patent suits must conform, as far as possible, to the practice at law as established by statute.

Pltf. in a patent suit ought to deliver to deft. particulars of the breaches whereon he means to rely, & having done so, is entitled to discovery from a deft. setting up the defence of prior user of particulars of such prior user.—*FINNEGAN v. JAMES* (1874), L. R. 19 Eq. 72; 44 L. J. Ch. 185; 23 W. R. 373.

Annotations:—*Folld. Crossley v. Tomey* (1876), 2 Ch. D. 533; *Birch v. Mather* (1883), 22 Ch. D. 629. *Mentd. Patterson v. Gaslight & Coke Co.* (1876), 2 Ch. D. 812; *Parnell v. Mort, Liddell* (1885), 29 Ch. D. 325; *Hayward v. Lely* (1887), 56 L. T. 418.

1625. — — —.]—A pltf. in interrogatories as to alleged prior user should not attempt to put a construction on his patent, but should confine himself to asking specifically whether the things which he says are the essentials of his patent have been done or not.

The owners of a patent for improvements in the manufacture of metallic alloys commenced an action for infringement. Defts. alleged that the patent was invalid, & in particular that the alleged

invention had been used prior to the date of pltf.'s patent by a number of persons. Pltf's. delivered interrogatories asking if the persons named manufactured zinc iron alloys containing a definite percentage of iron by saturating zinc maintained at a definite temperature with iron, & was that the anticipation relied on, or if not, requiring defts. to state precisely what the said persons did with reference to the manufacture of iron & zinc alloys. Defts.' secretary answered that he believed the processes adopted by the persons referred to were substantially the same as pltf.'s process, but declined to answer further on the ground that the interrogatories were immaterial & irrelevant & went to details of evidence:—*Held*: the materiality of the first part of the interrogatory depended on the construction of the patent & it was too early a stage to decide that; the second part of the interrogatory was an inquiry into defts.' evidence, & need not be answered, & the application should be dismissed with costs.—*DELTA METAL CO. v. MAXIM NORDENFELT GUNS & AMMUNITION CO., LTD.* (1891), 8 R. P. C. 169, D. C.

— Names of persons using.]—*See Nos. 1639–1642, post.*

1626. Validity of patent.] — *HOFFMANN v. POSTILL*, No. 1794, *post.*

1627. Manufacture under licence—*Interrogatories to number of articles of similar value sold.*]—In an action brought upon an indenture licensing defts. to manufacture certain gates upon a patented principle, in which defts. covenanted to pay certain royalties upon all gates manufactured by them according to the said principle, & to deliver quarterly statements of the gates so manufactured by them to pltf., & to stamp the gates so manufactured by them below certain specified prices, the ct. refused to allow interrogatories to be administered to defts. asking the number of gates constructed by defts. wherein the apparatus for closing or opening the gates acted simultaneously upon signals. The patent being one for an improved apparatus for closing & opening gates acting simultaneously upon signals, there being other methods besides the patented one of constructing gates so acting, & it being denied by defts. that they had broken their covenants, interrogatories as to prices of gates sold were also disallowed, it not appearing that pltf. relied upon this as a substantial cause of action.—*LEA v. SAXBY* (1875), 32 L. T. 731.

1628. Particular breaches specified—*Further particulars.*]—*ELSEY v. BUTLER* (1886), *Griffin's Patent Cases*, 96.

1629. — What part of specific article an infringement.]—The owner of a patent for mechanical musical instruments brought an action for alleged infringement against defts., & delivered particulars of breaches in which he complained generally of the infringement of the first claiming clause of the specification, & "in particular & by way of illustration" of a specific article sold by defts. Defts. delivered particulars of objections which alleged, among other grounds, that the alleged invention was not the subject of a patent, but the mere application of old machinery to an analogous purpose; that, as disclosed by the specification, it did not make any useful addition to the existing stock of public knowledge; & that

TILLIE & HENDERSON (1866), 17 L. C. L. R. 783.—*IR.*

1. Correspondence between principal & agent—*Relating to specifications.*]

—An interrogatory should be allowed as to whether any letters or documents had passed between pltf. co., its directors or officers, & the patent agent of pltf. co. relating to the letters

patent or to the specifications & drawings thereof, & if so what letters & documents.—*GANE MILKING CO. v. MACLEWAN & CO.* (1914), 33 N. Z. L. R. 1008.—*N.Z.*

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, J. (a) & (b), K. & L.]

the specification did not sufficiently distinguish the new from the old. Defts. also delivered interrogatories which in effect asked pltf. to admit the truth of the above-mentioned objections, or to state how he made them out not to be true, & asking various questions as to the specific article alleged to be an infringement, including what portions of it were alleged to infringe the patent. Pltf. having declined to answer these interrogatories, defts. took out a summons to compel him to do so. The summons was adjourned into ct., & pltf. there consenting to answer the interrogatory as to subject matter, & to amend the particulars of breaches by omitting the words "by way of illustration":—*Held*: no further answer should be ordered.—*EHRlich v. IHLEE* (1887), 5 R. P. C. 37.

1630. — General breaches.]—In an action for infringement of two patents, one being for a process & the other for an improvement of that process, pltf., by their particulars of breaches delivered with their statement of claim, alleged, in paragraph 1, a general user of the patents since the dates of their respective grants, & by paragraph 2 they gave, as required by R. S. C., Ord. 53A, r. 13, a particular instance of the type of infringement alleged. In support of their case they delivered three interrogatories, the first two of which were directed to asking defts. whether they had used pltf.'s process as alleged in substance in paragraph 1 of the particulars. The first interrogatory was directed to the general use of the process described in the first patent & the second interrogatory to the use of the process described in the second patent. The third interrogatory was with regard to the particular instance set out in paragraph 2 of the particulars. Defts. did not object to the third interrogatory except so far as it asked what was the method used by defts., there being no claim in pltf.'s specifications for any specific method of application of the process. They objected to the first & second interrogatories on the general ground that in the then state of the pleadings the only instance that pltf. would be allowed to prove at the trial would be that given in paragraph 2 of the particulars, & that pltf., were not entitled to interrogate them in respect of the general allegation in paragraph 1, but were confined to the particular instance in paragraph 2:—*Held*: it being the function of particulars of breaches to point out to a deft. what were the particular acts complained of so that he should not be taken by surprise, paragraph 1 of the particulars being a mere general allegation did not comply with that requirement, & the first & second interrogatories must be disallowed; the third interrogatory should be allowed, subject to the omission of any reference to the method used by defts.—*AKT. FÜR AUTOGENE ALUMINIUM SCHWEISSUNG v. LONDON ALUMINIUM Co.*, [1919] 2 Ch. 67; 88 L. J. Ch. 366; 121 L. T. 168; 36 R. P. C. 199.

1631. Construction of specification.]—An interrogatory in effect asking pltf. to swear to a construction of their specification disallowed.—*BIBBY & BARON, LTD. v. DUERDEN* (1910) 27 R. P. C. 283.

(b) *Names of Customers, etc.*

See, generally, PATENTS.

1632. Customers.]—It is no ground for refusing to answer interrogatories under C. L. P. Act, 1854 (c. 125), s. 51, in an action for the infringement

of a patent that the answers may expose deft.'s customers to actions.—*TETLEY v. EASTON* (1856), 18 C. B. 643; 25 L. J. C. P. 293; 139 E. R. 1522. *Annotation*:—*Mentd.* The Don Francisco (1862), 6 L. T. 133.

1633. — Residing abroad.]—In a suit, to restrain the infringement of a patent, defts. were required to set out the names & addresses of all persons from whom they had received sums of money for the use of articles alleged to be manufactured, in infringement of pltf.'s rights, even though such persons might reside abroad.—*CROSSLEY v. STEWART* (1863), 1 New Rep. 426; 7 L. T. 848.

1634. — Inquiring as to profits.]—Where a decree has been made directing deft. to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; & if he be unable to give such information precisely, he may then, but not otherwise, be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped.—*LEATHER CLOTH Co., LTD. v. HIRSCHFELD* (1863), 1 Hem. & M. 295; 11 W. R. 933; 71 E. R. 129.

Annotation:—*Consd.* Saccharin Corpn. v. Chemicals & Drugs Co., [1900] 2 Ch. 556.

1635. — —.]—In an action for the infringement of a patent defts. were ordered to account for profits:—*Held*: defts. must disclose the names & addresses of their customers.—*SACCHARIN CORPN. v. CHEMICALS & DRUGS Co.*, [1900] 2 Ch. 556; 69 L. J. Ch. 820; 83 L. T. 206; 49 W. R. 1; 16 T. L. R. 564, C. A.

1636. — —.]—A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agent's works, & not a licensor, having obtained a perpetual injunction against defts., who were also manufacturers of brick-cutting machines, from infringement, defts. were ordered to file an affidavit stating the number of machines made by them since the date of the patent, & the names & addresses of the persons to whom the same had been sold, & of the agents concerned in the transactions. Upon motion to vary the order:—*Held*: pltf. was entitled to have discovery of the names & addresses of the purchasers, but not of the agents concerned, there being nothing to show that any agents had been employed.—*MURRAY v. CLAYTON* (1872), L. R. 15 Eq. 115; 42 L. J. Ch. 191; 27 L. T. 644; 21 W. R. 118.

Annotations:—*Foll.* American Braided Wire Co. v. Thompson (1888), 5 R. P. C. 375. *Apprvd.* Saccharin Corpn. v. Chemicals & Drugs Co., [1900] 2 Ch. 556.

1637. — Patent disputed.]—*ROLLS v. ISAACS*, [1878] W. N. 37.

1638. — Infringement not admitted.]—Pltf. in an action for infringement against a co., who denied infringement obtained leave to interrogate, the interrogatories to be answered by defts.' secretary. Pltf. interrogated, touching the sales of certain goods & to particular customers. By the answer the sales were admitted generally, but the interrogatory as to sales to named customers was refused to be answered, on the ground that the information was not sought *bonâ fide*, & was not material at the then present stage of the action. Pltf. took out a summons to enforce an answer:—*Held*: unless defts. within seven days admitted the sale of goods inquired after, the interrogatory must be answered.—*LISTER v. NORTON* (1885), 2 R. P. C. 68; Griffin's Patent Cases, 148.

1639. Persons by whom prior user alleged.]—In a suit to restrain the infringement of a patent deft. was required to state whether he was not

making articles in all respects identical with those of pltf., & to set forth in what respects they differed & by what process they were made:—*Held*: (1) deft., who alleged prior user by himself & others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of pltf., the articles he now made differed from those made by pltf., but he could not show in what they differed without ocular demonstration; (2) deft. was bound, in alleging prior user by other persons, to set forth the names of some of those persons.—*CROSSLEY v. TOMLEY* (1876), 2 Ch. D. 533; 34 L. T. 476.

Annotation:—*As to* (2) *Folld. Birch v. Mather* (1883), 22 Ch. D. 629.

1640. —.]—In a patent suit the form of order requiring deft. to furnish further & better particulars of objections, should follow Patent Law Amendment Act, 1852 (c. 83), s. 41, & requires deft. to state in his particulars merely "the place or places at or in which & in what manner the invention is alleged to have been used or published prior to the date of the patent," but under such an order deft. must furnish full & sufficient particulars.—*FLOWER v. LLOYD* (1876), 45 L. J. Ch. 746; 35 L. T. 454; 25 W. R. 17, C. A.; *subsequent proceedings*, 20 Sol. Jo. 860.

Annotations:—*Consd. Birch v. Mather* (1883), 22 Ch. D. 629. *Refd. Drake v. Muntz's Metal Co.* (1886), *Griffin's Patent Cases* 78; *Fowler v. Gaul* (1886), *Griffin's Patent Cases* 99.

—.]—*BIRCH v. MATHER*, No. 1617, *ante*.

1642. —.]—Where a deft. in a patent action alleges, in his particulars of objection, general user of pltf.'s alleged invention previous to the date of the letters patent, he may be compelled to answer interrogatories asking for the names & addresses of persons so using it as alleged.—*ALLIANCE PURE WHITE LEAD SYNDICATE v. MACIVOR'S PATENTS* (1891), 39 W. R. 487.

1643. Persons by whom infringement supplied.]—Pltfs. in an action to restrain infringement of their patent issued a summons for further & better answers by defts. to certain interrogatories. Pltfs. were owners of a patent for improvements in the manufacture of incandescent electric lamps. By two of their interrogatories they sought to discover from defts. whether a particular set of 150 lamps were manufactured wholly or in part by a specified firm in Paris, or by what other persons or firms; & whether the said lamps were supplied to defts. by the particular firm in Paris, or by what other persons or firms. Defts. admitted the sale of these lamps by them to a firm in England, but stated that none of the lamps were manufactured by defts.; & further, that they had no knowledge of the process employed in the manufacture of the filaments of the lamps. They objected to answer the two interrogatories in question on the ground that they were irrelevant & immaterial to the issues to be tried in the action, & were not sought *bond fide* for the purposes of the action. The avowed object of pltfs. was to ascertain from defts. the sources from which the lamps were obtained, so as to enable them to identify & establish the process of manufacture employed in the production of these particular lamps:—*Held*: the point was covered by *Marriott v. Chamberlain*, No. 1526, *ante*, & *Nash v. Layton*,

No. 1703, *post*, & defts. must answer the interrogatories.

It is said that the right to interrogate should be limited to that which is directly in issue in the action, & that pltfs. cannot go outside that merely to enable them to extract information which may help them to prove, in one particular way, the issue which arises between the parties. That is a contention which cannot prevail (*COZENS-HARDY, M.R.*).—*OSRAM LAMP WORKS, LTD. v. GABRIEL LAMP CO.*, [1914] 2 Ch. 129; 83 L. J. Ch. 624; 111 L. T. 99; 58 Sol. Jo. 535; 31 R. P. C. 230, C. A.

K. Payment.

1644. As to circumstances of payment.]—Under the general charge as to the fact of payment pltf. may interrogate as to all the circumstances, that go to prove or disprove the truth of the fact, as when, where, etc., without particular charges.—*FAULDER v. STUART* (1805), 11 Ves. 296; 32 E. R. 1102, L. C.

Annotation:—*Refd. Mason v. Wakeman* (1848), 2 Ph. 516.

1645. Allegation of payment to deceased creditor —Time & mode of payment.]—To an action by surviving partners, for goods sold, money lent to, & on accounts stated with deft., by them & their late partner, deft. pleaded a settlement of the account between him & deceased by a bill not yet due. The ct., in conformity with the practice in Ch., allowed interrogatories to be put to deft. as to the circumstances of the alleged settlement. The ct. allowed similar interrogatories in a similar action by the exors. of a deceased person, in which a similar plea had been pleaded.—*HAWKINS v. CARR, PARSONS v. CARR* (1865), L. R. 1 Q. B. 89; 6 B. & S. 995; 35 L. J. Q. B. 81; 13 L. T. 321; 12 Jur. N. S. 334; 14 W. R. 138; 122 E. R. 1400.

Annotations:—*Consd. Hills v. Wates* (1874), L. R. 9 C. P. 688. *Refd. Baker v. L. & S. W. Ry.* (1867), L. R. 3 Q. B. 91.

—.]—In an action by two exors. against the makers of a promissory note given to the testator defts. pleaded as to part of the claim, payment to the testator in his lifetime:—*Held*: pltfs. might interrogate defts. as to the time & place at which & the circumstances under which the alleged payment took place.—*HILLS v. WATES* (1874), L. R. 9 C. P. 688; 43 L. J. C. P. 380; 31 L. T. 407.

1647. To obtain admission of payment.]—*HELLIER v. ELLIS*, [1884] W. N. 9; Bitt. Rep. in Ch. 72.

L. Recovery of Land.

1648. General rule—In action for ejectment.]—It is no answer to an application for leave to deliver interrogatories to deft., under C. L. P. Act, 1854 (c. 125), s. 51, that the answers to the proposed interrogatories might tend to a forfeiture of the party's estate: the objection must be made to the particular questions, after the party has been sworn. Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture.—*CHESTER v. WORTLEY* (1856), 17 C. B. 410; 25 L. J. C. P. 117; 2 Jur. N. S. 287; 4 W. R. 325; 139 E. R. 1133; *subsequent proceedings*, 18 C. B. 239.

Annotations:—*Folld. Bartlett v. Lewis* (1862), 12 C. B. N. S. 249. *Refd. James v. Barnes* (1856), 17 C. B. 596; *Bickford v. D'Arcy & Beachey* (1866), 35 L. J. Ex. 202; *Lyell v. Kennedy* (1882), 20 Ch. D. 484.

PART IV. SECT. 5, SUB-SECT. 15.—L.

1648 i. General rule—In action for ejectment.]—In an action of ejectment on the title deft. will not, in the absence of special circumstances, be permitted to interrogate pltf. as to the character

or right in which pltf. claims to be entitled to the premises sought to be recovered.—*PROVIDENT ASSURANCE CO. v. MCINERHENY* (1872), 18 W. R. 583.—*IR.*

g. *As to circumstances under which*

possession taken.]—In an action charging defts., as assignees of a lease for rent or for use & occupation, pltf., in exhibiting to defts. an interrogatory inquiring whether he became possessed of the lease of the premises under an

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, L. & M.]

1649. As to plaintiff's title.]—*Sect. 51 of C. L. P. Act, 1854 (c. 125), which enables the parties to a cause to deliver interrogatories upon any matter as to which discovery may be sought, applies to actions of ejectment. Under that sect. a deft. in ejectment is entitled to interrogate pltf. as to the character in which he sues & the nature of the pedigree on which he relies.—FLINTCROFT v. FLETCHER (1856), 11 Exch. 543; 25 L. J. Ex. 94; 26 L. T. O. S. 227; 2 Jur. N. S. 191; 156 E. R. 946; sub nom. FLINTCROFT v. FLETCHER, 4 W. R. 263.*

Annotations:—Expld. & Distd. Edwards v. Wakefield (1856), 6 H. & B. 462. Consd. Ingilby v. Shafto (1863), 33 Beav. 31. Expld. & N.F. Stote v. Rew (1863), 14 C. B. N. S. 209; Pearson v. Turner (1864), 16 C. B. N. S. 157. Expld. & Distd. Finney v. Forwood (1865), L. R. 1 Exch. 6. Follid. Kettlewell v. Dyson (1868), 9 B. & S. 300. Expld. & Distd. Wallen v. Forrestt (1872), L. R. 7 Q. B. 239. Dbtd. Lyell v. Kennedy (1882), 51 L. J. Ch. 409. Refd. Chester v. Wortley (1856), 17 C. B. 410; Horton v. Bott (1857), 2 H. & N. 249.

1650. —.]—*Pltf. alleged the seisin of his father, for many years before his death, of the premises in question in fee: his death & will in 1822, & possession under that will ever since: that deft. for the first time raised a claim to the premises in 1855, through two persons, named F. & W.: that pltf. could not discover that any person named F. or W. had ever been interested or connected with the premises: deft. was proceeding in ejectment. Pltf. now filed his bill, asking a discovery of the character or right in which, & the person through whom, deft. claimed, & of the nature & particulars of his claim, & how he made out the same:—Held: an injunction ought to be granted until answer.—GARLE v. ROBINSON (1857), 3 Jur. N. S. 633.*

1651. —.]—*Deft. by his interrogatories inquired whether pltf. had in his possession, etc., any deed relating to the lands mentioned in the declaration, & if so required that pltf. should state the number of such deeds & the dates & the parties thereto. Pltf. by his affidavit replied that he had in his possession, etc., divers deeds, etc., relating to the lands mentioned in the declaration but abstained from stating the number or giving the dates or names of the parties thereto, & stated that the interrogatory was immaterial & irrelevant:—Held: he was not bound to give names & dates, the interrogatory was bad & the answer sufficient, & in such cases there is no obligation on the party interrogated to set out in a schedule a list of his title deeds with names & dates.—ADAMS v. LLOYD (1858), 3 H. & N. 351; 27 L. J. Ex. 499; 31 L. T. O. S. 219; 4 Jur. N. S. 590; 6 W. R. 752; 157 E. R. 506; subsequent proceedings, sub nom. LLOYD v. ADAMS, 4 K. & J. 467.*

Annotations:—Refd. Owen v. Nickson (1861), 3 L. T. 737. Mentd. Re Reynolds, Ex p. Reynolds (1882), 20 Ch. D. 294.

1652. —.]—*A deft. in ejectment is not without showing special circumstances entitled to interrogate pltf. under C. L. P. Act, 1854 (c. 125), s. 51, as to the nature of the title upon which he relies: but he will be allowed to do so where he has been long in possession, & is altogether ignorant of the nature of the case he is called upon to meet.*

assignment or will, cannot go on to ask how otherwise they so became possessed.—GRATTAN v. WALL (1868), 16 W. R. 463.—IR.

h. —.]—*In an action by an administratrix for recovery of lands which formerly were in the possession of deceased, deft. was not compelled to answer interrogatories as to the*

circumstances under which he went into possession, the instrument, if any, under which he held, & the character of his possession. If in an action for recovery of land it is alleged that there are peculiar circumstances entitling pltf. to administer interrogatories of such a character as the above, there should be an affidavit setting out the facts relied on.—

—STOATE v. REW (1863), 14 C. B. N. S. 209; 32 L. J. C. P. 160; 11 W. R. 595; 143 E. R. 426.

Annotations:—Apprvd. & Follid. Pearson v. Turner (1864), 16 C. B. N. S. 157. Apld. Wallen v. Forrestt (1872), L. R. 7 Q. B. 239. Refd. Finney v. Forward (1865), L. R. 1 Exch. 6.

1653. —.]—*BETHELL v. CASSON, No. 589, ante.*

1654. —.]—*A deft. in ejectment will only be allowed to deliver interrogatories to pltf. under C. L. P. Act, 1854 (c. 125), s. 51, where his affidavit discloses special circumstances which satisfy the ct. or judge that justice requires it.—PEARSON v. TURNER (1864), 16 C. B. N. S. 157; 33 L. J. C. P. 224; 10 L. T. 461; 10 Jur. N. S. 731; 12 W. R. 801; 143 E. R. 1085.*

Annotations:—Apld. Wallen v. Forrestt (1872), L. R. 7 Q. B. 239. Refd. Finney v. Forward (1865), 14 W. R. 85.

1655. —.]—*In ejectment on the title, the ct. will allow deft. to exhibit interrogatories to pltf. as to the links through which he claims to be heir; & this both at common law & under C. L. P. Act, 1854 (c. 125), s. 51.*

Semble: pltf. will not be allowed to exhibit similar interrogatories to deft.—KETTLEWELL v. DYSON (1868), 9 B. & S. 300; 18 L. T. 285; 16 W. R. 851.

1656. — To show title expired.]—*A tenant withholding possession of demised premises after the termination of his lease, & defending an action of ejectment brought by his lessor will not be allowed to administer interrogatories to pltf. which seek to ascertain the fact that the title of the latter has expired.—WALLEN v. FORRESTT (1872), L. R. 7 Q. B. 239; 41 L. J. Q. B. 96; 26 L. T. 290.*

1657. — Postponed till proof of heirship.]—*CROMWELL v. SWAIL (1885), 1 T. L. R. 474, D. C.*

1658. — Not if inquiry into evidence.]—*In an action by the lay rector of a parish claiming the freehold in the chancel & churchyard against the vicar of the parish & his churchwardens, interrogatories were disallowed which went to inquire into the evidence of pltf.'s title.—GARIAND v. ORAM (1890), 55 J. P. 374; 7 T. L. R. 80, D. C.*

1659. As to defendant's title.]—*MUTLOE v. SMITH (1796), 3 Anst. 709; 145 E. R. 1014.*

1660. —.]—*A pltf. in ejectment, who claims as heir-at-law, has no right, under C. L. P. Act, 1854 (c. 125), s. 51, to interrogate the person in possession of the land as to what his title is.—HORTON v. BOTT (1857), 2 H. & N. 249; 26 L. J. Ex. 267; 29 L. T. O. S. 228; 3 Jur. N. S. 568; 5 W. R. 792; 157 E. R. 104.*

Annotations:—Consd. Kettlewell v. Dyson (1868), 16 W. R. 851. Apprvd. & Distd. Lyell v. Kennedy (1883), 8 App. Cas. 217. Refd. Bayley v. Griffiths (1862), 10 W. R. 798; Stote v. Rew (1863), 14 C. B. N. S. 209.

1661. —.]—*KETTLEWELL v. DYSON, No. 1655, ante.*

1662. — Not to show how title to be proved.]—*Where deft.'s title to a hereditament is in controversy, interrogatories as to the character of his title & the quality of his possession will be allowed, although interrogatories as to the mode in which he proposes to prove his title would be inadmissible.*

Pltf., who was the rector of a parish, claimed in an action for money had & received against the patron of the living, one-half of the rent of the churchyard & of the tithe rent-charge which had

BLEAZBY v. BLEAZBY (1882), 10 L. R. Ir. 60.—IR.

k. To disclose forfeiture of defendant's estate.]—*In an action for the recovery of land, interrogatories delivered for the purpose of discovering whether a forfeiture of deft.'s estate has been committed are objectionable, & will be struck out on the application*

been received by the patron since pltf.'s induction. Deft. having pleaded a title by prescription, & also, as to the rent-charge, an agreement under Tithe Act, 1836 (c. 71), whereby it was agreed that the tithes should be commuted, & that the substituted rent-charge should be received in equal shares by the then rector & himself, pltf. was permitted to administer interrogatories as to the period for which deft. & his predecessors had received the rent & tithes, or tithe rent-charge, & as to the circumstances under which they had so received them.—*TOWNE v. COCKS* (1874), L. R. 9 Exch. 45; 43 L. J. Ex. 41.

Annotation.—*Reid*. *Garland v. Oram* (1890), 55 J. P. 374.

1663. —.—.]—*LYELL v. KENNEDY*, No. 123, *ante*.

1664. —.— No title claimed by defendant.]—Pltfs. brought an action for an account of coal worked by defts. under certain closes of land, & an injunction to restrain any further working, & by their statement of claim alleged that they were entitled to the minerals under the said closes of land. Defts. denied the title of pltfs., but did not set up any title in themselves. Pltfs. administered interrogatories to one of deft. firm, one of which required him to set forth "under or by what, if any, conveyance, assignment, lease, licence or authority deft. firm claim to be entitled to the coal & minerals underlying the closes in question, giving the dates & names of parties to any such conveyance, assignment or lease, & the names of the person or respective persons from whom they allege that they obtained any such licence or authority, & giving the date of any such licence or authority, & stating whether the same be in writing or not." Deft. objected to answer such interrogatories, whereupon pltfs. applied for & obtained an order for a further answer, but the order did not direct to what extent the answer should go:—*Held*: the order was right.—*CAYLEY v. SANDYCROFT BRICK, TILE & COLLIERY CO.* (1885), 33 W. R. 577.

1665. —.—.]—*HORTON v. DONNINGTON* (LORD) (1886), 2 T. L. R. 739, D. C.

1666. —.— Illegal distress by landlord alleged—By third party.]—*TADMAN v. HENMAN* (1893), 37 Sol. Jo. 478, D. C.

1667. —.— Admissions as to predecessor in title.]—*ABERGAVENNY (MARQUIS) v. PARSONS* (1897), 41 Sol. Jo. 468.

1668. Whether defendant real defendant.]—The claimant in ejectment has a right to interrogate deft. in order to discover whether he be the real deft. or not; & if it appears that he is the nominal deft. only, the claimant has a right to ask who the real deft. is.—*SKETCHLEY v. CONOLLY* (1863), 2 New Rep. 23; 11 W. R. 573.

1669. Power to eject on bona fide intention to build—Interrogatory to test bona fides.]—Deft. held a dry dock & premises of pltf. under a lease, which contained a proviso empowering pltf., if he should be desirous of building on the premises & of closing the dock, "& should bona fide determine so to do," to put an end to the demise by giving notice in the way therein provided for. Pltf., who was himself only a lessee of the premises, having put an end to the demise by giving notice according to this proviso, & brought ejectment, deft. was allowed in such action, with the view of

testing the *bona fides* of pltf.'s intention to build, to interrogate pltf. as to whether he had obtained from his lessors, the freeholders, any licence or authority to close the dry dock & to build thereon.—*WINN v. ROSE* (1867), 36 L. J. C. P. 306.

1670. Document claimed to be privileged in affidavit of documents—To plaintiff's title.]—*NICHOLL v. WHEELER*, No. 1586, *ante*.

1671. Dates & natures of tenancies by which defendants in possession.]—Defts., in their defence to an action of ejectment, stated that they were in possession "by themselves or their tenants." Pltfs. delivered an interrogatory requiring them to give "the names of the tenants referred to in their defence, state the nature of their tenancies, & the dates at which the same were respectively created":—*Held*: the interrogatory did not require defts. to disclose what exclusively related to their own title, & pltfs. were entitled to information as to the dates, but not as to the nature, of the tenancies.—*EYRE v. RODGERS* (1891), 40 W. R. 137; 36 Sol. Jo. 28.

1672. As to acquisition of lands of similar character.]—In an action to recover possession of two strips of land forming part of one continuous strip lying on one side of a road & alleged to be waste within pltfs.' manor, pltfs. intimated that at the trial they intended to show acts of ownership by them over parts of the strip contiguous to & at greater distance from the parts of the strip in dispute in the action. They proposed to interrogate defts. as to facts concerning defts.' acquisition of other parts of the strip not in dispute lying between inclosures of defts. & the road:—*Held*: the interrogatories ought to be allowed, the answers to be admissible when pltfs. had established that they were the owners of the manor, & the whole strip lay within the manor, & was of one continuous character.—*LEEKE v. PORTSMOUTH CORPN.* (1912), 106 L. T. 627; 76 J. P. Jo. 159.

Interrogatories involving forfeiture.]—See Sect. 2, sub-sect. 2, *ante*.

M. Sale of Goods, Business, or Land.

See, generally, SALE OF GOODS.

1673. Whether agent for undisclosed principal.]—Pltf. instructed deft., a broker, to purchase certain goods for him. Deft., accordingly, professing to have bought the goods as a broker, delivered a bought note to pltf.: "Bought by order & for account of T. & Co., pltf., from principal, 102 barrels of raisins, etc." Pltf. paid to deft. the purchase-money, & received from him a delivery warrant for the goods; but, upon pltf.'s presenting it to the wharfingers holding the goods, they refused to deliver them, on the ground that the warrant was fictitious. In an action for money had & received to recover back the money so paid, the ct. allowed pltf. to deliver interrogatories to deft., under O. L. P. Act, 1854 (c. 125), s. 51, requiring him to answer whether he acted in the transaction as principal or agent, & if as agent, to name his principal.—*THÖL v. LEASK* (1855), 10 Exch. 704; 3 C. L. R. 317; 24 L. J. Ex. 142; 24 L. T. O. S. 262; 1 Jur. N. S. 117; 156 E. R. 623.

Annotations.—*Consd.* *Sebright v. Hanbury*, [1916] 2 Ch. 245. *Refd.* *Jones v. Platt* (1861), 30 L. J. Ex. 365.

1674. —.—.]—In an action by vendor against

of the party required to answer.—*BROWNE v. DAVIS* (1878), 2 L. R. Ir. 434.—*IR.*

1. *Matters supporting case of party interrogating—Though resulting in disclosure of opponent's case.*]—In an action to recover possession of land on the title, where the defence of possession

is pleaded, pltf. is entitled to interrogate deft. upon matters tending to support his own case, & is not deprived of that right merely because the discovery has the tendency or effect of disclosing deft.'s case.—*MILLER v. KIRWAN*, [1903] 2 I. R. 118; 36 I. L. T. 236.—*IR.*

PART IV. SECT. 5, SUB-SECT.

m. *Sale of wheat destroyed before delivery—Action by purchaser to ascertain whether property passed—Previous dealings with defendant.*]—Motion by defts. for further & better examination of pltf. for discovery. The action was to determine whether defts., vendors,

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, M., N., O., P. & Q.]

purchaser for specific performance of a contract of sale, pltf. is not entitled to interrogate deft. for the purpose of discovering whether he was acting as agent for an undisclosed principal.—*SEBRIGHT v. HANBURY*, [1916] 2 Ch. 245; 85 L. J. Ch. 748; 115 L. T. 75.

1675. Purchase & sale of horses—Dispute as to course of dealing—Price at which horses sold.]—In an administration action a horsedealer brought a claim against the estate of testator for charges connected with the purchase & sale of horses for testator, & for the standing of horses at livery, for several years. The extrix. disputed the amount charged, & alleged that the horsedealer had sold several horses, as agent for testator, on commission, & asked for discovery of entries in the horsedealer's books relating to the sales. The horsedealer alleged that he had never sold horses on commission as agent for testator, but on the terms that he should pay testator a fixed sum for each horse & sell it again on his own account for what he pleased, retaining the difference, if any, by way of profit; & that this was the custom of all horsedealers of good standing. He declined to disclose the prices at which he had sold the horses as being irrelevant to the issue, namely, what the agreement or course of dealing between himself & testator was:—*Held*: the discovery was irrelevant to the issue: & the ct., in exercise of its discretion under R. S. C., 1875, Order XXXI., rule 19, refused to order discovery to be made except as to the dates of the sales.—*Re LEIGH'S ESTATE, ROWCLIFFE v. LEIGH* (1877), 6 Ch. D. 256; 37 L. T. 557; 25 W. R. 783, C. A. *Annotation*:—*Reid. Dickson v. Harrison* (1878), 47 L. J. Ch. 680.

1676. — Purchase by wife without authority—Date & prices of purchase.]—*SHEWARD v. LONSDALE* (LORD), No. 1453, *ante*.

1677. — Ownership.]—*SHEWARD v. LONSDALE* (LORD), No. 1453, *ante*.

1678. Sale of pictures—Allegation of fraud—Person from whom purchased—& price.]—*ELLIS v. WESTERN* (1877), 41 J. P. Jo. 292, D. C.

1679. —]—*Re LEIGH'S ESTATE, ROWCLIFFE v. LEIGH, LEIGH v. BROOKS*, [1877] W. N. 24.

1680. Goods delivered to company as agent for defendant—Defendant's liability.]—In an action for the price of goods sold & delivered the defence was that the goods were supplied to a limited co. & pltf.s replied that the co. was acting as agent of deft. Pltf.s then applied for leave to interrogate deft. as to whether he had formed the co., whether its purpose was to manage a theatre, whether he owned any of the shares, & whether he had supplied moneys for the purpose of the theatre:—*Held*: (1) the interrogatories ought to be allowed, as they might form a step in establishing deft.'s liability.

(2) The House of Lords will not regard with favour an appeal on a matter of procedure.

(3) It is not necessary that the answers should be conclusive on the question at issue. It is enough that they should have some bearing on the question & that they might form a step in establishing liability (*FINLAY, L.C.*).—*BLAIR v. HAYCOCK CADLE CO.* (1917), 34 T. L. R. 39; 62 Sol. Jo. 68, H. L.

1681. Sale of business—Action to set aside—

or pltf. the purchaser, should bear the loss by fire of certain wheat indicated by defts. to be in a certain elevator, & destroyed before delivery to pltf. On

his examination for discovery pltf. refused to answer any questions as to his former dealings with defts. or with the storage co. It was ordered that

Conduct of business.]—*SMALL v. ATTWOOD*, No. 1487, *ante*.

1682. — Fraudulent representation.]—*BLIGHT v. GOODLIFFE* (1865), 18 O. B. N. S. 757; 144 E. R. 642.

1683. — Monthly receipts.]—In an action for the balance of money due on the sale of a public house, interrogatories were allowed as to the monthly receipts of the business which formed the subject of the alleged agreement.—*BARTHOLOMEW v. RAWLINGS*, [1876] W. N. 56; Bitt. Prac. Cas. 125; 2 Char. Cham. Cas. 56.

1684. Sale of land—As to tenancies.]—A bill for specific performance of a contract to sell to pltf. certain premises & machinery alleged that defts., the vendors, had since the date of the contract let the premises to third parties, & defts. were required by the interrogatories to set out the names of such persons, the particulars of the letting, & an account of the rents of the premises, & also to state whether the plant was not being deteriorated by the user thereof by defts.' tenants. Defts. having refused to give the discovery sought by the interrogatory:—*Held*: on exception to the answer for insufficiency, pltf. was entitled to know to whom the property had been let, & for what term.—*DIXON v. FRASER* (1866), L. R. 2 Eq. 497.

N. Seduction.

See, generally, MASTER & SER.

1685. Means of defendant.]—I. the seduction of pltf.'s daughter as to deft.'s pecuniary means considered to deft.; but interrogatories, deft. had had sexual intercourse with pltf. & had stated that he believed that she had such intercourse with any other man, allowable.—*HODSOLL v. TAYLOR* (1873), L. R. 79; 43 L. J. Q. B. 14; 29 L. T. 534; 22 W.

1686. As to admission by defendant.]—*HODS v. TAYLOR*, No. 1685, *ante*.

1687. Where paternity denied—Not name & address of suggested father.]—*HOOTON v. DALBY*, No. 1421, *ante*.

O Stock Exchange.

1688. Allegation that plaintiff had not acted as agents—Names of persons from whom stocks bought.]—Deft. alleged that he had employed pltf.s as his agents for the sale & purchase of stocks through brokers on the Stock Exchange. They had rendered him weekly accounts, & when the transactions had ceased sued him on a balance of account. Deft. pleaded that pltf.s had not bought & sold stocks as authorised by him, but had themselves speculated in them, & that they had given fictitious accounts of sales & purchases alleged by them to have been made on his behalf. Deft. sought to obtain particulars from them of the dates of the purchases & sales, & the names of the persons to or of whom the shares had been sold or bought by the brokers employed by them on the Stock Exchange, of the amounts paid by them on his behalf, & the mode of payment of such money:—*Held*: the only question between the parties being whether or not pltf.s had acted within the authority given to them by deft., he was not entitled to the particulars for which he asked.—*GENERAL STOCK EXCHANGE v. BETHELL* (1886), 2 T. L. R. 683, D. C.

1689. Allegation of gaming transaction—

he attend & answer the questions in issue.—*INGLIS v. RICHARDSON* (1912), 22 O. W. R. 977; 4 O. W. N. 23; 5 D. L. R. 880.—CAN.

Whether stocks ever in plaintiff's possession.]—UNIVERSAL STOCK EXCHANGE CO. v. CROWTHER (1892), 8 T. L. R. 650, C. A.

Penalty by stockbroker.]—See Nos. 1335–1337, *ante*.

P. Trade Marks.

See, generally, TRADE MARKS.

1690. As to matters common to the trade.]—P. & Co., who were pen manufacturers, brought an action for an injunction to restrain H. & Co., who were also manufacturers of pens, from passing off pens & boxes of their manufacture as pens & boxes of pltf's. Defts. desired to administer a number of interrogatories to pltf's, four of which were interrogatories asking whether the type, shape or pattern of certain specified pens of pltf's, & the boxes in which they were sold, were common to the trade; & what other manufacturers used them, & in particular whether they had sold pens similar in pattern:—*Held*: the interrogatories proposed were admissible with a substitution for the words "similar in pattern" of words making that part of the first interrogatory applicable to pens of the "same" pattern & shape, or only colourably differing therefrom.

Another interrogatory asked whether the labels on the boxes of certain of pltf's pens bore certain specified trade marks now or formerly separately registered by pltf's. This interrogatory was disallowed.—PERRY & CO., LTD. v. HESSIN & CO. (1910), 28 R. P. C. 108.

Q. Trade Secrets.

1691. Trade secrets not privileged from discovery.]—Pltf. complained that deft. had sold, under pltf.'s name, sewing machines which had not been manufactured by him, & he sought a discovery of all the machines sold by deft., the price, the profit, the names of the purchasers & other particulars. Deft. refused to answer, saying that he would thereby disclose the names of his customers & the secrets of his trade:—*Held*: he was bound to answer.—HOWE v. M'KERNAN (1862), 30 Beav. 547; 54 E. R. 1001.

1692. —.]—It is no ground for refusing, in answer to interrogatories, to produce a correspondence which has taken place upon the subject-matter of the action, that the production of such correspondence would disclose the secrets of the trade of the party interrogated.—THE DON FRANCISCO (1862), 1 Lush. 468; 31 L. J. P. M. & A. 205; 6 L. T. 133; 1 Mar. L. C. 203.

1693. Secret process—Existence of secret process denied.]—Pltf. by his bill sought to set aside an agreement, entered into by him with deft., for the purchase of the secret of a process of manufacture, on the ground of fraud, & of deft. possessing no such secret. By the agreement, as stated in the bill, neither of the parties were to divulge the secret. Deft. demurred to such of the interrogatories of the bill as sought a discovery of the nature of the secret, & he answered the remainder of the bill, denying all fraud, & insisting on the existence of the secret process:—*Held*: deft. was bound to discover the nature of the secret.—CARTER v. GOETZE (1838), 2 Keen, 581; 7 L. J. Ch. 276; 2 Jur. 736; 48 E. R. 752.

*Annotation:—*Reid. A.-G. v. Thompson (1849), 8 Hare, 106.

1694. Disclosure of materials used.]—In a suit to restrain the infringement of a patent for making dyes in a particular manner, deft. denied that his process was an infringement, & alleged that his process was secret, & that his trade depended on keeping it secret:—*Held*: he was bound to answer whether he used the materials mentioned in the specification, & whether he used any additional materials.

Semle: he was not bound to disclose the proportions in which he used the specified materials, or what the additional materials were.—RENARD v. LEVINSTEIN (1864), 3 New Rep. 665; 10 L. T. 95.

1695. —.]—In his [deft.'s] answer filed on May 20, 1882, he had declined to answer the 13th interrogatory on the ground that by answering it he would disclose his secret process, but by an order made on Dec. 5, 1882, his objection was overruled & he was required to answer (BAGGALLAY, L.J.).—BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN (1885), as reported in 29 Ch. D. 366, C. A.; *on appeal* (1887), 12 App. Cas. 710, H. L.

*Annotations:—*Mentd. Easterbrook v. G. W. Ry. (1885), 2 R. P. C. 201; Haslam Foundry & Engineering Co. v. Hall (1887), 4 T. L. R. 154; Kurtz v. Spence (1887), 58 L. T. 438; Cole v. Saqui & Lawrence (1888), 40 Ch. D. 132; Edison & Swan United Electric Light Co. v. Holland (1889), 5 T. L. R. 294; Vickers v. Siddell (1890), 7 R. P. C. 292; Lane Fox v. Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; *Re Martindale*, [1894] 3 Ch. 193; Atkins & Applegarth v. Castner-Kellner Alkali Co. (1901), 18 R. P. C. 281; Scott v. Scott, [1913] A. C. 417; Osram Lamp Works v. Popes Electric Lamp Co. (1917), 34 P. R. C. 369.

1696. —.]—In an action for an account against a licensee of pltf.'s process, deft. cannot by denying user & setting up a plea of "secret process" refuse to give pltf. any discovery as to the extent to which either alone or in combination with his own process he has used pltf.'s process, the question of user being material to the issue whether an account is to be given. Therefore in such an action, notwithstanding a denial of user & a plea of secret process, a patentee is entitled to deliver to his licensee & require answers to interrogatories framed specially with reference to his, pltf.'s, specification, taking it step by step, & asking whether & to what extent deft. has used this or that particular process claimed in the specification, & *semle*: also to require him to give the names of some of his customers. But these interrogatories must not be used oppressively so as to compel disclosure of the secret process.—ASHWORTH v. ROBERTS (1890), 45 Ch. D. 623; 60 L. J. Ch. 27; 63 L. T. 160; 39 W. R. 170; 7 R. P. C. 451.

1697. — Discretion of court.]—It is in the discretion of the ct. to compel answers to interrogatories, & to order inspection of documents which might disclose a trade secret.—MISTOVSKI v. MANDLEBERG & CO. (1890), 6 T. L. R. 207, D. C.

1698. — Validity of plaintiff's patent denied.]—In an action for alleged infringement of a patented process, although deft. denies the validity of the patent, he may still be compelled to answer interrogatories as to his own process before the validity of the patent has been established.

It is intended to give the ct. the opportunity of saying that discovery shall not be given before the trial of the action, unless it is wanted for the

PART IV. SECT. 5, SUB-SECT. 15.—Q.

*n. Information obtained by employee in conducting transaction.]—*In an action by a purchaser to set aside an agreement for sale:—*Held*: deft. must answer on examination for discovery certain questions in regard to information obtained by him from

his employee who conducted the transaction with pltf.—BURNS v. HENDERSON, [1918] 1 W. W. R. 885.—CAN.

*o. Business dealings in general.]—*The ct., will, in cases where the defence of wagering is set up, refuse to allow the party setting up this defence to interrogate his opponent generally as

to his business transactions apart from the particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case.—BHAGWANDAS PARASHRAM v. BURJORJI

Sect. 5.—What interrogatories will or will not be allowed: Sub-sect. 15, Q. & R. Sect. 6: Sub-sect. 1.]

purposes of the trial (NORTH, J.).—BENNO JAFFE & DARMSTAEDTER LANOLIN FABRIK v. RICHARDSON & Co. (1893), 62 L. J. Ch. 710; 68 L. T. 404; 41 W. R. 534; 37 Sol. Jo. 404; 3 R. 515; 10 R. P. C. 136.

Annotation:—Distd. Akt. für Autogene Aluminium Schweißung v. London Aluminium Co., [1919] 2 Ch. 67.

1699. — Specific Interrogatory denied—Refusal to disclose process.]—ACT. FÜR ANILIN FABRIKATION IN BERLIN v. LEVINSTEIN, LTD. (1913), 30 R. P. C. 673.

R. Other Cases.

1700. Agency—Whether acting for undisclosed principal.]—THÖL v. LEASK, No. 1673, ante.

1701. — —.]—SEBRIGHT v. HANBURY, No. 1674, ante.

1702. Carriage—Particulars of goods collected over series of years.]—HALL v. LONDON & NORTH WESTERN RY. CO. (1877), 35 L. T. 848.

Copyright.]—See COPYRIGHT, Vol. XIII., p. 226, Nos. 654, 655.

1703. Money-lender—Previous transactions to prove money-lending.]—An action was brought to enforce a charge given by the borrower to secure a loan with interest at 10 per cent upon certain surplus moneys held on his behalf by the trustees of a private Act of Parliament which authorised them to raise a fund for the payment of the borrower's debts existing at the date of the Act. The trustees, who were defts. to the action, raised the defence that pltf. was a money-lender within Money-lenders Act, 1900 (c. 51), & was not registered under that Act:—*Held*: defts. were entitled to administer interrogatories to pltf. as to what, if any, other loans he had transacted during a reasonable period before the loan in question in the action, & on what security & at what rate of interest, & generally as to the circumstances & terms of such loans, as being facts relevant to the issue raised by the defence; but they were not entitled to require pltf. to disclose the names of the borrowers.—NASH v. LAYTON, [1911] 2 Ch. 71; 80 L. J. Ch. 636; 104 L. T. 834, C. A.

Annotations:—Fold. Osram Lamp Works v. Gabriel Lamp Co., [1914] 2 Ch. 129. Rejd. Knapp v. Harvey, [1911] 2 K. B. 725.

1704. Insurance—Dealings with other policies.]—Pltf. being shortly about to go to India, effected with deft. co. a policy of assurance which contained conditions for the payment of extra premiums if the assured went beyond European limits, & for the policy being reinstated within six months after the expiration of the days of grace, upon payment of the premium, with a fine. A special premium was required from pltf. but, as defts. alleged, on account of his bad health, & not as the extra rate for residence in India. Pltf. went to India & paid the premiums regularly for some years, but upon default having been then made in payment of one

of the premiums within the days of grace, defts. refused to reinstate the policy, except on the terms of pltf. paying the extra Indian rate for the whole period from the date when he went to India. Pltf. filed his bill to enforce his claim to have a policy granted him at the rate of premium originally charged, with liberty to reside in India; & he interrogated defts. as to their habit in similar cases, & called upon them to state, as examples of their practice, the particulars of the ten insurances effected by them on lives of persons about to start for India immediately preceding, & of the ten of such insurances immediately subsequent to pltf.'s insurance. Defts. having declined to answer this interrogatory:—*Held*: pltf. was entitled to this discovery as evidence of defts.' conduct.—GIRDLESTONE v. NORTH BRITISH MERCANTILE INSURANCE CO. (1870), L. R. 11 Eq. 197; 40 L. J. Ch. 230; 23 L. T. 392.

1705. Redemption suit—Dates of securities, amount of advance & rate of interest.]—In every bill for redemption & foreclosure it is relevant for pltf. to interrogate deft. as to the dates of his securities, the amount of money which he has actually advanced & the rates of interest reserved.—BEAVAN v. COOK (1869), 20 L. T. 689; 17 W. R. 872.

1706. Trover—Title of plaintiff.]—The rule allowing, in cases of ejectment, interrogatories inquiring into pltf.'s title will not be extended to other actions. In an action of trover for cotton deft. interrogated pltf. how & when he first became possessed of the cotton & when & in whose hands it was when he first became possessed of it. This interrogatory was disallowed. He also interrogated pltf. as to his dealings with the person from whom deft. had obtained the cotton but did not show by his affidavit that any such dealings had taken place or that he had made any inquiries of that person. This was also disallowed.—FINNEY v. FORWOOD (1865), L. R. 1 Exch. 6; 4 H. & C. 33; 35 L. J. Ex. 42; 13 L. T. 296; 11 Jur. N. S. 878; 14 W. R. 85. *Annotations:—Distd. Derby Bank v. Lumsden (1870), L. R. 5 C. P. 107. Rejd. Wallen v. Forrestt (1872), L. R. 7 Q. B. 239.*

1707. —.]—Barley was consigned by A. to B., & was delivered by the shipowners to B. without production of the bill of lading. Pltfs., who were B.'s bankers, as indorsees of the bill of lading from him, three months afterwards, B. having in the meantime become bkpt., brought trover against the shipowners. Upon an affidavit suggesting that the bill of lading was indorsed to pltfs. after the delivery of the barley to B., or that they, having the bill of lading in their possession, knowingly suffered the shipowners to deliver the barley to B.: the ct. allowed interrogatories under C. L. P. Act, 1854 (c. 125), s. 51, to be administered to pltfs. as to the time when & the circumstances under which the indorsement of the bill of lading to them took place.—DERBY BANK v. LUMSDEN (1870), L. R. 5 C. P. 107; 39 L. J. C. P. 72; 21 L. T. 673; 18 W. R. 526.

RUTTONJI (1912), L. R. 37 Bom. —IND.

p. Circulation of newspaper.]—Interrogatories as to the circulation of a well-known newspaper will not be allowed.—GORDON v. NEW ZEALAND TIMES CO., LTD. (1912), 31 N. Z. L. R. 1060.—N.Z.

PART IV. SECT. 5, SUB-SECT. 15.—R.

q. Action to set aside will—As to dealings with estate assets.]—Pltf., in her statement of claim, charged her brother, deft. M., with inducing her father to make a will in her mother's

favour, with the fraudulent design on the part of M., of obtaining the whole estate for himself, & charged that her father was induced to make the will by fraudulent misrepresentations, & that after her father's death M. obtained from her mother a power of attorney to manage the estate, & invested large sums in the purchase of property in his own name & that of his wife, & prayed to have the will set aside. M., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, & dealing with the estate under it, but

denied having used any portion of the estate for his own purposes:—*Held*: although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; & although pltf. was entitled to know generally what dealings deft. had with the estate, & to interrogate him upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part & parcel of the estate, or as to what property came into his hands under the power of attorney,

1708. Trustee—Title of person claiming to be cestui que trust.]—A testator gave real estates to trustees in trust for his son for life, with a gift over if he charged or encumbered them. One of the trustees filed a bill for the administration of the trusts of the will, & afterwards filed a supplemental bill against certain defts. who were in possession of part of the estates, alleging that they claimed under a charge made in their favour by the tenant for life which operated as a forfeiture. Defts. were interrogated as to the particulars of all charges in their favour, if any, of the property of testator. Defts. stated in their answer that they claimed under no charge made by the tenant for life, but under a lease at a rack-rent which he had granted to a lessee, who had mortgaged the lease to them. Pltf. excepted to the answer because defts. did not set forth the date of the lease:—*Held*: pltf., being a trustee, was entitled to know the particulars of those who claimed to be *cestuis que trust*; & the exceptions must therefore be allowed.—*HURST v. HURST* (1874), 9 Ch. App. 762; 44 L. J. Ch. 111; 31 L. T. 264; 22 W. R. 939, L. JJ.

1709. Wrongful dismissal—Acts justifying dismissal.]—*SAUNDERS v. JONES*, No. 1493, *ante*.

1710. Where question of foreign law involved—When allowed.]—An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law.—*PERLAK PETROLEUM MAATSCHAPPIJ v. DEEN*, [1924] 1 K. B. 111; 58 L. Jo. 509; 156 L. T. Jo. 271; 68 Sol. Jo. 81, C. A.

SECT. 6.—APPLICATION FOR LEAVE TO DELIVER INTERROGATORIES.

SUB-SECT. 1.—IN GENERAL.

See, now, R. S. O., Ord. 31, r. 2.

1711. Discretion of judge to allow or disallow—In whole or in part.]—When interrogatories appear to a judge to be framed carelessly, & with too much latitude, so as in reality to throw upon him the trouble of settling them, he is not bound to select the one or two, which he may think proper, & to reject the others only; but in sending the whole of them back to be reformed, he exercises a reasonable discretion with which the ct. will not interfere.—*PHILLIPS v. LEWIN* (1864), 34 L. J. Ex.

should not be permitted.—*MACGREGOR v. McDONALD* (1886), 11 P. R. 386.—CAN.

r. As to assistance from third parties—In prosecution of action.]—On an examination of pltf. for discovery under Rule 379 of King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corps., not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit.—*GIBBINS v. METCALFE* (1903), 14 Man. L. R. 364.—CAN.

s. Action against executor by estate creditor—Plea of plene administravit—As to dealings with testator's assets.]—Where to an action by a simple contract creditor, an exor. has pleaded plene administravit, the ct. will, upon production of the affidavit required by O. L. P. Act, 1858, s. 57, allow interrogatories to be exhibited, requiring particulars & dates of the payments made by him out of the assets of testator.—*PECK v. NOLAN* (1864), 15 Ir. Jur. 417.—IR.

37; *sub nom.* *PHILLIPS v. EMMENS*, 5 New Rep. 248; 11 L. T. 512.

Annotation:—*Consd. Alexandra (Newport) Dock Co. v. Elliot* (1871), 23 L. T. 847.

1712. —.]—If a judge thinks that interrogatories as a whole, or *en bloc*, are vexatious or unreasonable, he may strike out the whole of them without sifting the mass for the purpose of saving those questions which may be reasonable & fit, & he may, if he think proper, allow the party whose interrogatories have been struck out to administer interrogatories again to the opposite party.—*CAWLEY v. BURTON* (1883), 32 W. R. 33.

1713. —.]—*CLARKE v. CLARKE* (1899), 43 Sol. Jo. 719.

1714. —.]—*CODD v. DELAP*, [1906] W. N. 78, C. A.

1715. — Whether interfered with by court of appeal.]—To an action for libel in sending to the *Times* newspaper a libellous extract from a letter, deft. pleaded the general issue & a justification. Upon the usual affidavit, pltf. were allowed to administer to deft. the following interrogatory: "Did you write & send to the *Times*, for publication, a letter signed Z., accompanied by what purported to be an extract from the letter from a Halifax merchant?" Deft. had obtained a commission to Nova Scotia to examine witnesses upon an affidavit which stated that the extract was from a letter which he had received from a person in Nova Scotia with whom he had since communicated, & on whose information, believing the statement to be true, he had pleaded a justification, in support of which it was necessary to examine witnesses in Nova Scotia. This affidavit was not before the judge, but it did not appear whether the facts had or had not been stated to him. On a motion to set aside the order allowing the interrogatory:—*Held*: whether such an interrogatory should be allowed or not was a matter for the discretion of the judge, with which the ct. would not interfere unless he was shown to have been clearly wrong & though some special circumstances should be shown to the judge before he would be justified in allowing such an interrogatory, yet the circumstances in the present case appeared to be sufficiently special, & were, at any rate, not shown not to be so.—*INMAN v. JENKINS* (1870), L. R. 5 C. P. 738; 39 L. J. C. P. 258; 22 L. T. 659; 18 W. R. 897.

Annotation:—*Reid. Bill v. Campbell* (1875), L. R. 10 C. P. 222.

PART IV. SECT. 6, SUB-SECT. 1.

t. Discretion of judge to allow or disallow—How exercised.]—Leave to deliver interrogatories is in the discretion of the Master, & if he considers that they are not necessary for the purpose of disposing fairly of the case, or for saving of costs, & further, that the party has already sufficient knowledge & information to enable him to conduct his case, leave for interrogatories may be refused.—*PICKELS CO. v. PICKUP* (1913), 12 E. L. R. 577.—CAN.

a. Affidavit in support of—By whom made.]—An affidavit in support of a summons to administer interrogatories is not sufficient if made by a clerk of the party's attorney, even though such party be a corporation, the attorney's clerk not being an agent of the corporation within Common Law Procedure Statute, 1865 (No. 274), s. 278.—*DAILY TELEGRAPH NEWSPAPER CO., LTD. v. BERRY* (1879), 5 V. L. R. 343.—AUS.

b. — Requirements.]—The affidavit to ground a motion for liberty to deliver interrogatories, should state the circumstances as to which discovery is sought.—*NAGHTEN v. MID-*

GREAT WESTERN RY. Co. (1859), 8 I. C. L. R. App. 55.—IR.

c. —.]—It is not necessary that all pltf. should join in an affidavit to ground a motion for liberty to administer interrogatories.—*READ v. M'JENNETT* (1872), I. R. 6 C. L. 267.—IR.

d. Rule nisi applied for in first instance.]—In taking out a rule for interrogatories, a rule *nisi* should be taken & not a rule absolute in the first instance.—*CHAMBERS v. HUNTER* (1870), 8 N. S. R. 144.—CAN.

e. Objection to—Want of parties—Whether valid.]—It is not a valid objection to an application for an order to examine a party, & for discovery upon oath of documents in his custody that other parties who might be affected by the discovery, ought to be parties to the action. Parties are entitled, upon an examination for discovery, to examine as fully as they could do in ct.—*BEAVEN v. FELL* (1895), 4 B. C. R. 334.—CAN.

f. Allowed with order for discovery—Action for libel.]—One of two joint defts. in an action for libel wrote a number of libels concerning pltf. & employed the other deft., a bill-poster,

Sect. 6.—Application for leave to deliver interrogatories: Sub-sects. 1 & 2. Sects. 7 & 8: Sub-sect. 1.]

1716. *]*—PEEK v. RAY, No. 1718, *post.*

1717. *]*—Pltf. claimed damages for an alleged libel contained in defts.' newspaper. Defts. pleaded fair comment, & that the alleged libel formed part of a fair & accurate report of a public meeting within Law of Libel Amendment Act, 1888 (c. 64), s. 4; the matter published was of public concern & for the public benefit, & the newspaper was a newspaper within the sect. Pltf. did not deliver a reply alleging express malice. He sought to interrogate defts. as to whether they had been requested to attend the meeting, & whether they had received remuneration for reporting the proceedings. The interrogatories were consistent with pltf. having in fact no information on which to found his interrogatories. The judge at chambers refused to allow the interrogatories:—*Held*: although the interrogatories were not necessarily inadmissible, the ct. would not interfere with the discretion of the judge at chambers.—DAWSON v. DOVER & COUNTY CHRONICLE, LTD. (1913), 108 L. T. 481; 29 T. L. R. 373, C. A.

Annotation:—*Mentd.* Smith v. Lewis (1917), 33 T. L. R. 195.

1718. Appeal by one defendant—From leave to administer interrogatories to co-defendant.]—In a suit relating to the affairs of a partnership, A. & R. were defts. as exors. of a deceased partner W., & R. was also deft. in respect of an interest in the partnership. An order was made in a suit for the administration of W.'s estate, giving A. the conduct of the defence on behalf of W.'s estate. Pltf. exhibited interrogatories for the examination of A. & R., which were laid before the judge, who made some alterations & allowed the interrogatories as altered. A. appealed from the allowance of interrogatories to be administered to R., & also, as regarded himself, appealed against the allowance of the interrogatories as premature:—*Held*: (1) A.'s being appointed to defend the suit on behalf of W.'s estate did not affect pltf.'s right to interrogate B.

(2) The allowance by a judge of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them, but leaves him at liberty to take any objection to answering which he might otherwise have taken.

(3) An appeal from the allowance of interrogatories by a judge will not be allowed unless the judge has gone on a wrong principal or done substantial injustice.—PEEK v. RAY, [1894] 3 Ch. 282; 63 L. J. Ch. 647; 70 L. T. 769; 42 W. R. 498; 38 Sol. Jo. 475; 7 R. 259, C. A.

Annotation:—*As to* (3) *Refd.* Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry., [1913] 3 K. B. 850.

Form of order.]—See R. S. C., Ord. 31, r. 4, Form No. 6, App. B.

to post, publish & circulate them. In an action by pltf. for damages an application was made for an order for discovery & for an order giving leave to administer interrogatories:—*Held*: that in a special case the ct. will grant both orders at the same time.—COONEY v. WILSON & HENDERSON (1913), 47 L. T. 294.—IR.

g. When refused — Tendency of answers to criminate.]—The ct. will refuse to allow interrogatories to be administered when, on the application for them, the party to be interrogated swears that he will refuse to answer on the ground that his answers might tend to criminate him.—HOLMES v. FURNESS (1884), 3 N. Z. L. R. 416.—N.Z.

h. Allowed without terms—Against

plaintiff outside jurisdiction.]—Where a pltf. resident out of the jurisdiction brings an action on a bill of exchange, & defts. obtain leave to defend, leave will be granted to administer interrogatories to pltf. without terms.—LAND & LOAN CO. OF NEW ZEALAND, LTD. v. FULTON (1892), 11 N. Z. L. R. 531.—N.Z.

PART IV. SECT. 6, SUB-SECT. 2.

k. Personal service unnecessary.]—The service of interrogatories on deft. need not be personal. They may be served in the same manner as a bill, when deft. does not enter an appearance.—DERHAM v. KIERNAN (1869), 3 I. R. Eq. 658.—IR.

l. Officers of corporation — Past

1719. Effect of leave to interrogate.]—McILROY v. DUNCAN, [1884] W. N. 48; Bitt. Rep. in Ch. 74. *Annotation*:—*Dbtd.* Oppenheim v. Sheffield, [1893] 1 Q. B. 5.

1720. Duty of master.]—On the hearing of a summons before the chief clerk for leave to deliver interrogatories under R. S. C., Ord. 31, r. 1, he may consider the general relevancy or irrelevancy of the proposed interrogatories, & may, if a copy of the interrogatories is produced to him on the summons, strike out such as are irrelevant; but he is not at liberty to settle or amend, in the way of condensation, the form of any particular interrogatory that is in itself relevant.—SWABEY v. DOVEY (1886), 32 Ch. D. 352; 55 L. J. Ch. 631; 54 L. T. 368; 34 W. R. 510.

Annotation:—*Consd.* Martin v. Spicer (1886), 34 W. R. 589.

1721. —.]—Upon an application for leave to exhibit interrogatories under R. S. C., Ord. 31, r. 1, it is not necessary for appct., nor can he be required, to produce a copy of the proposed interrogatories; & if produced to the Chief Clerk on the hearing of the summons he has no right to settle them, or to decide upon the relevancy or irrelevancy of specific interrogatories & allow or disallow them accordingly. All that is necessary to support the summons is a statement by appct., not necessarily in writing, as to the general nature & scope of the proposed interrogatories, so as to enable the ct. to decide whether he is entitled to the whole or any part of what he asks.—MARTIN v. SPICER (1886), 32 Ch. D. 592; 54 L. T. 598; 34 W. R. 589.

1722. Interrogatories not settled by judge.]—Interrogatories should only be struck out when objectionable or oppressive. The mere fact that interrogatories are open to criticism is not a reason for striking them out. It is not the business of the judge to settle the interrogatories (LINDLEY, J.).—WINTERS v. DABBS (1876), Bitt. Prac. Cas. 96; 2 Char. Cham. Cas. 54.

1723. —.]—TYE v. WILLOUGHBY (1894), 38 Sol. Jo. 338.

SUB-SECT. 2.—SERVICE OF NOTICE OF APPLICATION OR ORDER.

See, now, R. S. C., Ord. 31, r. 2.

1724. Personal service unnecessary—Service at solicitor's office.]—*Held*: Delivery of a copy of the interrogatories to a bill by leaving it at the office of deft.'s solr., without being served on the solr. personally, was sufficient under 15 & 16 Vict., c. 86, s. 12.—BOWEN v. PRICE (1852), 2 De G. M. & G. 899; 22 L. J. Ch. 179; 20 L. T. O. S. 174; 42 E. R. 1124, L. JJ.

1725. —.]—An order upon a party in a suit to answer interrogatories need not be personally served.—LITTLE v. ROBERTS (1874), 30 L. T. 367.

officers—Personal service necessary.]—A summons for the examination for discovery of past & present officers of a body corporate, must be served personally on all past officers.—HOBBS v.

m. Imperfect service—Effect of.]—It is not sufficient service of an appointment on the solr. of a party to be examined for discovery under Queen's Bench Act, 1895, to push it under the door of his office in his temporary absence, when it first comes to his notice on his return to his office within 48 hours of the time set for the examination, & the party in such case will be excused for not attending in obedience to a subpoena served upon him for

1726. Service of solicitor.]—Service of an order to answer interrogatories upon the solr. of a party is, under R. S. C., Ord. 31, r. 21, sufficient service to found an application for attachment. So held where the party in default had in fact notice of the order.—*Re MULCASTER, DALSTON v. NANSON* (1878), 47 L. J. Ch. 609; 26 W. R. 434.

1727. Service out of jurisdiction—With writ.]—Where an order directed service of copy, bill, & interrogatories upon a deft. "in Scotland or elsewhere, out of the jurisdiction," & deft. was duly served in Scotland, the ct. refused to discharge the order, but, on account of the irregularity, made no order as to costs.

Where the subject-matter of a suit was shares in an English joint-stock co., the ct. refused to discharge an order directing service of copy, bill, & interrogatories upon a sole deft. resident out of the jurisdiction.—*PHOSPHO GUANO Co., LTD. v. GUILD* (1874), L. R. 17 Eq. 432; 43 L. J. Ch. 360; 30 L. T. 117; 22 W. R. 526.

1728. ———.]—*YOUNG v. BRASSEY* (1875), 1 Ch. D. 277; 45 L. J. Ch. 142; 24 W. R. 110; 1 Char. Pr. Cas. 88.

Annotation:—Mentd. Stigand v. Stigand (1882), 19 Ch. D. 460.

1729. Application to interrogate member of

such examination.—*UNGER v. LONG* (1899), 12 Man. L. R. 454.—CAN.

n. ——— Service on solicitor.]—Pltf.'s solr., desiring to examine deft. for discovery, served upon his solr. a copy of the examiner's appointment, & upon deft. failing to attend, obtained an order directing deft. to attend for examination at his own expense.—*Held: service of a copy only of the appointment was not sufficient, without service also of a subpoena on deft. personally.—FOLEY v. BUCHANAN* (1908), 18 Man. L. R. 296.—CAN.

o. ——— Waiver of objection.]—Service of interrogatories upon deft.'s solr. before he has entered an appearance is invalid; but where appearance was afterwards entered, & deft. took subsequent steps to extend the time for filing his answer the ct. declared that the service should be deemed good.—*SANKEY v. ALEXANDER* (1873), 7 I. R. Eq. 407.—IR.

p. Service out of jurisdiction.]—An appointment was made *ex p.* by the master at Ottawa, for the examination of deft. at his office in Ottawa. A copy of the appointment & of a subpoena was served on defts. who resided in Hull, Que., & a copy of the appointment was served on deft.'s solr.—*Held: the proceedings were regular.—BANK OF BRITISH NORTH AMERICA v. EDDY* (1882), 9 P. R. 396.—CAN.

q. Party residing out of jurisdiction—Temporarily within jurisdiction—Procedure.]—A party resident out of the jurisdiction cannot be examined for discovery in an action unless by means of a special order made under rule 477 of the rules of 1897; & if served, pursuant to rules 439 & 445, while temporarily in the jurisdiction, with an appointment & subpoena for his examination, cannot be compelled to attend thereon.—*CONNOLLY v. DOWD* (1898), 18 P. R. 38.—CAN.

r. ———.]—Where a deft. resides out of Ontario, & is only in it for temporary purpose, his attendance to be examined for discovery can only be obtained, under rule 477, by a Judge's order upon notice, & not by appointment under rule 443.—*Cox v. PRIOR* (1899), 18 P. R. 492.—CAN.

served upon C., vice-president of deft. co., who was temporarily in the province of Manitoba at the time of the service,

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defendant corporation — Notice to member.] — *CHADDOCK v. BRITISH SOUTH AFRICA Co.*, No. 1375, *ante*.

SECT. 7.—DELIVERY OF MORE THAN ONE SET OF INTERROGATORIES.

See R. S. C., Ord. 31, r. 1.

1730. May be administered by leave—If answers to first set unsatisfactory.]—*LYELL v. KENNEDY*, No. 384, *ante*.

1731. ——— First set refused.]—It is perfectly competent to pltf. to make an application in chambers for leave to deliver new interrogatories, notwithstanding the refusal of the existing interrogatories (*KEKEWICH, J.*).—*BOAKE v. STEVENSON*, [1895] 1 Ch. 358; 64 L. J. Ch. 261; 71 L. T. 722; 43 W. R. 189; 13 R. 171.

SECT. 8.—THE ANSWER.

SUB-SECT. 1.—EXTENT OF DUTY TO ANSWER.

See, now, R. S. C., Ord. 31, rr. 8, 9.

1732. Answer according to knowledge, information, & belief.]—It is not a sufficient answer for a

sufficient to satisfy the ct. that such is in the interests of justice. Where pleadings were amended raising new issues, an order for such second examination was made, limited to such new issues.—*GRAHAM v. SHANNON*, [1919] 2 W. W. R. 30.—CAN.

d. ——— Action of slander—After pleading—On special grounds.]—In actions of slander when the ct. is satisfied of the *bona fides* of pltf., & is convinced that he cannot state fully & with sufficient particularity his various grounds of complaint, & when the knowledge required is within the possession & control of deft. an examination for discovery before statement of claim will be ordered, but in such case a further examination after pleading will not be allowed except upon special grounds.—*CAMPBELL v. SCOTT* (1891), 14 P. R. 203.—CAN.

e. ——— In a proper case.]—If a new interrogatory appear to be proper & not contained in the interrogatories already exhibited, such new interrogatory will be allowed.—*MAXWELL v. BOND* (1743), 2 How. E. R. 616.—IR.

f. ———.]—The ct. will, when necessary, allow pltf. to deliver further interrogatories in addition to those delivered with the summons & plaint.—*THOMPSON v. WYNNE* (1867), 1 R. 1 C. L. 600.—IR.

g. As to documents—Whether allowed if affidavit of documents sufficient.]—Further interrogatories as to documents will not be allowed when a sufficient affidavit of documents has been already made.—*CUMING v. BAILEY* (1895), 30 I. L. T. 11.—IR.

PART IV. SECT. 8, SUB-SECT. 1.

h. General rule.]—In answering interrogatories deft. must confess, or traverse the substance of each charge in the bill. Particular charges must be answered particularly & precisely, & not in a general manner.

Where deft. is interrogated as to the receipt of particular sums of money, it is not sufficient to refer to an account annexed to his answer, as showing what he had received, unless he states that it is the best account he can give.

If he states that an account annexed to his answer contains all the information he is able to give on a particular question, it is sufficient; though it was his duty to have kept a more particular account.

but resided in California a subpoena & appointment requiring him to attend for examination for discovery:—*Held: the service of the appointment & subpoena, under Rule 389, was not the proper procedure; what was required was an order under Rule 425, as amended; & deft. co. could not be penalised because C. had failed to attend.—MACDONALD v. DOMESTIC UTILITIES MANUFACTURING Co.* (1913), 23 W. L. R. 268; 4 W. W. R. 121, 841; 10 D. L. R. 429; 11 D. L. R. 812; 23 Man. L. R. 512.—CAN.

t. ———.]—Pltf. obtained an appointment from the local Registrar at Regina for the examination of deft. at Regina, & served it upon deft. at a place in Saskatchewan, in the judicial district of Melville, & nearer to Melville than to Regina:—*Held: if deft. resided in British Columbia, & was only temporarily in Saskatchewan, his attendance for examination could be obtained only by an order under Rule 285; & if he resided in Saskatchewan, the provisions of Rule 283 must be complied with—that is, he must be examined at the office of the Local Registrar nearest to the place where he resided, unless special reasons were shown to the contrary; & hence, on the supposition that he lived in or near where he was served, the appointment for his examination at Regina was improper, & he was not in default for not attending thereon.—DICKSON v. GIBBONS* (1914), 27 W. L. R. 731.—CAN.

a. Who entitled to notice.]—Notice of examination for discovery should be given to all parties adverse in interest to the party to be examined, so that they may be present upon the examination.—*GRAYDON v. GRAYDON* (1921), 67 D. L. R. 116; 51 O. L. R. 301.—CAN.

PART IV. SECT. 7.

b. May be administered by leave—After amendment of pleadings.]—Where a party, after being examined for discovery, materially amends his pleading so as to raise a new issue, he may be ordered to be examined again.—*BANK OF MONTREAL v. MAJOR & ELDRIDGE* (1896), 5 B. C. R. 181.—CAN.

c. ——— On special grounds.]—It is a proper practice to allow a second examination of a party liable to examination for discovery where special circumstances are shown

Sect. 8.—The answer: Sub-sect. 1.]

deft. to say, "that he has heard & believes it may be true, but he does not of his own knowledge know, etc."—*AGAR v. BECTIVE* (1823), 1 L. J. O. S. Ch. 132.

1733. — Party stranger to matters interrogated to.]—An answer as to matters to which deft. was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to, & could not form any belief respecting them, is sufficient.—*AMHURST v. KING* (1825), 2 Sim. & St. 183; 3 L. J. O. S. Ch. 90; 57 E. R. 315.

1734. —.]—There is no rule, that a deft. must answer affirmatively or negatively his own recent facts. All that the ct. can do, is to compel a deft. to afford such a discovery as he swears he is able to give.—*NELSON v. PONSFORD* (1841), 4 Beav. 41; 5 Jur. 332; 49 E. R. 252.

1735. —.]—Where pltf's. in a suit moved for leave to deliver interrogatories to deft. which, *inter alia*, inquired whether any & what documents relating to the suit were in the possession of deft., the application being founded on an affidavit by pltf's. & their proctor which stated their belief that material benefit in the suit would be derived from the discovery they sought, & that they had

Deft. is bound to answer an interrogatory if it is pertinent to the case made by the bill, though it is not founded on any specific charge in the bill; & *Semble*: he should answer an interrogatory whether it is material or not.

Deft., filling the offices of trustee & executor, is bound to answer an interrogatory, whether his accounts distinguish the receipts & charges as trustee from those as executor. It is not sufficient to refer pltf. to the accounts.

Deft. is bound to answer as to his own transactions, & if necessary, to obtain information to enable him to do so; but he is not bound to seek information as to transactions not his own, & of matters equally accessible to the pltf.

As a general rule, if deft. professes to answer, he must do so fully; & he cannot protect himself from the consequences of an insufficient answer by objecting that the interrogatory is not warranted by the bill, or that the pltf. has no equity.

An answer which states a conclusion of law is sufficient.

When an answer denies or ignores a matter inquired after, it must be as to the deft.'s knowledge, information or belief.

Defendant may be interrogated as to the contents of writings, decrees, etc.

Where the discovery would be material to the case made & the relief prayed by the bill, a deft. may be interrogated as to the amount of his property, & his ability to pay; but he is not bound to answer a mere hypothetical interrogatory.—*HENDRICKS v. HALLETT* (1867), 1 Han. 185.—CAN.

1732 i. *Answer according to knowledge, information and belief.*—In an action for breach of contract to deliver timber, pltf's. administered interrogatories to deft. a timber merchant & importer who employed many persons, who might have knowledge of the matters interrogated which deft. himself might not possess:—*Held*: in the circumstances, in addition to stating that the interrogatories were answered to the best of his knowledge, information, & belief, deft. should also state that they were answered after proper inquiries had been made from his servants & agents.—*ORMOND v. GUNNEISEN* (1920),

V. L. R. 402.—AUS.

1732 ii. —.]—It is not sufficient for deft. in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.—*HANNAGHAN v. HANNAGHAN* (1896), 1 N. B. Eq. Rep. 395.—CAN.

1732 iii. —.]—*LAUGHLAN v. PRES-COTT* (1896), 1 N. B. Eq. Rep. 342.—CAN.

1732 iv. —.]—Where a pltf. was properly interrogated as to the existence of a document in a public office, it was held that he was not bound to seek knowledge as to the fact, but that, if he had such knowledge or information or belief upon the subject, he should answer fully as to his knowledge, information & belief.—*SCOTT v. SPROUL* (1900), 2 N. B. Eq. Rep. 81.—CAN.

1732 v. —.]—The bill alleged that testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that pltf. was one of the children, & a beneficiary under the will. Defts., trustees under the will, to interrogatories whether pltf. was not one of the four children of the son mentioned in the will, & living at the date thereof, & beneficially entitled thereunder to some & what interest in the estate, after admitting the will, answered that they did not know that pltf. was one of the children of the son, that she was living at the date of the will, & that she was beneficially entitled to an interest in the estate, although they were so informed & believed:—*Held*: sufficient. Specific information should be given in answers upon facts within the knowledge of the party answering, & the matter should not be left to inference.—*CROSBY v. TAYLOR* (1903), 24 C. L. T. 241; 2 N. B. Eq. Rep. 511.—CAN.

1732 vi. —.]—To an interrogatory to sue out particulars of a claim of debt by deft. C. against deft. co., deft. C. answered that he believed that schedules (which contained the information sought) attached to the answer of deft. co. were true:—*Held*: the interrogatory relating to the matter within deft.'s knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information, & belief, accounting for his inability to swear positively to

good cause of action on the merits, the ct. overruled deft.'s objection that the affidavit contained no statement of pltf.'s belief that some document, to the production of which they were entitled, was in the possession or power of deft., & where, in answer to an interrogatory, deft. replied, "I am personally wholly unacquainted with the facts . . . & am unable to answer from my own knowledge save as hereafter":—*Held*: the answer was insufficient; deft. was bound to answer according to her information or belief.—*THE MINNEHAHA* (1870), L. R. 3 A. & E. 148; 23 L. T. 747; 19 W. R. 304; 3 Mar. L. C. 518.

1736. — Party unable to recollect contents of letter.]—In an action for libel, one of pltf.'s interrogatories required deft. to state whether she had not written & sent letters to a third person making certain defamatory statements of pltf. set out in the interrogatory, or statements to the same purport & effect, & to set out as fully as she could what her statements were. Deft. answered that to the best of her recollection & belief she never wrote any letters making the statements set out in the interrogatory, "or any of those exact statements"; that she did write a letter to the third person, but that she had no copy of it, & was unable to recollect "with exactness" what the

their correctness.—*LODGE v. CALHOUN* (1905), 25 C. L. T. 3.—CAN.

1732 vii. —.]—*BOYNTON v. GIVAN* (1906), 1 E. L. R. 482.—CAN.

1732 viii. —.]—Where defts., in answering interrogatories filed as part of the bill, neglect to state their belief, or, when required to set out a document at length, neglect to do so without assigning a sufficient reason, the answer is insufficient, & exceptions on that ground will be allowed. If, however, the interrogatories relate to matters which are altogether irrelevant, the exceptions will be overruled.—*GOLDEN v. MCGIVERY* (1908), 4 N. B. Eq. Rep. 42; 5 E. L. R. 89.—CAN.

1732 ix. —.]—A deft. who has acted entirely through his solr., & has himself no personal knowledge, must state in his answer, when required to do so, the knowledge that he has of the matters he is interrogated upon, basing his answers upon the information given him by his solr.—*FENETY v. JOHNSTON* (1909), 4 N. B. Eq. Rep. 101; 6 E. L. R. 213.—CAN.

1732 x. —.]—Motion by defts. for further examination of pltf. for discovery:—*Held*: pltf. had disclosed all the facts within his knowledge & that he was bound to ascertain.—*STUART v. BANK OF MONTREAL* (1912), 23 O. W. R. 205; 4 O. W. N. 218; 6 D. L. R. 870.—CAN.

1732 xi. —.]—A party to an action who is examined for discovery may be required to inform himself on all matters material to the issue & to impart such information to the other party.—*BONDAR v. USINOVITCH*, [1918] 1 W. W. R. 557; 11 Sask. L. R. 64.—CAN.

1732 xii. —.]—When a party is interrogated as to his knowledge, information, & belief, an answer as to knowledge & information, but not as to belief, is not sufficient. A general answer to a particular interrogatory is not sufficient.—*REYNOLDS v. BLOOMFIELD* (1858), 8 I. C. L. R. App. 14; 11 Ir. Jur. 31.—IR.

1732 xiii. —.]—An answer in which resp. stated as to his "knowledge" was sufficient although he did not proceed to state as to his "belief" or "information."—*IMPERIAL MERCANTILE CREDIT ASSOCN. v. HUNTINGDON* (1872), 1 R. 6 C. L. 545.—IR.

statements contained in it were:—*Held*: the answer was sufficient.

The rule at common law certainly was that, where a person was asked on interrogatories to verify the contents of an existing written document not in his possession, a demand to see the document before he answered was always allowed. I do not think the Judicature Acts have altered that rule, nor do I think that any law or authority exists by which a person can be compelled to set out his imperfect recollection of a document not produced for his inspection, which is not suggested to be lost or beyond the jurisdiction of the ct. (BOWEN, J.).—*DALRYMPLE v. LESLIE* (1881), 8 Q. B. D. 5; 51 L. J. Q. B. 61; 45 L. T. 478; 30 W. R. 105, D. C.

1737. —.]—*LYELL v. KENNEDY* (No. 2), No. 1849, *post*.

1738. —.]—*FOAKES v. WEBB*, No. 1756, *post*.

1739. —.]—Pltfs., being the owners of several letters patent relating to the manufacture of saccharin, commenced an action for infringement against defts., who denied infringement & the validity of the letters patent. Pltfs., who claimed to be entitled in England to all known processes for making saccharin, delivered interrogatories for the examination of deft., of which the first asked, *inter alia* & in effect, whether deft. had not sold in England certain compounds, & whether the same were manufactured in England, & where, & by whom, & how, & from whom did the deft. obtain the compounds so manufactured in England; whether the same were manufactured abroad, & where, & by whom; whether deft. imported into England the compounds in question, & if so, how & from whom, & if not, how & from whom did deft. obtain the same. The answer by deft. stated that he had sold in England the compounds, that he had no knowledge as to where or by whom the same were manufactured, but he believed on the Continent of Europe; that he had no knowledge as to by whom the same were manufactured, & he declined to state his belief on this point, or from whom he obtained the same. An order was made for a further & better answer. Deft. appealed:—*Held*: under the circumstances the order appealed from ought not to be disturbed.—*SACCHARIN CORPN., LTD. v. HAINES, WARD & CO.* (1898), 15 R. P. C. 344, C. A.

Annotation:—*Refd. Akt. für Autogene Aluminium Schweissung v. London Aluminium Co.*, [1919] 2 Ch. 67.

1740. — Answer affirming belief only.]—In a libel action defts. pleaded justification, & gave particulars containing extracts from a newspaper for which pltf. was responsible. Defts. then administered to pltf. the following interrogatory, "Are not all or some, & which, of the statements of fact contained in such extracts untrue?" Pltf. made answer that "in my firm belief none of the statements of fact contained in the extracts is untrue":—*Held*: as pltf. had affirmed as to one of the three elements of knowledge, information, & belief, without affirming as to all three, defts. were entitled to an order for a further & better answer to the interrogatory.—*DOUGLAS v. MORNING POST, LTD.* (1923), 39 T. L. R. 402, C. A.

1741. All documents must be consulted.]—It is not impertinence to state by amendment of the bill, part of the answer, by way of pretence, & interrogate as to it.

Qu.: whether one of two partners, who has retired from an active concern in the business, can be compelled to look into the partnership accounts, to state the result of them, as to particular transactions, which the acting partner had transacted?

—*SEELEY v. BOEHM & TAYLOR* (1817), 2 Madd. 176; 56 E. R. 300.

1742. — If in power of party to do so.]—A deft. who was examined in the master's office as to the contents of books in which he was jointly interested with other persons, stated, that he was not acquainted with the contents of the books, & that his partners refused to allow him to take copies of or to inspect them. The examination being reported insufficient, & the report being excepted to:—*Held*: deft. was bound to do all he could to obtain the information which was asked for, & as he had not applied personally to inspect or copy the books, his examination was insufficient.—*BUTE (MARQUIS) v. STUART* (1842), 12 L. J. Ch. 140; 7 Jur. 291, L. C.; *subsequent proceedings, sub nom. STUART v. BUTE (LORD)* (1843), 13 Sim. 453; *sub nom. BUTE (MARQUIS) v. STEWART* (1844), 2 L. T. O. S. 494, L. C.; *previous proceedings, sub nom. STUART v. BUTE (LORD)* (1842), 12 Sim. 460.

1743. — —.]—Where a deft. is interrogated as to the contents of the books of a co. in which he is a partner, & the question is one which he is bound to answer if he can, it is no excuse for not answering to say that the books are in the custody of the officer of the co., & that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, & the ct. will, if necessary, give him time for that purpose.—*TAYLOR v. RUNDELL* (1843), 1 Ph. 222; 13 L. J. Ch. 20; 2 L. T. O. S. 115; 7 Jur. 1073; 41 E. R. 616.

Annotations:—*Folld. Butte v. Stuart* (1842), 12 L. J. Ch. 140; *Butte v. Stewart* (1844), 2 L. T. O. S. 494. *Refd. Ellwand v. M'Donnell* (1844), 8 Beav. 14.

1744. —.]—Deft. is bound to make discovery of all matters relating to the suit of which he by himself or through his partners or servants has the means of acquiring information within his power; & it forms no excuse that the information to which he has a legal right is wrongfully withheld; under such circumstances he must take the proper legal means to obtain redress in order that he may be able to make the discovery required.—*BUTE (MARQUIS) v. STEWART* (1844), 2 L. T. O. S. 494, L. C.; *previous proceedings, sub nom. STUART v. BUTE (LORD)* (1843), 13 Sim. 453; *sub nom. BUTE (MARQUIS) v. STUART* (1842), 12 L. J. Ch. 140, L. C.; *sub nom. STUART v. BUTE (LORD)* (1842), 12 Sim. 460.

1745. — —.]—*MERTENS v. HAIGH*, No. 340, *ante*.

1746. — Documents numerous & access afforded to opponents.]—Defts., husband & wife, having answered a bill, seeking the accounts of a business in question in the suit extending over upwards of thirty years, in which pltf. had been a partner with the deft. husband, for the last ten years, an order was made, under which pltf. obtained access to all the documents. Pltf. amended his bill, introducing interrogatories as to minute particulars of the dealings & accounts; defts., by their answer to the amended bill, stated that they had no means of ascertaining the particulars inquired after, except by the books in defts.' possession, which were eighty in number, & the books in the possession of pltf. & deft., which were sixty in number; & alleged that pltf. had had access to all the documents, & that pltf.'s professional accountant had examined them, & made many extracts therefrom; & also that the books were ordinary business books, kept with regular entries; & that, to set forth the accounts as required, would subject defts. to an oppressive amount of labour; & they submitted that they

Sect. 8.—The answer: Sub-sect. 1.]

were not bound to answer such interrogatories in detail. Upon pltf.'s exception to this answer:—*Held*: though the answer was technically insufficient, yet the ct., having regard to the bill & answer, was bound to consider what object pltf. could gain by a more full answer; &, in the absence of an allegation that anything had been fraudulently or erroneously inserted in or omitted from the accounts, the ct. could not see any object to be gained by pltf. by a more full answer, & overruled the exception.—*WHITE v. BARKER* (1852), 5 De G. & Sm. 746; 20 L. T. O. S. 152; 17 Jur. 174; 64 E. R. 1327.

Annotation:—*Apprvd.* *Lockett v. Lockett* (1869), 4 Ch. App. 336.

1747. ———.]—A deft. who, by answer, denies pltf.'s right to an account, but makes admissions sufficient for the purposes of the suit up to decree, cannot be required to give, by answer, further accounts.

A bill was filed by one partner to set aside an agreement under which the partnership had been dissolved, & alleged that the other partner had represented a certain debt to be bad which was not so. The interrogatories asked deft. to set forth what sums he had received in respect of this debt, & also to set out the partnership accounts. Deft., by his answer as to the debt, set forth the particulars as to a patent assigned to him by the debtors, & proceedings connected therewith, & said that he

1748 i. *Information obtainable from agent—Must be disclosed.*]—Under the Saskatchewan rules of ct. the same principles apply to an examination for discovery in aid of execution as to an examination for discovery before trial. The party examined is bound to obtain information, & answer thereon, as to matters done by his agents & servants in the course of their employment or he must show sufficient reason for not doing so. He must, if necessary, examine documents in his possession or power. All documents which he has a right to inspect, provided he can enforce that right, are in his power. But there is no obligation on him to apply for information to persons who are not or have not been his agents, nor to seek information which is equally accessible to both parties, & which is not either in his own possession or knowledge or that of his agents or persons within his control. No order can be made for examination of deft. for discovery on matters on which he swears he is ignorant & where it does not appear that he has the means of acquiring the knowledge. The ct. can give pltf. no more than what deft. swears he is able to give, & it cannot on the question of insufficiency try whether it is true or not.—*BADGER v. TOROSOFF*, [1919] 1 W. W. R. 919.—CAN.

1748 ii. ———.]—*Officer of company.*]—Upon the examination for discovery of an officer of an incorporated co., in an action brought against the co. by a person whose building they supplied with electrical power, to recover damages for injury by fire which he alleged to have been caused by their negligence, the deponent, being asked whether on the date of the fire there was any indication at the power house or deft.'s works that there was any trouble or breakage in the wires on the circuit by which power was supplied to pltf., answered that there were such indications:—*Held*: he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; & if he had not such knowledge, but could obtain it from a servant of defts. who acquired the knowledge in the course of his employment, he was

bound to obtain it so as to enable him to answer the question; & even if the information which the deponent had was obtained for the purpose of enabling counsel to advise, & he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purposes of discovery.—*HARRIS v. TORONTO ELECTRIC LIGHT CO.* (1899), 18 P. R. 285.—CAN.

iii. ———.]—If an officer of a co. on his examination states that he does not know whether or not certain documents exist which, by the rules of the co., should be in existence, he will be ordered to enquire & obtain the information necessary to enable him to answer fully & explicitly.—*BAIN v. CANADIAN PACIFIC RY. CO.* (1905), 15 Man. L. R. 544.—CAN.

1748 iv. ———.]—*Use of memorandum prepared by solicitor.*]—On the examination of an officer of a co. for discovery, it is not competent for him to make use of a memorandum prepared by the co.'s solr. purporting to contain the information asked for, if he knows nothing of the facts otherwise than as stated in the memorandum & has not verified its accuracy, or to refuse to answer proper questions without referring to the memorandum on the ground that he has no personal knowledge of the matters inquired into. It is the duty of the officer in such a case to investigate for himself the original sources of information in the possession or under the control of any officer of the co. & come prepared to answer all relevant questions without the aid of any memorandum unless prepared by himself or, otherwise, under such circumstances that he can pledge his oath to its accuracy.—*FRASER v. CANADIAN PACIFIC RY. CO.* (1906), 4 W. L. R. 525.—CAN.

1748 v. ———.]—*When practice applies.*]—Where the officer of a co. party is orally examined for discovery, the English practice requiring him to inform himself by inquiry from other officers or servants of the co. as to relevant matters not within his knowledge, is not applicable. In British Columbia, there are two distinct modes of obtaining this kind of discovery, namely, by means of written inter-

had received an account of his interest in the patent more than the amount of the debt; & by his answer as to the accounts deft. said that they were very extensive, that pltf. had always access to the books, & that deft. had no means of giving the information sought except by referring to the books, & could only give the particulars required by employing an accountant, & submitted that he ought not to be obliged to set forth the accounts:—*Held*: the answer was sufficient.—*LOCKETT v. LOCKETT* (1869), 4 Ch. App. 336; 38 L. J. Ch. 290; 17 W. R. 476, L. JJ.

Annotations:—*Appld.* *Thompson v. Dunn* (1870), 18 W. R. 334; *Wier v. Tucker* (1872), L. R. 14 Eq. 25.

1748. *Information obtainable from agent—Must be disclosed.*]—The words "knowledge, information, remembrance, & belief," stated at the commencement of an answer, as applying to the whole, will govern the whole answer.

If a bill state a fact, not denied by the answer, by which it appears, that deft. had the means of making an inquiry, he must answer as to his belief, resulting from such inquiry.—*NEATE v. MARLBOROUGH (DUKE)* (1836), 2 Y. & C. Ex. 3; 5 L. J. Ex. Eq. 98; 160 E. R. 288.

Annotation:—*Refd.* *Martineau v. Cox* (1837), 2 Y. & C. Ex. 638.

1749. ———.]—Where defts. were asked to discover the contents of certain minute books of an abandoned railway project, of which they had been managing directors:—*Held*: the refusal of their late secretary to furnish the requisite informa-

rogatories & by oral examination; & the English practice referred to applies only when the procedure by interrogatories is adopted.—*BRYDON JACK v. VANCOUVER PRINTING & PUBLISHING CO.* (1911), 16 W. L. R. 262; 16 B. C. R. 55.—CAN.

—.]—It is duty of the officer of a co. who is examined to prepare himself to make discovery by obtaining information from the other servants or agents of the co. who have personally conducted the transaction in question.—*NICHOLS & SHEPARD CO. v. SKEDANUK* (1912), 22 W. L. R. 114; 6 D. L. R. 115; 5 Alta. L. R. 110.—CAN.

1748 vii. ———.]—Answers by the officer of a corpn. to interrogatories are to be made after full inquiries & investigation as required by the rule in order to save the calling of numerous witnesses, & to save expense at the trial; the answers are really not the answers of the officer but of the corpn., & are, so long as they remain unamended, admissions of fact binding the corpn.—*PYNE v. CANADIAN PACIFIC RY. CO.*, [1917] 3 W. W. R. 836; 28 Man. L. R. 266.—CAN.

1748 viii. ———.]—Notwithstanding that the Rules provide that the examination for discovery of an officer of a co. may be used in evidence against it, it is still the duty of such officer to acquaint himself with the facts in question not within his personal knowledge which are within the personal knowledge of other officers, servants or agents of the co., who have acquired such knowledge in such capacity, & to answer questions thereon, unless he shows it would be unreasonable to require him to do so, as that such servants have left the co.'s employment or it would occasion unreasonable expense or delay.—*GIDDINGS v. CANADIAN NORTHERN RY. CO.*, [1919] 1 W. W. R. 909; [1919] 3 W. W. R. 15.—CAN.

k. *Order made per incuriam.*]—The order giving leave to interrogate was made by consent & directed to one deft. personally & also in his capacity as an officer of the other deft., a limited co. The former deft. was not at the date of the order, or at any material

tion to enable them to answer, was no sufficient excuse for not giving the discovery sought.

Defts. have not done all that is in their power to afford the discovery sought by pltf. They have only to apply to the person who has been their officer, who was the secretary to the co., & he might enable them to give more satisfactory answers. Their letters to that officer appear to have the effect to put him on his guard against communicating the required information. As it is in their power they are bound to put in more satisfactory answers (LORD COTTENHAM, C.).—*LEAHY v. MILTON* (LORD) (1848), 11 L. T. O. S. 391, L. C.

1750. ———.]—If a deft. puts in an answer to an interrogatory, which is acquiesced in by pltf., & the bill is afterwards amended, leaving the interrogatory & the corresponding statement unchanged, but varying an antecedent which alters the meaning of such statement, pltf. is not entitled to a new answer to such interrogatory, unless he specially requires it; but a deft. who acquiesces in the new meaning of the statement by professing to answer it, must do so fully.

An answer may be verbally full, but technically insufficient, as where a deft. sets up his ignorance of facts as to which he has plainly the means of obtaining the information required.

Where the answer of persons engaged in working a coal mine stated that they could not, as to their belief or otherwise, set forth the mode of working:—*Held*: the answer was insufficient; the ct. assuming, that they must have workmen under their control from whom such information might be derived, & which defts. were bound to afford.—*A.-G. v. REES* (1849), 12 Beav. 50; 50 E. R. 979.

Annotations:—*Appld.* *Bolckow v. Fisher* (1882), 10 Q. B. D. 161. *Refd.* *Bridgwater v. De Winton* (1863), 12 W. R. 40; *Rasbotham v. Shropshire Union Rys. & Canal Co.* (1883), 24 Ch. D. 110; *Alliott v. Smith* (1895), 43 W. R. 597. *Mentd.* *Wich v. Parker* (1856), 22 Beav. 59.

1751. ———.]—*SOUTHWARK WATER CO. v. QUICK*, No. 714, *ante*.

1752. ———.]—Unless agent has left employment.]—(1) A party to a cause is not excused from

time, an officer of deft. co.:—*Held*: the order, so far as it directed the former deft. to answer on behalf of deft. co. was made *per incuriam* & he should not be ordered to comply with it.—*WINTERBOTTOM v. VARDON*, [1921] S. A. S. R. 364.—*AUS*.

l. *Party interrogated in custody.*]—The answers of a deft. in custody to interrogatories by pltf. after an order for the allowance, must not only be full, but satisfactory.—*SANDERSON v. CAMERON* (1839), 1 Ont. Dig. 504.—*CAN*.

m. *Confined to relevant interrogatories.*]—Where some defts. are concerned only in parts of the transactions set forth in the bill, they should only be required to answer such of the interrogatories as relate to those transactions.—*FRYE v. PRESCOTT* (1869), (1825-97) N. B. Dig. 648.—*CAN*.

n. ———.]—Deft. is bound to answer all interrogatories when discovery asked for is material to enable the ct. to determine as to representations made, & whether pltf. is entitled to the relief prayed for.

Deft. is not bound to answer any interrogatories not founded on charges in the bill.—*UNION MUTUAL LIFE INSURANCE CO. v. GILBERT* (1885), 25 N. B. R. 221.—*CAN*.

o. ———.]—The whole machinery of pleadings, particulars & discovery by production of documents & examination of parties, is for the purpose of enabling an action to be fairly & properly tried. Pltf. claimed commissions on insurance effected; deft.

insurance co. pleaded that pltf.'s right to commission was dependent upon his abstaining from acting as agent for any other insurance co.; pltf. replied that the agreement under which he sued was a new one, made at the termination of his agency for deft. co., & that it was intended that the clause precluding him from acting for any other co., which formed part of his former agreement, should be dropped from the new one; & if this was not the construction of the document, he asked reformation; he also said that the alleged breaches of the agreement were brought about by defts. employing detectives to seduce him to violate the agreement:—*Held*: (1) deft. R., managing director of the co., must, upon his examination both as a deft. & as an officer of deft. co., answer proper questions arising out of the correspondence. (2) Defts. should state whether they employed detectives, & whether the persons whom pltf. was said to have canvassed were employed by these detectives, & whether the breaches on which defts. relied were those reported to them by the detectives.—*PEARLMAN v. NATIONAL LIFE ASSURANCE CO.* (1917), 39 O. L. R. 141; 12 O. W. N. 72.—*CAN*.

p. ———.]—Rule 327 entitles a party to examine the other, or the officer of the other if that other be a corpn., "touching the matters in question" in the action. That does not mean that all questions which may be asked at a trial must be

answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment. He is bound to obtain the information from such agents or servants, unless he show that it would be unreasonable to require him to do so, as that either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of detail or the like.

Therefore in an action by cargo owners against the owners of a ship, for a loss alleged to have arisen from negligence in the navigation of such ship by which she ran ashore & was stranded, an answer by defts. to interrogatories as to what was done by those on board with regard to such navigation at the time of the accident, stated in substance that defts. were not on board at the time & had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which pltf. had had inspection:—*Held*: insufficient, as it did not appear that there was any difficulty in defts. obtaining the required information from those who were in charge of the ship at the time of the accident.

(2) Effect of Jud. Acts on mode of procedure discussed (*see* No. 8, *ante*).—*BOLCKOW v. FISHER* (1882), 10 Q. B. D. 161; 52 L. J. Q. B. 12; 47 L. T. 724; 31 W. R. 235; 5 Asp. M. L. C. 20, C. A.

Annotations:—*As to* (1) *Distd.* *Grumbrecht v. Parry* (1883), 49 L. T. 570; *Rasbotham v. Shropshire Union Rys. & Canal Co.* (1883), 24 Ch. D. 110; *L. T. & S. Ry. v. Kirk & Randall* (1884), 51 L. T. 599. *Consd.* *Alliott v. Smith*, [1895] 2 Ch. 111. *Distd.* *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1. *Refd.* *Vivian v. Little* (1883), 11 Q. B. D. 370. *As to* (2) *Refd.* *Grumbrecht v. Parry* (1883), 49 L. T. 570; *Rasbotham v. Shropshire Union Rys. & Canal Co.* (1883), 24 Ch. D. 110; *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1. *Generally*, *Mentd.* *Wells v. Smith*, [1914] 3 K. B. 722.

1753. ———.]—In an action against a tramway co. for negligence, interrogatories were administered to defts. asking, *inter alia*, whether

answered upon the examination for discovery.—*HAMILTON v. QUAKER OATS CO.* (1920), 46 O. L. R. 309.—*CAN*.

q. ———.]—The bill stated that deft., a stockbroker, had converted old 3½ per cent stock, which he had received as the attorney for pltf., to his own use, & prayed a retransfer. Deft., in answer, said that, on the dissolution of a partnership between him & H. W., & formation of two new establishments for carrying on the business of brokers, he, by the directions of pltf., & other customers of the old firm, transferred to H. W. a large specified sum of like stock, in which was included the stock belonging to pltf. & the other customers of the old firm who were similarly circumstanced. Pltf. amended his bill, stating the defence as a pretence, & interrogated as to the quantity of stock vested in the old firm at the time of the dissolution, & the quantity that belonged to each of the customers of the old firm at that time, & the name of & quantity of stock belonging to each of them, & the name of & quantity of stock belonging to the customers of the old firm who transferred their business to H. W., & the same of those who continued their business with deft.:—*Held*: deft. was bound to answer the interrogatories so far as they related to the old 3½ per cent stock, but not as to other stocks.—*FLANAGAN v. WILLIAMS* (1837), 2 Jo. Ex. Ir. 557.—*IR*.

r. *No cause of action disclosed—When objection invalid.*]—Where a deft.

—*The answer: Sub-sect. 2.*

such bill of exchange for £367 as in the bill mentioned, a charge, that deft. drew & gave to the payee, or to H., to be by him indorsed, a certain bill of exchange or promissory note in the name of the firm, for the sum of £367, will justify the qualification of the answer to the question, & such an exception was determined not to be a material or valid exception, on opening which an injunction ought to be awarded.

The test of the materiality of an exception is, to ascertain whether, if the answer excepted to should admit or deny the interrogatory, it would assist pltf.'s equity, or advance his claim to the relief sought by his bill.—*BALLY v. KENRICK & JAMES* (1824), 13 Price, 291; 147 E. R. 994.

Annotation:—Consd. Jodrell v. Slaney (1847), 16 L. J. Ch. 195.

1767. — — —.]—Ord. 38, of Aug. 1841, enabling a deft. by answer to decline answering any interrogatory, from answering which he might have protected himself by demurrer, applies as well where the demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only.

Under Ord. 74 of Apr. 1828, the master does not, on the ground of immateriality, overrule exceptions for insufficiency, unless it is clear that the question cannot be material. If the materiality be doubtful, the case is not within the order.

Construction of an answer, containing a general denial of the facts charged in the terms of the charge, with a saving so far as the other statements in the answer admits or explains them.

If deft. will simply answer in the terms of the bill, he avoids all difficulty on the subject; but, if instead of doing so, he gives an answer which is not precise with reference to all the matters on which he is interrogated, & then endeavours to shelter himself under a general denial, coupled with the words "except as aforesaid," or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not. The rule, since I have known the practice of the ct., has been, that wherever deft. denies the bill to be true, "except as aforesaid," or "except as appears by the other parts of the answer," if there be not found on the answer a clear & sufficient statement, which, to a reasonable extent, meets the whole case, the answer is deemed to be evasive (*SHADWELL, V.-C.*).—*TIPPING v. CLARKE* (1843), 2 Hare, 383; 67 E. R. 157.

Annotations:—Consd. Kaye v. Wall (1845), 4 Hare, 283. *Reid. Drake v. Drake* (1843), 2 Hare, 647; *Ashworth v. Roberts* (1890), 45 Ch. D. 623. *Mentd. Albert (Prince) v. Strange* (1849), 1 H. & Tw. 1; *Morison v. Moat* (1851), 9 Hare, 241; *Marshall v. Watson* (1858), 25 Beav. 501; *Merryweather v. Moore*, [1892] 2 Ch. 518; *Robb v. Green* (1895), 64 L. J. Q. B. 593; *Ashburton v. Pape*, [1913] 2 Ch. 469; *Alpertou Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377.

1768. — — —.]—Where it was objected that the answer to an interrogatory stated the defence to the action as well as a reply to the interrogatory, still as the latter part of the answer was a qualification of the former part, the whole was allowed to

stand.—*ANON.* (1876), Bitt. Prac. Cas. 112; 2 Ohar. Oham. Cas. 62.

1769. — — —.]—*Prolix explanation.*—Where an interrogatory setting out a certain letter asking whether the party interrogated had written such a letter or one to the same purport & effect at any time to any person was answered by ninety folios of matter giving the whole circumstances of the case:—*Held:* such an answer was irrelevant & embarrassing, although a reasonable & legitimate explanation of an interrogatory is relevant.—*LYELL v. KENNEDY* (No. 4) (1884), 33 W. R. 44, D. C.

1770. — — —.]—*RICHARDS v. CRAWSHAY* (1892), 8 T. L. R. 446, D. C.

1771. — — —.]—Exceptions allowed on the ground of the answer being too general, & not sufficiently meeting the interrogatory in terms, & to its full extent.

An interrogatory, enquiring whether there were not a *bonâ fide* consideration, & if not, what was the consideration:—*Held:* it would be sufficiently answered by a denial that there had been a *bonâ fide* consideration, the law recognising no other consideration.

The ct. refused to allow deft. costs, in a case where only four out of 35 exceptions taken were allowed, five only having been argued & one of those overruled.—*DANIEL v. BISHOP* (1824), 13 Price, 15; 147 E. R. 906.

1772. — — —.]—*Immaterial variations.*—Generally considered, what is material is not impertinent. Therefore, an examination, setting out material accounts clearly, & conveniently, is not rendered impertinent by varying from the strict course pointed out by the interrogatories, nor by introducing three columns of figures, so as to occasion blank columns in the office copy, although blank columns are an abuse.

In a suit to redeem, cost of exceptions allowed to a report of impertinence in an examination put in by defts., to be costs in the cause.—*BALLY v. WILLIAMS* (1825), M'Cle. & Yo. 334; 148 E. R. 441.

1773. — — —.]—An information filed for the purpose of ascertaining boundaries & recovering a rent alleged to be due to the Crown out of lands belonging to deft., contained a general charge, that deft. had in his possession divers deeds, etc. relating to the "lands & rents," whereby the truth of the allegations in the information would appear. Dft., by his answer, denied that he had any deeds mentioning or relating to the rent, & in answer to the general charge, denied that he had any deeds, etc. relating to the "lands & rent," or whereby the truth, etc. would appear:—*Held:* the answer was insufficient.

Qu.: whether upon an information or bill of this nature, deft. would or would not be compelled to produce all deeds relating to the lands, though not expressly relating to or mentioning the rent, the object of pltf. being to ascertain the identity of the lands.—*A.-G. v. DINORBEN (LORD)* (1838), 2 Jur. 129.

1774. — — —.]—A bill alleged that deft. had received certain sums from B. on behalf of pltf., &

PART IV. SECT. 8, SUB-SECT. 2.

1773 i. *Answer must be specific.*—Dft. was asked in an interrogatory delivered by pltf., whether he had not sent the originals of copy notices marked A, B, etc., which were attached to the interrogatory. The interrogatory stated that the originals could be inspected at the office of pltf.'s solr. Dft. answered "The originals of which the documents marked A, B, etc., purport to be copies" were so

sent:—*Held:* pltf. was entitled to a further answer not describing the copies as "purporting" to be copies. A Judge has no power to strike out, on summons, superfluous matter from an answer to an interrogatory.—*KING v. COMMERCIAL BANK* (1920), V. L. R. 218.—AUS.

1773 ii. — — —.]—An answer to an interrogatory must be in plain & positive language, & clear in meaning, so that it may be safely put in evidence.—

SCOTT v. SPROUL (1900), 2 N. B. Eq. Rep. 81.—CAN.

1773 iii. — — —.]—In an action against a surviving trustee & exors. of a deceased trustee for alleged breaches of trust, the exors. pleaded *plene administravit*, & pltf. having thereupon administered interrogatories, seeking for particulars of testator's real & personal estate, & their administration of it, the exors.' answer was merely a repetition of their defence:—*Held:*

asked whether deft. did not, in fact, receive them, & whether on pltf.'s behalf, etc. The answer denied that deft. had received these sums on behalf of pltf.:—*Held*: it was insufficient.

Where particular facts are alleged & there are sifting inquiries founded on them, a general denial is sufficient.

Where a bill alleges specific payments to deft. by specific persons, at specific times, & the interrogatory asks generally, whether such or some other & what payments were not made, to deft., by such or some other & what persons, at such or some other & what times, the ct. will not enforce a discovery of all payments, by all persons, at all times, but will confine the discovery within reasonable limits.—*JODRELL v. SLANEY* (1847), 10 Beav. 225; 16 L. J. Ch. 195; 9 L. T. O. S. 49; 11 Jur. 530; 50 E. R. 569.

1775. —.]—Exceptions for insufficiency will be overruled, if they vary, in a material particular, from the form of the interrogatory, as where the interrogatory is in the present tense & the exception is in the past.

An interrogatory asked whether certain sums had not come to deft.'s hands, & whether he had not applied "the same." Deft. denied that any sums had come to his hands, but did not answer the remainder:—*Held*: the answer was sufficient.

An interrogatory asked whether deft. had not had communication with A. & C. & other persons. The answer admitted communications with A., but denied any with any other persons, omitting the name of C.:—*Held*: being specially interrogated as to C., the general answer was insufficient.—*BRUNSWICK (DUKE) v. CAMBRIDGE (DUKE)* (1849), 12 Beav. 279; 50 E. R. 1068.

1776. —.]—(1) An answer to an interrogatory, whether A. did not know that B. was at a time specified utterly or to some & what extent insolvent, stated that A. did not know that B. was at the time specified utterly insolvent, or insolvent to the extent beyond what he had heard from a third person, but the answer did not say from whom, or what was the precise nature of this communication:—*Held*: the answer was insufficient.

(2) Another interrogatory asked whether A. had not been informed by C. of B.'s insolvency. The answer was, that, except certain false & fraudulent representations, which were not further specified, C. had made no such representation as in the bill mentioned:—*Held*: the answer was in this respect also insufficient.

Semble: (3) an answer since 15 & 16 Vict., c. 86, & the General Orders made pursuant thereon, ought to traverse with accuracy such parts of an interrogatory as are not intended to be admitted, (4) since there are no degrees of insolvency, the words "utterly or to some & what extent insolvent" need not be particularly answered beyond the fact, insolvent or not.—*PATRICK v. BLACKWELL* (1853), 17 Jur. 803.

1777. —.]—Where a married woman's separate property, not the subject of the suit, is sought to be made liable for rents improperly received by her or a trustee for her, & discovery is sought as to the particulars of such separate

property, it is not sufficient that she answers that she has some separate estate:—*Held*: exceptions to such an answer would be allowed.—*WRIGHT v. CHARD* (1857), 5 W. R. 857.

1778. —.]—(1) A father & son were living together. The father being indebted to the son conveyed to him certain freehold lands, for an alleged consideration of £11,000. This transaction was impeached, & a bill filed to set aside the conveyance, on the ground (*inter alia*), of no consideration. Interrogatories were filed requiring deft., the son, to set forth what his resources were from which he had paid the consideration, with the amount & value of the income thereof. Deft. answered that he had private resources, partly his own & partly his wife's, but did not state the amount, or value, or annual income thereof:—*Held*: the answer was insufficient, the question of value being especially material to establish pltf.'s case.

(2) By another interrogatory it was sought to be discovered how, when & where the consideration money had been paid. Deft. answered that £4,000, part of it, was money owing to him by his father, & so in his hands, & the rest he had paid by a cheque on his banker:—*Held*: this answer was insufficient, as not showing how deft. had the £4,000 in the hands of his father at the time, & how he came to have such a balance at his bankers to answer the cheque.—*NEWTON v. DIMES* (1857), 30 L. T. O. S. 30; 3 Jur. N. S. 583.

Annotation:—As to (1) & (2) *Reid. Bridgwater v. De Winton* (1863), 12 W. R. 40.

1779. —.]—Where there is a specific averment an interrogatory founded thereon must be specifically answered. A general denial is not a sufficient answer to a specific charge.

Therefore, where the averment was that land was to be conveyed to one J. & the interrogatory was whether such land was not conveyed to one J. "or to some & what person or persons":—*Held*: an answer, stating conveyances to persons other than J. & adding that, save as therein appeared, the person answering could set forth whether the land in question was or was not conveyed to one J., or to some or what person or persons, was evasive.—*EARP v. LLOYD* (1858), 4 K. & J. 58; 31 L. T. O. S. 391; 70 E. R. 24.

1780. —.]—Answer by general reference to documents.—By the interrogatories of a bill, filed by a foreign merchant against his London agents, debts were asked what were the powers & authorities given to them, & by what documents they made out the same. Defts. stated that the powers & authorities appeared from written correspondence, & that various letters had passed between the parties, to which they referred:—*Held*: the answer was insufficient, & debts were bound to specify the documents containing their powers & authorities.—*INGLESSI v. SPARTALI* (1861), 29 Beav. 564; 54 E. R. 747.

1781. —.]—Where the bill alleges that deft., in the course of a correspondence between himself & others, made certain representations respecting the subject-matter of the suit, & one of the interrogatories requires him to set forth a list of the correspondence, an answer which merely

pltf. entitled to further & more specific answer.—*ST. GEORGE v. ST. GEORGE* (1887), 19 L. R. Ir. 225.—IR.

1. —.]—*What amounts to proof*—Deft. being required to set forth whether a document in pltf.'s possession, purporting to have been signed by the person under whom deft. derived, was correctly stated in the bill:—*Held*: not prolix, to state that

in a book belonging to that person, he found an entry which he believed to be the document referred to in the bill, & to set out a verbatim copy of it in the answer, it differing slightly from the document in the bill.

When deft. is required to set forth a document at length, it is not impertinent to set forth merely an abstract of it.

When the answer set forth a verbatim copy of a letter of pltf. to deft., which was not called for by the bill, nor stated in the answer to be evidence of any fact stated therein as part of deft.'s case:—*Held*: it was prolix & impertinent, though the latter might be material.

An interrogatory called for accounts. Setting out very minute accounts:—

Sect. 8.—The answer: Sub-sects. 2 & 3.]

states that the correspondence contained no such representation, is insufficient.—*RISHTON v. GRISSEL* (1866), 14 W. R. 578; *subsequent proceedings*, 14 W. R. 789.

Annotation:—Refd. *Danell v. Page* (1868), 37 L. J. Ch. 681.

1782. —.]—Where pltf., in disputing the right of defts. to certain lands, averred that no act of ownership had been exercised by them until within a recent period, & interrogated them as to the circumstances of their possession & acts of ownership:—*Held*: a mere allegation of acts of ownership from time immemorial, & possession generally, was not a sufficient answer to pltf.'s interrogatories.—*BUTE (MARQUIS) v. LEWIS* (1867), 16 L. T. 82; 15 W. R. 479.

1783. — Answer by reference to previous affidavit.]—In answer to interrogatories a deft. filed an answer in which he referred to certain affidavits sworn & filed by him in the same suit as containing his answer to the interrogatories, but not expressly answering any of the interrogatories:—*Held*: (1) the answer was evasive & must be taken off the file; (2) deft. must pay the costs.—*TURNER v. JACK* (1871), 23 L. T. 800; 19 W. R. 433.

1784. Irrelevant matters excluded.]—Where a schedule to an answer, contained at length a bill of costs & observations with reference to a bill formerly delivered for the same business, & the bill called upon deft. to set forth, how he computed & made out his demand with all the particulars relating thereto, with interrogatories pointed to the particular items & to a minute comparison of the two bills:—*Held*: it was impertinent.—*ALSAGER v. JOHNSON* (1798), 4 Ves. 217; 31 E. R. 112, L. C.

Annotations:—Refd. *Byde v. Masterman* (1841), 10 L. J. Ch. 282. *Mentd.* *Barker v. Birch* (1847), 10 L. T. O. S. 66.

1785. —.]—Where deft., in a schedule to his answer, set forth a great deal of irrelevant & impertinent matter:—*Held*: pltf. was not bound to point out the particular portions of the schedule which were impertinent, but the whole being mixed up with the material parts of the schedule, a general exception ought to be allowed.—*BOYD v. BOYD* (1848), 11 L. T. O. S. 325, L. C.

1786. —.]—C. L. P. Act, 1854 (c. 125), s. 53, directs that in case of omission, without just cause, to answer sufficiently written interrogatories, the judge may direct an oral examination of the interrogated party as to such points as he may direct before the master. A deft. having answered the interrogatories in a voluminous manner, introducing many additional & irrelevant topics to those contained in the interrogatories, the judge made an order directing deft. to appear & answer orally before the master:—*Held*: (1) where the answers contained such an amount of irrelevant matter as to amount to an impertinent excess, the sect. was applicable; (2) the judge need not specifically direct as to what points the master is to examine deft., but a general direction is sufficient.—*PEYTON v. HARTING* (1873), L. R. 9 C. P. 9; 43 L. J. C. P. 10; 29 L. T. 478; 22 W. R. 61.

Annotations:—As to (1) *Apld.* *Furber v. King* (No. 2) (1881), 29 W. R. 536. *Consd.* *Lyell v. Kennedy* (1884), 27 Ch. D. 1.

Held: not to be prolix or impertinent, although they were unnecessary.—*BARRY v. HARRISON* (1839), 2 I. Eq. R. 60; Jo. & Car. 278.—*IR.*

g. Answer "yes" or "no"—Good if not capable of being misunderstood.]—In an action for libel interrogatories were administered to deft. &

were answered simply "Yes" or "No." These answers were not capable of being misunderstood:—*Held*: the answers so framed were good.—*WINTERBOTTOM v. VARDON*, [1921] S. A. S. R. 364.—*AUS.*

1 C. L. Ch. 229.—*CAN.*

1787. —.]—A married woman, living separate from her husband, filed a bill against him in respect of property to her separate use, & interrogated him as to truth of statements in her bill, of their marriage, separation & certain arrangements with regard to her separate property. The interrogatory concluded with the words "or how otherwise." In his answer the husband (*inter alia*) alleged his belief that his wife had been guilty of adultery. He also filed a bill against her, relating to her separate property, in which the same charges were made. The wife excepted for scandal to the allegations respecting her adultery:—*Held*: these allegations were scandalous & must be expunged, as, whether true or not, they were irrelevant to the issues to be decided at the hearing of the causes.—*PEARSE v. PEARSE*, *PEARSE v. PEARSE* (1873), 29 L. T. 453; 22 W. R. 69.

1788. Information must be full.]—In a suit for an account, an answer going no farther than to enable pltf. to go into the master's office is not sufficient. He is entitled to the fullest information defts. can give by the answer, not by long schedules, in an oppressive manner, but giving the best account they can, stating that it is so, referring to books, etc., so as to make them part of the answer, & giving the fullest opportunity of inspection.—*WHITE v. WILLIAMS* (1803), 8 Ves. 193; 32 E. R. 327, L. C.

Annotations:—Consd. *Christian v. Taylor* (1841), 11 Sim. 401. *Expld.* *Drake v. Symes* (1859), John. 647. *Refd.* *Davis v. Cripps* (1843), 2 Y. & C. Ch. Cas. 430. *Mentd.* *Dawson v. Busk* (1817), 2 Madd. 184.

1789. — Unless immaterial to relief sought.]—The rule, that where a deft. submits to answer he must answer fully, does not apply where the matter of discovery is immaterial to the relief sought by the bill.

A pltf. cannot by one bill obtain specific relief, & also a discovery on a matter distinct from that specific relief.

A bill for a receiver, pending a litigation as to probate, ought not to seek discovery in reference to the merits on that litigation.—*WOOD v. HITCHINGS* (1841), 3 Beav. 504; 10 L. J. Ch. 257; 49 E. R. 198.

Annotation:—Consd. *Horlock v. Patch* (1845), 10 Jur. 108.

1790. —.]—Trustees & exors. by their answer in an administration suit, instituted by a residuary legatee under the will of testator in the cause, admitted that testator had, by certain deeds of which they stated the dates, conveyed & assigned part of his property to trustees, but they refused to say to whom or upon what trusts, the property had been conveyed. Upon exceptions to the answer for insufficiency:—*Held*: where defts. had in fact admitted the obligation to give some information, they were bound to give full information as to the deeds, & the answer was insufficient.—*MAJOR v. ARNOTT* (1856), 27 L. T. O. S. 149; 2 Jur. N. S. 387.

1791. — Reference to books must be specific.]—In answer to interrogatories to a bill filed by shareholders in an insurance co. against the directors, requiring defts. to set forth a list of various particulars relating to the business transacted by the co., defts. referred generally to the books of the co., as containing all the information

k. Formal defects.]—The answers of a prisoner being styled in the cause, & intitled in the proper ct., were headed "The answers upon oath of," etc., & proceeded thus: "To the first interrogatory, he saith," etc. 2. To the second interrogatory, & not adding "he saith." To the fifteenth interrogatory only the figures "15" were

(1850),

required. Upon exceptions:—*Held*: the answer was insufficient, it being the duty of defts. to make the reference to the books as easy to plffs. as possible, & refer specifically to the books & portions of books containing the information sought under each particular head of inquiry.—*DRAKE v. SYMES* (1859), John. 647; 29 L. J. Ch. 349; 1 L. T. 186; 6 Jur. N. S. 318; 8 W. R. 85; 70 E. R. 578; *subsequent proceedings* (1860), 2 De G. F. & J. 81, L. JJ.

1792. —.]—(1) Exceptions to answer, in which deft. alleged as a reason for not answering fully that part of the interrogatories were unsupported by corresponding statements in the bill, & were copied from interrogatories in an action at law which deft. had answered, & to which he craved leave to refer:—*Held*: the exceptions would be allowed with costs.

(2) Instead of answering as to documents deft. alleged that he was ready to make a full & complete answer on a summons at chambers, to which plff. excepted:—*Held*: the exceptions would be allowed with costs.—*HUDSON v. GRENFELL* (1861), 3 Giff. 388; 5 L. T. 417; 8 Jur. N. S. 878; 66 E. R. 460.

1793. —.]—A deft. electing to answer is bound to answer fully. Therefore, where an answer set forth a deed which would have proved an effectual bar to plff.'s title, & deft., upon the assumption that this deed was valid, claimed to be relieved from answering interrogatories as to the state of investment of funds, the subject of plff.'s suit:—*Held*: for the purpose of exceptions, no part of an answer could be assumed as true, & plff. was therefore entitled to a full answer.—*SWABEY v. SUTTON* (1863), 1 Hem. & M. 514; 9 L. T. 711; 9 Jur. N. S. 1321; 12 W. R. 124; 71 E. R. 225.

1794. —.]—In answering interrogatories filed by a deft. for the examination of plff. the general rule applied that he who is bound to answer must answer fully. Interrogatories for the examination of plff. are on a different footing from those for the examination of deft. in this respect, that a plff. is not entitled to discovery of deft.'s case but a deft. may ask any question tending to destroy plff.'s claim. In determining whether a question is one of fact, & therefore, to be answered, it makes no difference that it is asked with reference to a written document.

Deft. in a suit for infringement of a patent, in order to prove that there was no novelty in plff.'s patent, interrogated plff. as to the inventions described in the specifications of previous patents, & asked him to show in what respect they differed from his. Plff. declined to answer these interrogatories on the ground that the questions were not questions of fact, & that they related to plff.'s case; deft. excepted to the answer, & the exceptions were allowed.—*HOFFMANN v. POSTILL* (1869), 4 Ch. App. 673; 20 L. T. 893; 17 W. R. 901, L. JJ.

—*Consd. London City Sewers Comrs. v. Glasse* (1873), L. R. 15 Eq. 302; *Bidder v. Bridges* (1885), 29 Ch. D. 29. *Reid. Ashley v. Taylor* (1877), 37 L. T. 522.

prefixed. The *jurat* stated that deponent was sworn, etc., "& made oath that the foregoing answers were true":—*Held*: the forms of the answers & the *jurat* were defective.—*ADDY v. BROUSE* (1850), 1 P. R. 234.—AN.

1. *Doubt whether interrogatory alternative.*—In an action for libel, deft. having pleaded publication on a privileged occasion, plff. administered the following interrogatory: "What information had you when you published

the said words which induced you to believe that the allegations in the said words complained of were true, or what steps (if any) did you take before writing the words to ascertain whether they were true?" Deft. answered the first half of the interrogatory, but refused to answer the second half:—*Held*: the language left in doubt as to whether it was alternative in form, & deft. was entitled to answer it as he had done.—*FITZGERALD v. WATSON*, [1918] 2 I. R. 586.—IR.

1795. —.]—An interrogatory asked whether certain shares did not still remain unsold, & whether they were not still standing in the name of deft., or how otherwise. The answer stated that the shares had been sold & that the certificates of some of them were in the possession of deft., but did not state further as to whose name they were standing in:—*Held*: an exception to the answer for insufficiency would be allowed.—*EASEY v. WEBBER* (1870), 18 W. R. 1064.

1796. *Precise words need not be followed.*—A statement by an exor. that a person took possession of goods of testator "without objection, on his part" is a good answer to an interrogatory whether the person had possession with the exor.'s "privity & consent."—*THOMPSON v. DUNN* (1870), 18 W. R. 334; *reversd.* on other grounds, 5 Ch. App. 573, L. C. & L. J.

Annotations:—*Reid. Newry v. Kilmorey* (1870), 24 L. T. 15; *Re Sutcliffe, Allison v. Allison* (1881), 50 L. J. Ch. 574. *Mentd. Elmor v. Creasy* (1873), 42 L. J. Ch. 807.

1797. *Answer confused—Refusal to file.*—In equity, the test whether the form of sworn discovery be proper is: Can a definite issue for perjury be put to a jury, assuming the answer to be false?

Where an answer is so confused & intricate that no assignment for perjury would lie on it, the ct. will direct the record & writ clerk not to file it.—*WALKER v. DANIELL* (1874), 30 L. T. 357; 22 W. R. 595.

1798. *Formal defects—Amendment in chambers.*—Where a party has substantially answered interrogatories delivered to him, but there are defects or flaws in any of his answers, which render them formally insufficient, but which the ct. has no reason to think were intentional, the proper course is to apply to have them amended at chambers, & a rule for his oral examination will be discharged, & the costs will be made his costs in the cause.—*BENDER v. ZIMMERMAN* (1860), 29 L. J. Ex. 244.

1799. *Printing answer—Dispensed with.*—The ct. would not order a written schedule to a printed answer to be filed, but dispensed with the printing of the answer, including the schedule.—*WEBB v. BORNFORDE* (1876), 46 L. J. Ch. 288; 25 W. R. 251.

See R. S. C., Ord. 31, r. 9.

SUB-SECT. 3.—ANSWER OF A COMPANY OR CORPORATION.

See R. S. C., Ord. 31, r. 5.

1800. *By clerk & member—On oath.*—ANON. (1882), No. 310, *ante*.

1801. *Duty of corporation—To consult all books—Before answer.*—It is the duty of a corpn., when apprised by the information of the nature & extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, & muniments in their possession or power, & to give in their answer all the information derived from

PART IV. SECT. 8, SUB-SECT. 3.

m. Must be by responsible officer.—An affidavit in answer to interrogatories administered to a corpn., if no particular person is indicated in the order, should be sworn either by the general manager or by some other officer of the corpn. who is in a position to obtain & to weigh carefully all the information available with respect to the matters inquired after. Moreover it must be stated specifically

Sect. 8.—The answer: Sub-sects. 3 & 4, A.]

such examination; & if they pursue an opposite course, & in their answer allege their ignorance upon the subject, & the information required is afterwards obtained from the documents scheduled to their answer, the ct. will infer a disposition on the part of the corpn. to obstruct & defeat the course of justice, & on that ground alone will charge them with the costs of the suit.—*A.-G. v. EAST RETFORD CORPN.* (1833), 2 My. & K. 35; 39 E. R. 857; *reversd.* on other grounds (1838), 3 My. & Cr. 484, L. C.

Annotations:—Mentd. *A.-G. v. Newark-upon-Trent Corpn.* (1842), 1 Hare, 305; *Solicitor-General v. Bath Corpn.*, *A.-G. v. Blair* (1849), 18 L. J. Ch. 275; *Mill v. Hawker* (1874), L. R. 9 Exch. 309.

1802. Member must answer if no officer capable of making discovery.]—(1) Where a member of a co. is examined on interrogatories under R. S. C., Ord. 31, r. 4, he cannot refuse to file his affidavit until he has been paid his taxed costs of making it; nor will the ct. make any order as to the payment of his costs separately from the costs of the co.

Semble: (2) An ordinary member of a co. ought not to be examined on interrogatories unless the judge is satisfied that there is no officer of the co. capable of making the discovery, & that the member proposed to be examined has the required information.—*BERKELEY v. STANDARD DISCOUNT CO.* (1879), 13 Ch. D. 97; 49 L. J. Ch. 1; 41 L. T. 374; 28 W. R. 125, C. A.

Annotations:—As to (2) *Consd. Tannetta, Walker v. Newport (Alexandra) Dock Co.* (1890), 6 T. L. R. 325. *Refd. Re Alexandra Palace Co.* (1880), 16 Ch. D. 58; *Chaddock v. British South Africa Co.* (1896), 65 L. J. Q. B. 635.

1803. Officers acting as solicitor—Claim of professional privilege—Option given to answer by another officer.]—Interrogatories, delivered in an action against a corpn. to the town clerk, or other their proper officer, were answered by the town clerk, who objected to give information on the ground that it was derived from communications which had been made to him as solr. in the action, & were therefore privileged:—*Held:* as the corpn. had elected to answer through him, the objection could not be maintained.—*SWANSEA CORPN. v. QUIRK* (1879), 5 C. P. D. 106; 49 L. J. Q. B. 157; 41 L. T. 758; 44 J. P. 378; 28 W. R. 371, D. C.

Annotation:—Distd. *Salford Corpn. v. Lever* (1890), 24 Q. B. D. 695.

1804. ———.]—In an action by a corpn. interrogatories were administered by deft. for the examination of the town clerk, who objected in his answer to answer certain of the interrogatories, on the ground that the information possessed by pltf. or himself had been obtained by him as the solr. for pltf. in the action for the purpose of enabling pltf. to bring &

made, & that the information supplied is given as the result of those inquiries.—*COMMERCIAL BANK OF AUSTRALIA v. WHINFIELD* (1920), V. L. R. 225.—*AUS.*

*n. ———.]—*S. was an agent for the sale of pltf. co.'s machinery on commission, that being a part only of his business; & he canvassed deft. to buy machinery from pltf. co., which deft. did:—*Held:* as Rule 224, as amended in 1902, permits the examination of the officer of a corpn. to be used as evidence in the same way as the examination of a party, it could not be said that S. was such "Officer" as was intended by the Rule.—*NICHOLS & SHEPARD CO. v. SKEDANUK* (1912), 22 W. L. R. 114; 6 D. L. R. 115; 5 Alta. L. R. 110.—*CAN.*

*o. ———.]—*Master refused to order

the examination of T. H., alleged to be the "manager for Canada" of deft. co., a Sheffield, Eng., corporation, on the ground that Con. Rule 1321 conferred a discretion as to the making of an order thereunder, & as a co. was bound by the admissions made upon such an examination, it must be clearly shown that a responsible officer is sought to be examined.—*GROCOCK v. EDGAR ALLEN CO.* (1913), 23 O. W. R. 788; 4 O. W. N. 660; 10 D. L. R. 391.—*CAN.*

*p. Answer of foreign company.]—*The ct. will order a deft. corpn. doing business in Nova Scotia, though incorporated abroad, to answer interrogatories, under 4th R. S., c. 96. The officers of such co. can be interrogated, though not mentioned by name in the commission to interro-

maintain the action:—*Held:* as the corpn. had no option to answer by any officer other than the town clerk, but were compelled to answer through him, the privilege was properly claimed by him on their behalf, & the objection was good.—*SALFORD CORPN. v. LEVER* (1890), 24 Q. B. D. 695; 59 L. J. Q. B. 248; 62 L. T. 434; 54 J. P. 519; 6 T. L. R. 239, D. C.

Privileged communications.]—See Sub-sect. 4, C., *post.*

1805. Officer interested in success of plaintiff—Not ordered to answer for defendant company.]—*MANCHESTER VAL DE TRAVERS PAVING CO. v. SLAGG*, [1882] W. N. 127, C. A.

Annotations:—Refd. *Chaddock v. British South Africa Co.*, [1896] 2 Q. B. 153; *Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co.* (1900), 83 L. T. 58.

1806. Officers' information acquired in course of employment.]—An officer of a co., answering on their behalf interrogatories administered to them in an action, is only bound to answer as to his knowledge acquired in the course of his employment by the co., & as to the result of inquiries made by him of the other officers & agents of the co. with regard to their knowledge acquired in the same way. He is not bound to answer as to his own knowledge, or to make inquiries of the other officers or agents of the co. as to their knowledge, acquired accidentally or in some other capacity.

The answer of an officer of a co. on their behalf, being their answer, can be read against them, & they can only be required to answer as to that with respect of which an individual litigant in their position would have been bound to answer.—*WELSBACH INCANDESCENT GAS LIGHTING CO. v. NEW SUNLIGHT INCANDESCENT CO.*, [1900] 2 Ch. 1; 69 L. J. Ch. 546; 83 L. T. 58; 48 W. R. 595; 44 Sol. Jo. 483, C. A.

Annotation:—Mentd. *Wells v. Smith*, [1914] 3 K. B. 722.

By & against whom interrogatories administered.]—See Sect. 3, *ante.*

Extent of duty to answer.]—See Sub-sect. 1, *ante.*

SUB-SECT. 4.—GROUNDS FOR NOT ANSWERING.

A. In General.

See, now, R. S. C., Ord. 31, r. 1.

1807. Objections taken in answer.]—(1) An order cannot be made under R. S. C., Ord. 31, r. 7, striking out those parts of a set of interrogatories which the judge considers objectionable.

(2) Any objection which the party interrogated may have to answering should be taken in the affidavit in answer.—*SAMMONS v. BAILEY* (1890),

gates.—HART v. WESTERN UNION TELEGRAPH CO. (1877), 2 R. & C. 535.—*CAN.*

*q. Officer to be selected by corporation.]—*Deft. bank selected its present local manager to be examined for discovery, & whose answers might be used against it at the trial. Application by pltf. to substitute for such purpose a former local manager, still in deft.'s employ elsewhere in the province, refused.—*MCDUGALL & SECORD, LTD. v. MERCHANTS BANK OF CANADA*, [1919] 1 W. W. R. 830.—*CAN.*

*r. Officer presumed to know the facts.]—*Where an officer of a co. answers interrogatories he is presumed to have acquainted himself with the facts.—*ESQUIMALT & NANAIM RY. CO. v. WILSON*, [1920] 52 D. L. 509; 27 B. C. R. 144.—*CAN.*

24 Q. B. D. 727; 59 L. J. Q. B. 342; 38 W. R. 605; 6 T. L. R. 326, D. C.

Annotation.—As to (1) N.F. Oppenheim v. Sheffield, [1893]

1808. — Though interrogatory allowed by judge.]—*PERK v. RAY*, No. 1718, *ante*.

1809. Where adverse title set up—Objection to disclose fact establishing title.]—(1) Pltfs. & defts. were partners in a colliery, the lease of which expired in 1846. Defts. gave notice to dissolve at the expiration of the old lease, & they obtained a renewal to themselves. Pltfs. insisted that they were entitled to participate in the new lease, & stated facts in support of that equity. Defts. by answer, denied pltfs.' right, & declined to set out the accounts of the subsequent profits of the colliery, or to produce the documents subsequent to the dissolution, which, they said, did not tend to show pltfs.' right to a decree, until pltfs. had established some right in the new partnership:—*Held*: they were bound to answer & to produce.

(2) Where deft. neither pleading nor demurring, answers the bill, he must answer fully; but there are exceptions to the rule, as where deft. sets up a distinct & independent title in himself, which if established, will destroy pltf.'s title. In that case he is not bound to produce or set out any documents which he swears establish his own title, & do not establish that of pltf. Cases where the discovery would subject deft. to penalties & forfeitures are also exceptions to the rule.

(3) The expression, "tending to make out pltf.'s title," means, his title to the relief which he seeks by his bill.

(4) Questions of insufficiency of answer & production of documents rest on the same grounds, & must be dealt with in the same way.—*CLEGG v. EDMONSON* (1856), 22 Beav. 125; 27 L. T. O. S. 117; 2 Jur. N. S. 824; 52 E. R. 1055.

Annotations.—As to (1) *Consd. Elmer v. Croasy* (1873), 9 Ch. App. 69. *Refd. Do la Rue v. Dickinson* (1857), 3 K. & J. 388. As to (2) *Folld. Great Luxembourg Ry. v. Magnay* (1857), 23 Beav. 646.

PART IV. SECT. 8, SUB-SECT. 4.—A.

1812 i. *Irrelevance*.]—Where an injury is alleged to have been caused by the negligence of deft. in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of showing his prior negligence; & upon an examination for discovery deft. is justified in declining to answer questions relative to such subsequent placing.—*COLE v. CANADIAN PACIFIC RY. CO.* (1900), 19 P. R. 104.—CAN.

1812 ii. —.]—The ct. refused to dismiss an action for refusal to answer certain questions on discovery, holding that they were irrelevant.—(1913), 24 O. W. R. 1092; 10 D. L. R. —CAN.

a. *Matter of law*.]—Deft. was asked to state the amount owing on given date by certain persons on certain promissory notes. Deft. objected to answer on the ground that the interrogatory inquired after a matter of law & was indefinite & unwieldy:—*Held*: deft. was set out the facts, in relation to promissory notes, from which or non-liability might be & from which a conclusion of law might be drawn as to the owing, but that it was common to him to object to answer on the ground that it was a matter of law.—*KING v. COMMERCIAL* (1920), V. L. R. 218.—AUS.

Contents of written document.]—certain interrogatories deft. ob-

jected to answer on the ground that they were interrogatories as to the contents of a written document:—*Held*: the objection was good & deft. was not bound to answer.—*WINTERBOTTOM v. VARDON*, [1921] S. A. S. R. 364.—AUS.

a. — *Not documents of party's title—Illiteracy of party interrogated*.]—Where interrogatories submitted to a party refer to the contents of documents & deeds not the personal titles of the party & not shown to be in his possession, his answer that he is an illiterate man & is not aware of the contents of said documents is sufficient.—*THOMPSON v. PINSONNAULT & TUPPER* (1899), Q. R. 15 S. C. 621.—CAN.

b. *Party a corporation—Misnomer*.]—Defts., a co., were styled in the bill "The O. W. P. Co." Other defts., alleged to be directors of this co., when brought up to be examined for discovery, denied all connection with it & refused to answer any questions relating to "The O. W. P. Co. of Toronto." This latter name pltf.'s solr. stated to be the true corporate name of the co., intended to be described by the bill; but there being no further evidence of this fact, an application to compel defts. to answer the questions put to them was refused.—*DICKEY v. ONTARIO WOOD PAVEMENT CO.* (1873), 6 P. R. 93.—CAN.

c. *Discretion of court as to*.]—In an action for an account in relation to partnership dealings between pltfs. & defts., pltfs. obtained an order requiring deft. to answer interrogatories. After receiving deft.'s answer, a further

1810. Not by disputing question of fact involving right of action.]—When a deft. has been ordered to answer interrogatories in support of pltf.'s right of action, he cannot excuse himself from answering by swearing to some matter of fact which involves the existence of the right of action; for that is the very question to be tried upon the whole of the evidence, & (*inter alia*) upon his answers to the interrogatories.

Therefore, where a pltf. sued for money had & received, being the proceeds of goods of his, sent to deft., & had been allowed to interrogate deft. as to his sales of the goods, especially as to the purchasers & the prices, pltf.'s case being, that they were sold on his account; & deft. had excused himself from answering, on the ground that he had himself purchased the goods of pltf. so that the sales were on his own account, & that, therefore, he was not bound to answer:—*Held*: the excuse was insufficient; he was bound to answer; & unless he did so he would be liable to attachment for not answering.—*GEARY v. BUXTON* (1860), 29 L. J. Ex. 280.

1811. Not statement of belief that plaintiff not entitled to discovery.]—In an action for slander deft. objected to answer an interrogatory as to whether he had been user of the slanderous words attributed to him on the ground that he was advised & believed that pltf. was not entitled to this discovery. Deft. was ordered to answer further. He should have applied to strike out the interrogatory.—*ANON.*, [1875] W. N. 229; Bitt. Prac. Cas. 37; 1 Char. Cham. Cas. 107.

1812. *Irrelevance*.]—Objections to particular interrogatories on the ground of irrelevance, or that they seek discovery of the other party's evidence, must be taken in the affidavit in answer, & do not afford ground for setting aside the interrogatories.—*GAY v. LABOUCHERE* (1879), 4 Q. B. D. 206; 48 L. J. Q. B. 279; 27 W. R. 413, D. C.

—.]—See Sect. 5, sub-sect. 7, *ante*.

Crimination.]—See Sub-sect. 4, B., *post*.

order was obtained requiring deft. to attend before a master for further examination as to matters contained in certain of the interrogatories. Deft. appealed, on the ground that he was not obliged to answer until pltfs. had first established their interest.

It appearing that the facts sought to be elicited by the interrogatories, were essential to pltfs.' case:—*Held*: there was no ground for interfering with the discretion of the Judge below, & deft. must answer as required.—*JENKINS v. TUPPER* (1886), 7 R. & G. 506; 8 C. L. T. 62.—CAN.

d. *Lis alibi pendens*.]—The president of pltfs. lived in the United States, but being in Toronto, he was there subpoenaed to attend for examination for discovery before a special examiner at Toronto. He was paid \$1, & made no objection as to the amount, nor did he object that he was prevented by any engagements from attending, but he failed to attend:—*Held*: he should have attended on the day appointed, & the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; & he was ordered to attend at his own expense.—*SMITH CO. v. GREY* (1886), 11 P. R. 345.—CAN.

e. *Champerty*.]—Pltf. should not be compelled on examination to answer questions touching an alleged cham-

8.—*The answer: Sub-sect. 4, A. & B.*

Confidential & privileged communications.]—See Sub-sect. 4, C., *post*.

Penal actions & forfeiture.]—See Sect. 2, sub-sect. 2, *ante*.

Oppressive.]—See Sect. 5, sub-sect. 12, *ante*.

Disclosure of evidence.]—See Sect. 5, sub-sect. 6, *ante*.

Scandalous.]—See Sect. 5, sub-sect. 13, *ante*.

B. Incrimination.

1813. Whether criminating interrogatories need be answered.]—If a bill be for discovery of matters

pertous agreement.—*WELBOURNE v. CANADIAN PACIFIC RY. CO.* (1894), 16 P. R. 343.—CAN.

f. Disclosure of names of witnesses.]—A party is not, upon his examination for discovery under Rule LXI., bound to disclose the names of his witnesses.—*JONES v. PEMBERTON* (1897), 6 B. C. R. 69.—CAN.

g. Burden of proof on party interrogated.]—Where the burden of proof lies on pltf., he can object to be examined for discovery by deft. before he himself has examined deft.—*DE MARTIGNY v. BIENVENUE* (1902), Q. R. 21 S. C. 317.—CAN.

h. Irregularities as to notice.]—Pltf., having obtained an order, under Rule 285, for the examination of deft. in British Columbia before M., served a copy of the order on deft.'s solr., & obtained an appointment from M. for the examination of deft. at Vancouver. The appointment was served on deft., but he was not served with a copy of the order, nor was his solr. (who was in Saskatchewan) served with a copy of the appointment. Deft. appeared upon the appointment before M. & (after objecting) was sworn, but refused to answer any questions because his solr. had not been served with the appointment.—*Held*: the omission to serve deft. with a copy of the order & his solr. with a copy of the appointment were irregularities which would justify deft. in refusing to attend on the examination, & that he had not waived the irregularities by attending & being sworn—his attendance being for the purpose of objecting. *Seem*: that pltf. might have overcome the difficulty of serving deft.'s solr. in Saskatchewan by a provision in the order for service of the appointment on the solr.'s agent in British Columbia.—*DICKSON v. GIBBONS* (1914), 27 W. L. R. 731.—CAN.

k. Exposure to forfeiture.]—Where, under Land Clauses Consolidation Act, 1845, sect. 127, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a conditional limitation & not of a forfeiture. In an action brought to establish title to lands, defts. objected to answer interrogatories, on the ground that discovery might disclose facts in consequence of which lands might become forfeited.—*Held*: having regard to the distinction between a conditional limitation & a forfeiture, the defts. were not entitled to exemption from discovery.—*MILLER v. WATERFORD HARBOUR COMRS.*, [1904] 2 I. R. 421; 38 I. L. T. 45.—IR.

PART IV. SECT. 8, SUB-SECT. 4.—B.

1813 i. Whether criminating interrogatories need be answered.]—Deft. in an action for libel refused to answer interrogatories on the ground "that my answers might tend to criminate me":—*Held*: a valid objection.—*HUGHES v. WATSON* (1917), V. L. R. 300.

1813 ii. —.]—Deft. objected to answer on the ground that the answers

might incriminate him:—*Held*: as there was reasonable ground to apprehend danger that the answers might incriminate deft. he should not be ordered to answer.—*WINTERBOTTOM v. VARDON*, [1921] S. A. S. R. 364.—AUS.

1813 iii. —.]—No man can be compelled to answer a question incriminating himself, & where deft. upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, & claimed privilege, upon a motion by pltf. to commit him for refusal to answer, swearing positively that the answers might tend to criminate him:—*Held*: he was entitled to the privilege.—*HALL v. GOWANLOCK* (1888), 12 P. R. 604.—CAN.

1813 iv. —.]—In an action of libel & slander, pltf. complained that deft. had communicated to several persons the contents of a letter received from another person in which pltf. was accused of larceny, etc. Upon an examination of deft. for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so:—*Held*: the reason given was sufficient to privilege deft. from answering.—*WEISER v. HEINTZMAN* (1893), 15 P. R. 258.—CAN.

1813 v. —.]—Upon the trial of an action for libel, Ontario Witnesses & Evidence Act, s. 5, as now enacted by 4 Edw. VII., c. 10, s. 21, would be applicable, & deft. would not be excused from answering proper questions because the answers might tend to criminate him; & Con. Rule 439 (1250) puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, & he is not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him & if he objects to answer on that ground, his answer is within the protection of s. 5.—*CHAMBERS v. JAFFRAY* (1906), 12 O. L. R. 377; 7 O. W. R. 371; 8 O. W. R. 26.—CAN.

1813 vi. —.]—A deft. must put in a full answer in all cases, except to criminate himself, or when purchaser for valuable consideration without notice.—*LEONARD v. LEONARD* (1810), 1 Ball & B. 325.—IR.

1813 vii. —.]—An information against distillers required them to discover the actual quantities of wort fermented in the distillery, & prayed an account of the duties payable to the Crown on spirits distilled by them. The A.-G. waived all penalties & forfeitures:—*Held*: defts. were bound to answer the charges fully; & could not protect themselves on the ground that the facts charged would, if coupled with other facts, show that they had been guilty of a conspiracy to defraud the Crown.—*A.-G. v. CONROY* (1838), 2 Jo. Ex. Ir. 791.—IR.

penal at common law, or by statute, deft. need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires between the first & second answers, & exception is taken to the second answer for not discovering, the exceptions shall be allowed, & the party is bound to discover.—*WILLIAMS v. FARRINGTON* (1789), 3 Bro. C. C. 38; 2 Cox, Eq. Cas. 202; 29 E. R. 395.

1814. — Answer furnishing link in evidence.]—Witnesses are not compelled to answer interrogatories, having a direct tendency to subject them to penalties, etc., or having such a connection with them as to form a step towards it.—*PAXTON*

1813 viii. —.]—Upon a motion to attach pltf. for refusing to answer interrogatories, it was insisted on his behalf, upon the argument, though not insisted on in the affidavit of pltf., that the answers to the interrogatories might tend to expose him to criminal proceedings:—*Held*: it was a valid reason for declining to answer, that pltf. apprehended that his answers might tend to criminate him.—*M'MAHON v. ELLIS* (1859), 10 I. C. L. R. 120; 12 Ir. Jur. 16.—IR.

1813 ix. —.]—In an action against the proprietor of a newspaper for libel deft. cannot protect himself from answering the interrogatories, on the ground that a criminal prosecution for the alleged libel is pending against him, & that the interrogatories tend to criminate him.—*LEFROY v. BURNSIDE* (1879), 4 L. R. Ir. 340.—IR.

1813 x. —.]—Where a person interrogated refuses to answer an interrogatory on the ground that his answer might tend to criminate himself, if the ct. can clearly & affirmatively arrive at the conclusion that there is no reasonable ground for believing that it would have that effect, it has jurisdiction to compel an answer. But, if a *corpus delicti* or an act which there is reasonable ground for believing amounts to a *corpus delicti*, is shown to exist, the ct. should have very clear evidence that danger to the deponent cannot reasonably be apprehended before it declines to allow the privilege claimed.—*BRADLEY v. CLAYTON & CO.* (1890), 26 L. R. Ir. 405, 410.—IR.

1813 xi. —.]—In an action for libel against proprietors of a newspaper:—*Held*: as the statutory protection afforded printers, publishers & proprietors of newspapers was not extended to editors & reporters, the ct. would not call upon the latter to answer interrogatories calculated to criminate them, unless very special circumstances in support of the application were established.—*MURRAY v. NORTHERN WHIG, LTD.* (1911), 46 I. L. T. 77.—IR.

i. — Crimination of husband or wife of party interrogated.]—In an action of libel against a husband as the writer of libellous articles, & as editor of a newspaper in which they were printed, & his wife as owner & publisher of the newspaper, on examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, & the wife refused to answer questions as to the authorship of the newspaper articles in question, & as to the editing of the newspaper, on the like grounds as to her husband:—*Held*: defts. were justified in their refusals.—*MILLETTE v. LITTLE* (1884), 10 P. R. 265.—CAN.

m. — Objection must be on oath of party.]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person, how-

v. DOUGLAS (1809), 16 Ves. 239; 33 E. R. 975; *subsequent proceedings* (1812), 19 Ves. 225; 34 E. R. 502.

Annotations:—*Consd. Green v. Weaver* (1827), 1 Sim. 404; *Glynn v. Houston* (1836), 1 Keen, 329. *Distd. Derby Corp'n. v. Derbyshire County Council* (1897), 77 L. T. 107. *Reid. Maccallum v. Turton* (1828), 2 Y. & J. 183; *Swift v. Swift* (1832), 4 Hag. Ecc. 139; *Chennell v. Martin* (1833), 4 Sim. 340; *Chadwick v. Chadwick* (1852), 22 L. J. Ch. 329; *Robinson v. Kitchin* (1856), 21 Beav. 365. *Mentd. Rice v. Gordon* (1843), 13 Sim. 580.

1815. —.]—The ct. will not compel a deft. to answer allegations which may subject him to penalties. This protection extends not only to the question which directly may tend to criminate him, but to every link in the chain of proof.

Where the chairman of a joint-stock co., with a knowledge that the co. had been dissolved, & that the managing committee had determined to buy up the shares, sent his shares into the market & sold them as good & available shares; the ct. protected him from answering these allegations, upon the ground that there existed a reasonable probability that he might be indicted for the *jud.*—*MACCALLUM v. TURTON* (1828), 2 Y. & J. 183.

Annotation:—*Consd. Glynn v. Houston* (1836), 1 Keen, 329.

1816. —.]—Deft. is not bound to discover the principal fact, or any one of a long series or chain of facts, which may contribute to establish a criminal charge against himself, & he cannot waive this right by any agreement. Pending the proceedings in the cause, pltf. indicted defts. in respect of the same transactions, the time for answering was extended until after the trial of the indictment.—*LEE v. READ* (1842), 5 Beav. 381; 12 L. J. Ch. 26; 6 Jur. 1026; 49 E. R. 625.

Annotation:—*Reid. Robinson v. Kitchin* (1856), 21 Beav. 365.

party, in her personal answers to a libel, is not bound to answer to articles which, though not on the face of them criminatory, may, by possibility, furnish a link in the evidence against herself.

The right of a party to exact answers depends on the form of proceeding. If the suit be prosecuted by articles on no account can answers be at all exacted. In a civil cause a contrary rule prevails, answers are due; but engrafted on that rule is this exception, that the party giving in his answers is entitled to object to answer to so much of a plea as may criminate him (*DR. LUSHINGTON*).—*KING v. KING* (1850), 2 Rob. Eccl. 153; 7 Notes of Cases, 396; 14 Jur. 276.

Annotation:—*Reid. Redfern v. Redfern*, [1891] P. 139.

1818. —.]—Interrogatories were filed, founded upon allegations in a bill, that deft. had induced pltf. to pay to him the large sums of money without any legal consideration, & that pltf. had been induced to accept, indorse & sign various bills of exchange, promissory notes, I.O.U.'s & cheques for large sums of money which were not actually paid, but were advanced for gaming purposes, & were immediately staked, betted, & lost by pltf. in the presence & with the privity of deft. & others. Defendant answered some of the interrogatories, but refused to answer the others, on the ground that by so doing he should subject himself to a criminal prosecution:—*Held*: deft. was not exempted from answering

anything which might, in his opinion, be a link in a chain of evidence which would end in a criminal prosecution. Inasmuch as it did not appear to the ct. that the answer would necessarily lead to such a result, the exceptions were allowed with costs.—*SIDEBOTTOM v. ADKINS* (1857), 29 L. T. O. S. 310; 3 Jur. N. S. 631; 5 W. R. 743.

Annotations:—*Apld. R. v. Boyes* (1861), 1 B. & S. 311. *Reid. Re Reynolds, Ex p. Reynolds* (1882), 20 Ch. D. 294.

1819. —.]—*MANT v. SCOTT*, No. 1432, *ante*.

1820. —.]—Partly criminating partly innocent.]

—It is objected that the information requires defts. to answer charges amounting to a criminal accusation. On that objection it is clear, not only that if the information requires an answer to matter of criminal accusation & also to innocent matter the demurrer must be overruled (*LORD ELDON, V.-C.*).—*A.-G. v. BROWN* (1818), 1 Swan. 265; 1 Wils. Ch. 323; 36 E. R. 384.

Annotations:—*Mentd. Meux v. Maltby* (1818), 2 Swan. 277; *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; *A.-G. v. Dublin Corp'n.* (1827), 1 Bl. N. S. 312; *A.-G. v. Carlisle Corp'n.* (1828), 2 Sim. 437; *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *A.-G. v. Compton* (1842), 1 Y. & C. Ch. Cas. 417; *George v. Chambers* (1843), 7 Jur. 836; *Nightingale v. Goulburn* (1847), 5 Hare, 484; *Macintyre v. Connell* (1851), 1 Sim. N. S. 252; *A.-G. v. Eastlake* (1853), 11 Hare, 205; *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *A.-G. v. Mid-Kent Ry. & S. E. Ry.* (1867), 3 Ch. App. 100; *Re St. Botolph Without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480.

1821. —.]—(1) Demurrer to a bill for discovery in aid of an action brought by pltf. to recover damages for an assault & false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters which, if established, would have subjected deft. to penal consequences. The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory.

(2) *Semble*: a bill of discovery in aid of an action for a mere personal tort cannot be sustained.—*GLYNN v. HOUSTON* (1836), 1 Keen, 329; 6 L. J. Ch. 129; 48 E. R. 333.

Annotations:—*As to* (1) *Consd. Atherley v. Harvey* (1877), 46 L. J. Q. B. 518. *Reid. Hill v. Campbell* (1875), L. R. 10 C. P. 222. *As to* (2) *Consd. Pye v. Butterfield* (1864), 34 L. J. Q. B. 17.

1822. —.]—Where pltf. by his bill, seeks a discovery of matters which might subject deft. to a criminal prosecution, & also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that either by inference or exclusion they may lead to a disclosure which might subject deft. to prosecution, he is not bound to answer any portion of it.—*LICHFIELD (EARL) v. BOND* (1843), 6 Beav. 88; 12 L. J. Ch. 329; 7 Jur. 209; 49 E. R. 758.

1823. —.]—A party is not bound to answer any question which is in any manner connected with a criminal charge (*LEACH, V.-C.*).—*THORPE v. MACAULEY* (1820), 5 Madd. 218; 56 E. R. 877.

Annotations:—*Consd. Glynn v. Houston* (1836), 1 Keen, 329. *Reid. Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Bowden v. Allen* (1870), 39 L. J. C. P. 217; *Hill v. Campbell* (1875), L. R. 10 C. P. 222; *Atherley v. Harvey* (1877), 2 Q. B. D. 524. *Mentd. Shackell v. Macaulay* (1824), 3 L. J. O. S. Ch. 30; *Small v. Attwood* (1834), 1 Y. & C. Ex. 37; *Morris v. Morgan* (1839), 10 Sim. 341; *Re Mysore West Gold Mining Co.* (1889), 37 W. R. 794.

1824. —.]—Where a libel had been published, & the person libelled elected to seek his remedy

ever, or, in the case of a corp'n., an officer, must pledge his oath to his belief that such would or might be the effect of his answer, & it must appear that such belief is likely to be well

c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery.

—*D'IVBY v. WORLD NEWSPAPER CO. OF TORONTO* (1897), 17 P. R. 387.—*CAN.*

n. —.]—*At what stage objection taken.*—In an action founded upon

Sect. 8.—The answer: Sub-sect. 4, B. & C.]

by action for damages, & to the declaration in such action, deft. pleaded as a justification the truth of the facts constituting the libel, & filed against pltf. in the action, a bill praying a discovery from deft.

Pltf. having, in his bill, charged & interrogated upon facts impeaching the character of deft. in equity, & facts which might subject him to criminal proceedings:—*Qu.*: whether such deft. is bound to answer any interrogatory which indirectly tends to establish the charge, or any interrogatory affecting him with moral turpitude or degradation of character.—*MACAULAY v. SHACKELL* (1827), 1 Bli. N. S. 96; 4 E. R. 809, H. L.; *affg. S. C. sub nom. SHACKELL v. MACAULAY* (1824), 2 Sim. & St. 79, L. C.

Annotations:—*Consd. Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 146. *Refd. Stewart v. Nugent* (1836), 1 Keen, 201; *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Stern v. Sevastopulo* (1863), 14 C. B. N. S. 737; *The Mary otherwise Alexandra* (1868), 38 L. J. Adm. 29; *Hill v. Campbell* (1875), L. R. 10 C. P. 222; *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151. *Mentd. Glyn v. Soares* (1836), 1 Y. & C. Ex. 655; *Mills v. Campbell* (1836), 2 Y. & C. Ex. 389; *R. v. Upton St. Leonards* (1847), 2 New Pract. Cas. 272; *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551.

1825. —.]—Where a bill charges deft. with acts which would subject him to a criminal prosecution under a statute, deft. need not read the statute, but may demur to the bill.—*FLEA v. ST. JOHN* (1828), 2 Sim. 181; 57 E. R. 757.

1826. — As to abjuration of religion.]— party is not bound to answer when his answer would criminate himself.—*SWIFT v. SWIFT* (1832), 4 Hag. Ecc. 139; 162 E. R. 1399.

Annotations:—*Folld. Dysart v. Dysart* (1843), 3 Curt. 543. *Refd. Redfern v. Redfern*, [1891] P. 139. *Mentd. H. (falsely called C.) v. C.* (1860), 1 Sw. & Tr. 605.

1827. —.]—Every averment of a plea must be fully answered except where the answer might criminate the party.—*DYSART v. DYSART* (1843), 3 Curt. 543; 7 Jur. 658; 163 E. R. 819.

1828. —.]—*Re* — (1853), 21 L. T. O. S. 154.

1829. — Objection must be on oath of party.]—On an application to the ct. for leave to deliver interrogatories in writing to the opposite party in the cause, under C. L. P. Act, 1854 (c. 125), s. 51, the affidavit of the attorney of the party spught to be interrogated, that he believes that the questions proposed will criminate his client, is no answer to the application. Such objection ought to be made by the party himself when he has been sworn.

Qu.: whether a witness, to entitle himself to object to a question, on the ground that it has a tendency to criminate him, is bound to satisfy the ct. that such will be its effect, or whether he is himself the sole judge of its effect.—*OSBORN v. LONDON DOCK CO.* (1855), 10 Exch. 698; 3 C. L. R. 313; 24 L. J. Ex. 140; 24 L. T. O. S. 262; 1 Jur. N. S. 93; 3 W. R. 238; 156 E. R. 620.

Annotations:—*Apld. Chester v. Wortley* (1856), 17 C. B. 410. *Folld. R. v. Boyes* (1861), 1 B. & S. 311; *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249. *Apld. Bickford v. Darcy* (1866), L. R. 1 Exch. 354. *Consd. Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Apprvd. Re Reynolds, Ex p. Reynolds* (1882), 20 Ch. D. 294. *Refd. Whateley v. Crowter* (1855), 5 E. & B. 709; *Tupling v. Ward* (1861), 30 L. J. Ex. 222; *Baker v. Lane* (1865), 3 H. & C. 544; *Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70; *Villeboisnet v. Tobin* (1869), L. R. 4 C. P. 184. *Mentd. Chaplin v. Reid* (1858), 1 F. & F. 315; *Collins v. Yates* (1858), 27 L. J. Ex. 150.

an alleged conspiracy between defts. to defraud pltf., amounting to a criminal offence, interrogatories were sought to be administered to one deft. going directly to the proof of what

was charged:—*Held*: the objection that the answers might tend to criminate deft. might be taken on the appln. for leave to deliver the interrogatories. The English practice of

1830. —.]—Where an application was made to deliver interrogatories to deft., which application was opposed on the ground that the questions might tend to criminate him:—*Held*: there was no one question which directly charged deft. with having committed an indictable offence, & even if there was, the proper time to take the objection was after the party had been sworn to answer, & not before: also, there is nothing in C. L. P. Act, 1854 (c. 125), s. 51, enacting that the practice of the ct. of Ch. in respect of bills of discovery is to be imported into the cts. of common law, or that questions are not to be permitted to be put in the form of written interrogatories in any case in which a ct. of equity would not allow them to be put.—*BARTLETT v. LEWIS* (1862), 12 C. B. N. S. 249; 31 L. J. C. P. 230; 6 L. T. 388; 9 Jur. N. S. 202; 142 E. R. 1139.

Annotations:—*Consd. Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Refd. Chartered Bank of India, etc. v. Rich* (1863), 4 B. & S. 73; *Stern v. Sevastopulo* (1863), 14 C. B. N. S. 737; *Goodman v. Holroyd* (1864), 15 C. B. N. S. 839; *Bickford v. Darcy* (1866), L. R. 1 Exch. 354; *Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319; *Villeboisnet v. Tobin* (1869), L. R. 4 C. P. 184; *Atherley v. Harvey* (1877), 2 Q. B. D. 524.

1831. —.]—Where circumstances point to deft. as the publisher of a libel, & pltf. cannot otherwise prove his case, he may administer interrogatories to deft. as to the publication, unless criminal proceedings are pending, or appear to be contemplated; & if deft. objects to answer on the ground that he will criminate himself, he must make an affidavit to that effect.—*GREENFIELD v. REAY* (1875), L. R. 10 Q. B. 217; 44 L. J. Q. B. 81; 31 L. T. 756; 23 W. R. 732.

Annotation:—*Consd. Atherley v. Harvey* (1877), 36 L. T. 551.

1832. —.]—*NATIONAL ASSOCN. OF OPERATIVE PLASTERERS v. SMITHIES*, No. 62, ante.

1833. —.]—In an action for libel, the ct. will not permit pltf. to exhibit interrogatories, to deft., the answers to which, if in the affirmative, would tend to show that he composed or published the libel, & would therefore criminate him.—*TUPLING v. WARD* (1861), 6 H. & N. 749; 30 L. J. Ex. 222; 4 L. T. 20; 7 Jur. N. S. 314; 9 W. R. 482; 158 E. R. 309.

Annotations:—*Apld. Edmunds v. Greenwood* (1868), L. R. 4 C. P. 70. *Refd. Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Stern v. Sevastopulo* (1863), 14 C. B. N. S. 737; *Baker v. Lane* (1865), 3 H. & C. 544; *Villeboisnet v. Tobin* (1869), L. R. 4 C. P. 184; *Hill v. Campbell* (1875), L. R. 10 C. P. 222; *Atherley v. Harvey* (1877), 36 L. T. 551.

1834. —.]—Interrogatories will not be allowed in an action of libel if they tend to charge deft. with an indictable offence.—*BAKER v. LANE* (1865), 3 H. & C. 544; 34 L. J. Ex. 57; 11 L. T. 638; 11 Jur. N. S. 117; 13 W. R. 293; 159 E. R. 644.

Annotation:—*Expld. Bickford v. Darcy* (1866), L. R. 1 Exch. 354.

1835. — When not necessarily criminating.]—In an action against defts., A. & B., as attorneys & solrs., for failing to invest on mtge. in a proper manner certain money entrusted to them, as such attorneys & solrs., by pltf. for that purpose, pltf. proposed to administer interrogatories to deft., B., with a view of showing that a partnership existed between him & A. in their business of attorneys & solrs., & inquiring particularly into the share of the profits of such business received by B., & generally into the manner in which such profits

allowing the interrogatories in such a case, leaving it to deft. to raise his objection in his answers, does not obtain in New Zealand.—*ROSKRUGE v. RYAN* (1896), 15 N. Z. L. R. 246.—N.Z.

were divided & the business carried on. B. objected to the interrogatories on the ground that, never having been admitted as an attorney & solr., the answers thereto would tend to criminate him, & render him liable to an indictment for misdemeanour under Solicitors Act, 1843 (c. 73), s. 2, for practising without a certificate:—*Held*: the interrogatories, which appeared to be put *bond fide* & with the view of obtaining answers relevant to the action, & to pltf.'s interest therein, might be administered; & moreover, deft. might answer the questions without rendering himself liable to any proceedings or penalties under Solicitors Act, 1843 (c. 73), inasmuch as the questions related to the business of defts. as money scriveners, which was a different thing from that of attorneys & solrs. properly so called.—*BICKFORD v. DARCY* (1866), L. R. 1 Exch. 354; 4 H. & C. 534; 35 L. J. Ex. 202; 14 L. T. 629; 12 Jur. N. S. 816; 14 W. R. 900.

Annotations:—*Consd.* *McFadzen v. Liverpool Corpn.* (1868), 18 L. T. 611. *Refd.* *Apothecaries Soc. v. Nottingham* (1875), Bitt. Prac. Cas. 72.

1836. —.]—In an action for libel the ct. refused to allow interrogatories to be administered to deft. under C. L. P. Act, 1854 (c. 125), s. 51, the express object of pltf. being to make deft. criminate himself if he answered them in the affirmative.—*EDMUNDS v. GREENWOOD* (1868), L. R. 4 C. P. 70; 38 L. J. C. P. 115; 19 L. T. 423; 17 W. R. 142.

Annotations:—*Fold.* *Villeboisnet v. Tobin* (1869), L. R. 4 C. P. 184. *Consd.* *Inman v. Jenkins* (1870), L. R. 5 C. P. 738; *Hill v. Campbell* (1875), L. R. 10 C. P. 222. *Refd.* *Davis v. Gray* (1874), 30 L. T. 418; *Fisher v. Owen* (1878), 8 Ch. D. 645.

1837. — Discretion of court.]—Interrogatories, the answers to which may criminate the person interrogated, will not be allowed under C. L. P. Act, 1854 (c. 125), upon the common affidavit. Special circumstances must be shown which render them necessary, & it is a matter for the discretion of the judge whether there is sufficient ground for allowing them to be put.—*VILLEBOISNET v. TOBIN* (1869), L. R. 4 C. P. 184; 38 L. J. C. P. 146; 19 L. T. 693; 17 W. R. 322.

Annotations:—*Refd.* *Inman v. Jenkins* (1870), L. R. 5 C. P. 738; *Hill v. Campbell* (1875), L. R. 10 C. P. 222.

1838. —.]—(1) In an action for libel a judge at chambers refused to allow interrogatories to be administered to deft. under C. L. P. Act, 1854 (c. 125), s. 51, the object of pltf. being to rebut the possible defence of privilege by proving malice in deft.:—*Held*: the refusal was right.

(2) Interrogatories in libel will not be allowed where the answers would enable pltf. to abandon the civil & institute criminal proceedings against deft.

(3) The discretion vested in a judge at chambers under C. L. P. Act, 1854 (c. 125), s. 51, will not be reviewed by the ct. except on very strong grounds.—*DAVIS v. GRAY* (1874), 30 L. T. 418.

1839. —.]—In an action against deft. as publisher of a newspaper containing a libel on pltf.:—*Held*: deft. may refuse to answer interrogatories as to his being the publisher, on the ground that the answers tend to criminate him & make him liable to an indictment.—*BOWDEN v. ALLEN* (1870), 39 L. J. C. P. 217; 22 L. T. 342; 18 W. R. 695.

1840. —.]—*ALLHUSEN v. LABOUCHERE*, No. 1456, *ante*.

1841. —.]—An action having been brought to set aside a deed of gift made by a lady a few

days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, pltf. exhibited interrogatories, following out in detail the statements of the claim, with a view of showing that deft. who was the grantee in the deed of gift, had procured the drug for her & encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. Deft. moved to strike out the interrogatories as scandalous, irrelevant, & not put *bond fide* for the purposes of the action:—*Held*: supposing the matter inquired after to be an indictable offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous, & the remedy of deft. was to decline to answer, on the ground that his answer might tend to criminate him.

Nothing can be scandalous which is relevant (*COTTON, L.J.*).—*FISHER v. OWEN* (1878), 8 Ch. D. 645; 47 L. J. Ch. 681; 38 L. T. 577; 42 J. P. 758; 26 W. R. 581, C. A.

Annotations:—*Fold.* *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654. *Apld.* *Webb v. East* (1880), 44 J. P. 200. *Consd.* *Lamb v. Munster* (1882), 10 Q. B. D. 110. *Expld.* *Hunnings v. Williamson* (1883), 10 Q. B. D. 459. *Apld.* *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 121. *Apprvd.* *National Asscn. of Operative Plasterers v. Smithies* (1906), 95 L. T. 71.

1842. — No precise form of objection necessary — “May” sufficient.]—An objection to answer interrogatories which is made by affidavit on the ground of the tendency of the answer to criminate the person interrogated may be valid, although not expressed in any precise form of words, if, from the nature of the question & the circumstances, such a tendency seems likely or probable. In an action for libel deft. pleaded a denial of the publication, & to interrogatories asking him, in effect, whether he published the libel he stated by his affidavit in answer: “I decline to answer all the interrogatories upon the ground that my answer to them ‘might’ tend to criminate me”:—*Held*: his answer was sufficient.—*LAMB v. MUNSTER* (1882), 10 Q. B. D. 110; 52 L. J. Q. B. 46; 47 L. T. 442; 31 W. R. 117, D. C.

Annotations:—*Apld.* *Re Genese, Ex p. Gilbert* (1886), 3 Morr. 223. *Fold.* *Pankhurst v. Wighton* (1886), 2 T. L. R. 745. *Distd.* *Derbyshire County Council v. Derby Corpn.* (1896), 74 L. T. 747.

1843. —.]—*HARVEY v. LOVEKIN*, No. 1325, *ante*.

1844. —.]—The law of England said that no man could be compelled to answer a question incriminating himself (*CAVE, J.*).—*PANKHURST v. WIGHTON & Co.* (1886), 2 T. L. R. 745.

1845. —.]—*BEYFUS v. JONAS* (1886), 2 T. L. R. 687.

— Maintenance of action.]—*See ACTION*, Vol. I., pp. 88, 89, Nos. 726–728.

1846. Where fraud not a criminal offence.]—It is no objection to interrogatories under C. L. P. Act, 1854 (c. 125), s. 51, that the answers, if given in the affirmative, will show that the execution of a deed upon which the defence is founded was obtained by fraud.—*GOODMAN v. HOLROYD* (1864), 15 C. B. N. S. 839; 143 E. R. 1015; *sub nom.* *GOODMAN v. HARVEY*, 3 New Rep. 512.

C. Privilege.

See, generally, EVIDENCE.

1847. Communication with legal adviser or agents—Relating to matters in dispute.]—*OATT v. TOURLE*, No. 1580, *ante*.

PART IV. SECT. 8, SUB-SECT. 4.—C. o. Communications made to party interrogated in official capacity.]—In an action for defamation pltf. sought

leave to deliver interrogatories requiring deft. to disclose the information on which he based the statement complained of, & the steps if any

which he had taken to verify the same. Deft. pleaded qualified protection:—*Held*: the circumstance that such information might have been

Sect. 8.—The answer: Sub-sect. 4, C. & D.; sub-sect. 5. Sect. 9.]

1848. ———.]—In an action by a principal against his agent for negligence in the purchase of certain goods for the principal, deft. being interrogated touching certain matters connected with such purchase not within his own knowledge, but known to his partner at New York, declined to answer on the ground of ignorance as to such matters. Further interrogatories being administered touching the same matters, he answered, stating that since action brought, certain communications had passed between him & his firm at New York, with a view to his defence to the action, & that all his information as to the matters in question was derived from such communications, & submitting that he was privileged from disclosing such communications:—*Held*: he was so privileged.—*PHILLIPS v. ROUTH* (1872), L. R. 7 C. P. 287; 41 L. J. C. P. 111; 26 L. T. 845; 20 W. R. 630.

Annotation:—*Reid. Bolekow v. Fisher* (1882), 10 Q. B. D. 161.

1849. ———.]—A party to an action cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solrs. or their agents; for since under those circumstances his knowledge & information are protected, so also is his belief when derived solely from such communications.

Pltf. having been interrogated as to his knowledge, information & belief upon matters relevant to deft.'s case answered that he had no personal knowledge of any of the matters inquired into; that such information as he had received in respect of those matters had been derived from information procured by his solrs. or their agents in & for the purpose of his own case:—*Held*: the answer was sufficient.

I take it to be tolerably clear & certain that he is entitled to search pltf.'s conscience, & to ask him not merely as to what he may himself have seen, or may himself know, but as to all the facts which he has & all the information which he has for forming a knowledge & belief, derived from his agent (LORD BLACKBURN).—*LYELL v. KENNEDY* (No. 2) (1883), 9 App. Cas. 81; 53 L. J. Ch. 449; 50 L. T. 277; 32 W. R. 497, H. L.; *varying* S. O. *sub nom.* *KENNEDY v. LYELL*, 23 Ch. D. 387, C. A.

Annotations:—*Folld. Seal v. Turner* (1913), 30 T. L. R. 227.

Reid. Bursill v. Tanner (1885), 16 Q. B. D. 1; *R. Holloway, Young v. Holloway* (1887), 12 P. D. 167; *Sammon v. Bennett* (1892), 8 T. L. R. 235; *Calcraft v. Guest*, [1898] 1 Q. B. 759; *Ainsworth v. Wilding*, [1900] 2 Ch. 315. *Mentd. Bidder v. Bridges* (1885), 29 Ch. D. 29; *Martin v. Treacher* (1886), 2 T. L. R. 268.

1850. ———.]—In an action for damage

communicated to deft. in his official capacity would afford no reason for exempting him from answering.—*LUCOCK v. PIERCE* (1919), 15 Tas. L. R. 73.—AUS.

p. *Communications between branch & head office.*—The manager of a branch bank at W., having its head office at M., laid an information against pltf., who subsequently brought an action against the bank for malicious arrest. On an examination of the manager:—*Held*: he was right in refusing to answer the following question: "Did you from time to time communicate [to head office] the facts previously stated in your examination as they occurred?"—*MCLEAN v. MERCHANTS' BANK* (1884), 1 Man. L. R. 178.—CAN.

q. *Communications between husband & wife during marriage.*—R. S. O. 1887, c. 61, s. 8, which provides that "no husband shall be compellable to disclose any communication made by his wife during the marriage," is still in force. It is competent for a husband who is making disclosures as to what took place between his wife & himself during coverture, at any time during an examination for discovery to refuse to disclose anything further.—*CONNOLLY v. MURRELL* (1891), 14 P. R. 187.—CAN.

r. *Legal professional privilege—How far available.*—An attorney cannot, on the ground of professional confidence, refuse to answer an interrogatory touching his having seen a

caused by the negligence of defts. or their servants in the use of an engine, whereby sparks & red-hot cinders escaped from the engine & set fire to pltf.'s buildings, pltf. administered the following interrogatory: "Have defts. or any of their servants or agents any knowledge, information, or belief as to the cause of the fire in respect to the happening whereof this action is brought? If yea, set out the same fully, with dates & all particulars. If any of those servants or agents have communicated to defts. such knowledge, information, or belief, let defts. set out the substance of such communications, with dates & all particulars." To this deft. answered: "We have no information at all on the subject, save such as appears in the reports set out in the schedule to our affidavits, filed in this cause on May 28, 1884, & which by the judgment of the Div. Ct. of July 7 last, were held to be privileged from production, which we decline to produce":—*Held*: the answer was sufficient, as a further or better answer could not be given without disclosing the contents of privileged reports made to defts. by their servants, which reports defts. were not bound to disclose.—*LONDON, TILBURY & SOUTHEAST RY. CO. v. KIRK & RANDALL* (1884), 51 L. T. 599, D. C.

1851. ———.] — *GORT (VISCOUNT) v. ROWNEY* (1884), 28 Sol. Jo. 533.

1852. ———.] *But not capable of being confidential.*—*FOAKES v. WEBB*, No. 1756, *ante*.

1853. ———.] — *WOLFF* (1886), 3 T. L. R. 229, D. C.

1854. ———.]—Pltf., who was a shareholder in a guarantee society, having brought an action against the chairman for false representations alleged to have been made by deft. to pltf. at a general meeting administered to deft. an interrogatory as to whether at the date of the meeting the society had taken over certain properties. Deft. answered that certain of the properties had been taken over, & that certain others had been taken possession of owing to failure of the mtgors., & he gave the names of these two sets of properties, but he said he had no personal knowledge with regard to the remaining properties & submitted that he was not bound to seek information about them from confidential documents obtained by his solrs. for the purpose of his defence:—*Held*: this was a sufficient answer.—*SEAL v. TURNER* (1913), 30 T. L. R. 227, C. A.

1855. *Solicitor defendant—Information obtained from client & other sources.*—If a solr. obtains information from his client, & also from other sources, it is not privileged; & the solr., if made a party to a suit with his client, is bound to answer interrogatories respecting it, though his client made the communications to him confidentially.—*LEWIS v. PENNINGTON* (1860), 29 L. J. Ch. 670; 2 L. T. 344; 6 Jur. N. S. 478; 8 W. R. 465.

Annotation:—*Consd. Kennedy v. Lyell* (1883), 23 Ch. D. 387.

certain instrument; & if so, when, & in whose hands.—*O'GORMAN v. M'NAMARA* (1831), Hayes, 174.—IR.

s. — *Not available to agent or friend.*—An agent or friend of the exor., acting for or advising him in matters connected with the will, cannot, when interrogated as to his knowledge of the advice given, claim privilege.—*GRISDELL v. REID* (1888), 7 N. Z. L. R. 129.—N.Z.

t. *Public policy.*—In an action for libel pltf. interrogated deft. as to the contents of a written communication made by deft., a Justice of the Peace, to the Lords Commissioners of the Great Seal, concerning pltf., who was also, a Justice of the Peace.

1856. — Information obtained for client privileged.]—In an action for libel contained in a circular, defts. justified giving full particulars of the justification. Pltf. administered interrogatories as to certain communications referred to by defts., which they objected to answer upon the ground that by so doing they would disclose facts & information obtained by them in confidence & acting in their capacity as solrs. for a client:—*Held*: defts. were not bound to answer further the interrogatories, the privilege claimed not being their privilege but that of their clients.—*PROCTER v. SMILES* (1886), 55 L. J. Q. B. 527; 2 T. L. R. 906, C. A.

Annotation:—*Reid*. *Procter v. Raikes & Wolff* (1886), 3 T. L. R. 229.

1857. Bequest to executors affected by secret trust—Communications between executors.]—A.-G. v. *JOHNSTONE*, [1872] W. N. 12.

1858. Documents held by officials of society.]—*EMMOTT & Co. v. WALTERS*, [1891] W. N. 79, D. C.

1859. Evidence given before ecclesiastical commission of inquiry—Action for slander.]—*BAR-RATT v. KEARNS*, No. 1556, *ante*.

Privilege as ground for resisting production of documents.]—*See* Part III., Sect. 9, *ante*.

D. Stating Objection.

See, now, R. S. C., Ord. 31, r. 6.

1860. Ground of objection must be stated specifically—Unless question of law.]—A. sued defts. as man & wife, & then asked them whether they were married. The interrogatory was ordered to be struck out. A. did not appeal, because he considered that a part of the remaining interrogatories would oblige an answer to the question disallowed. Defts. neglected to answer that part of the interrogatories:—*Held*: they were not bound to answer.

Is a person bound to give by his answer a reason for not answering an interrogatory? The principle is that, if fresh facts are relied on as reasons for not answering, they should be set out; but that, if the objection is a mere matter of argument, & not a statement of new facts, & the judge sees that the answer is sufficient, he is quite right in refusing to require a person to state his objection (*LINDLEY, J.*).—*SMITH v. BERG* (1877), 36 L. T. 471; 25 W. R. 606, D. C.

Annotation:—*Expld. & Follid.* *Church v. Perry* (1877), 36 L. T. 513.

1861. —.]—*DALGLEISH v. LOWTHER*, No. 1549, *ante*.

SUB-SECT. 5.—FILING ANSWER.

See Ord. 31, rr. 8, 26.

1862. Time for answer—Death of sole plaintiff—Order by executor to revive action.]—In a suit relating to real & personal estate, where, after interrogatories filed, but before answer, the sole pltf. had died, the ct., on the application of the heir-at-law, who was also the exor. of the deceased pltf., made an order to revive, & as the time for answering had expired, ordered that deft. should within twenty-eight days, answer the interrogatories.—*BEAUCHAMP (EARL) v. WINN* (1866), L. R. 2 Eq. 302; 14 L. T. 856.

— Where security for costs ordered—

Runs from date of service of copy of receipt.]—*JONES v. JONES*, [1884] W. N. 17; Bitt. Rep. in Ch. 89.

1864. Duty of party filing—To produce office copy.]—The duty of producing the office copy of the affidavit in answer to pltf.'s interrogation lies on the deft., the party on whose behalf the affidavit is filed.—*MARSHALL v. NATIONAL PROVINCIAL BANK OF ENGLAND* (1892), 61 L. J. Ch. 465; 66 L. T. 525; 40 W. R. 328; 36 Sol. Jo. 294.

Annotation:—*Follid.* *Levi v. Taylor*, [1903] W. N. 183.

1865. —.]—*LEVI v. TAYLOR*, [1903] W. N. 183.

SECT. 9.—APPLICATION FOR FURTHER AND BETTER ANSWER.

See, now, R. S. C., Ord. 31, r. 11.

1866. Application made in chambers not in court.]—(1) The application to be made under R. S. C., Ord. 31, for further answers to interrogatories, should be by summons in chambers, & not by motion.

(2) The particular answers objected to as insufficient should be specified.—*CHESTERFIELD v. BLACK* (1876), 13 Ch. D. 138, n.; 24 W. R. 783; 3 Char. Pr. Cas. 195.

Annotation:—*As to* (2) *Follid.* *Anstoy v. North & South Woolwich Subway Co.* (1879), 11 Ch. D. 439.

1867. Answers objected to must be specified.]—One interrogatory contained six questions. Deft. answered five, but the answer to the sixth question was insufficient. Pltf. excepted to the answer, the exception including not only the unanswered sixth question, but all the other questions, which, it was admitted, had been answered:—*Held*: the exception was wrong in form.—*HIGGINSON v. BLOCKLEY* (1855), 25 L. J. Ch. 74; 26 L. T. O. S. 85; 1 Jur. N. S. 1104; 4 W. R. 60.

Annotations:—*N.F.* *Hoffmann v. Postill* (1869), 4 Ch. App. 673. *Distd.* *Zambaco v. Cassavetti* (1869), 38 L. J. Ch. 503. *Reid.* *Langton v. Waite* (1866), 15 L. T. 204; *Crossley v. Tomey* (1876), 2 Ch. D. 533.

1868. — Unless part of one question.]—The ordinary questions as to particulars on an interrogatory asking for an account of personal estate are not to be regarded as separate questions; & an exception to the answer in respect to such an interrogatory need not specify which of them is unanswered.—*ZAMBACO v. CASSAVETTI* (1869), 38 L. J. Ch. 503.

1869. —.]—*CHESTERFIELD v. BLACK*, No. 1866, *ante*.

1870. —.]—Objections to answers to interrogatories must be specific. A party cannot, by objecting at chambers in a general way to the answers given, or by objecting to a particular answer, entitle himself to an appeal from the order of the judge upon the sufficiency of all the answers, or of those not specifically objected to.—*CHURCH v. PERRY* (1877), 36 L. T. 513.

1871. —.]—A summons for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required.—*ANSTAY v. NORTH & SOUTH WOOLWICH SUBWAY CO.* (1879), 11 Ch. D. 439; 48 L. J. Ch. 776; 40 L. T. 393; 27 W. R. 575.

1872. — Unless all answers objected to.]—In a case where all the answers to interrogatories are properly objected to, the rule that a summons

Deft. by his answer admitted that he had made a privileged communication concerning pltf., but declined to answer as to its contents. The ct., in the exercise of its judicial discretion, refused to compel deft. to answer the

interrogatory.—*FITZGIBBON v.* (1875), L. R. 9 C. L. 294.—*IR.*

PART IV. SECT. 8, SUB-SECT. 4.—

1861 i. Ground of objection he stated *specifically*—*Reid*

reasons for objections raised to answering questions should be stated by the objecting party.—*ARSENYCH v. CANADA PUBLISHING CO., LTD.* 31 W. L. R. 604; 8 W. W. R. CAN.

9.—*Application for further and better answer.*
Sect. 10.]

for a further answer ought to specify the interrogatories or parts of interrogatories to which a further answer is required does not apply, & the summons may be in general terms.—*FURBER & PRICE v. KING* (1881), 50 L. J. Ch. 496; 29 W. R. 536.

1873. Inconsistency between answer & schedule.]

—*BRIDGWATER v. DE WINTON*, No. 1485, *ante*.

1874. Objection for insufficiency—Truth of answer assumed.]—*LYELL v. KENNEDY*, No. 384, *ante*.

1875. — Party interrogated may refer to whole affidavit.]—*LYELL v. KENNEDY*, No. 384, *ante*.

1876. — — —.]—Where the answers to interrogatories taken together answered every question material to the issue between the parties, & the Div. Ct. ruled that the answers were honest & complete:—*Held*: the Ct. of Appeal ought not to interfere because some particular answer might be more accurately framed.—*FIELD v. BENNETT* (1885), 2 T. L. R. 122, C. A.

1877. — — —.]—*MOORE v. EXPLOSIVES Co.* (1885), 1 T. L. R. 467, D. C.

1878. Court of Appeal will not interfere with judge's orders—Except in special circumstances.]—*FIELD v. BENNETT*, No. 1876, *ante*.

1879. Objection that answer embarrassing.]—*LYELL v. KENNEDY*, No. 384, *ante*.

1880. Order for *viva voce* examination—Where failure to answer.]—Where a party to whom interrogatories have been allowed to be administered under C. L. P. Act, 1854 (c. 125), s. 51, has neglected to answer at all, without just cause, it may be admissible to apply for an order, under sect. 53, for his oral examination, instead of proceeding by way of attachment for contempt; at all events, where there is a question whether by reason of illness or on account of co-parties to the suit having sufficiently answered, or otherwise, the neglect is not altogether without "just cause," & certainly is not wilful or contumacious in the sense of a defiance of the authority of the ct. But the rule for an oral examination is only *nisi* in the first instance.—*TURK v. SYNE* (1857), 27 L. J. Ex. 54.

1881. — For insufficient answer—Discretion of court exercised with caution.]—The jurisdiction of the ct. under C. L. P. Act, 1854 (c. 125), s. 53, in case of omission without just cause to answer sufficiently written interrogatories under sect. 51, to direct an oral examination of the interrogated

party, as it is a jurisdiction to be exercised at the discretion of the ct., will be exercised with caution, & with a due regard to the nature & circumstances of the action.

Qu.: whether, where upon the answers given to the written interrogatories, it is extremely doubtful in law whether deft. is liable to be sued at all, the application will be acceded to; but in such a case, at all events, it will not be granted, where there is no affidavit in support of the application, even although the objection is not raised by the opposite party.

Thus, where deft. was sued as administrator, & answered to written interrogatories that he had not taken out administration in this country, nor administered nor intermeddled with any of the effects in this country, the ct. refused a rule that defts. should be orally examined, there being no affidavit in support of the application, although pltf. showed cause in the first instance, & waived the objection.—*SWIFT v. NUN* (1857), 26 L. J. Ex. 365.

1882. — — — After application to judge in chambers.]—When an oral examination is required of the interrogated party for having omitted without just cause to answer sufficiently written interrogatories delivered under C. L. P. Act, 1854 (c. 125), ss. 51, 53:—*Semble*: the proper course is to apply to a learned judge at chambers in the first instance as to the sufficiency of the answers to the interrogatories.—*MEADOWS v. KIRKMAN* (1860), 2 L. T. 251.

1883. — — — After exceptions to answer.]—Where, after decree, a pltf. has not sufficiently answered interrogatories filed by deft. for his examination, deft.'s proper course is to except to the answer, & not to apply for an examination *viva voce* in ct. in the first instance.—*CROSKEY v. EUROPEAN & AMERICAN STEAM SHIPPING Co., LTD.* (1866), 14 W. R. 514.

1884. — — —.]—A deft. who had put in three insufficient answers, was ordered to be examined *viva voce* by an examiner of the ct., instead of being interrogated under General Orders, Ord. 16, r. 19, & to pay the costs, but not exemplary ones, of his insufficient answers, & of the application for the order in question.—*DANELL v. PAGE* (1868), 37 L. J. Ch. 631; 18 L. T. 785; 16 W. R. 1080.

1885. — — — Only granted as to answers specifically objected to.]—(1) When an oral examination upon interrogatories is granted, it will only be granted as to those the answers to which have been specifically objected to as insufficient.

PART IV. SECT. 9.

1877 i. Objection for — — —.
If deft.'s answers to the interrogatories are insufficient, he may be required to make further answers.—*R. v. ELLIS, Ex p. BAIRD* (1889), 28 N. B. R. 497.—*CAN*.

1877 ii. — — —.]—In an action for libel deft. was *inter alia* interrogated (No. 4) as to whether he did not publish the words complained of "in the London 'Times' newspaper or some other & what newspaper?" "When did such publication take place?" deft. answered all the interrogatories in the one answer as follows: "That in *bona fide* comment on the conduct & language of pltf., & in reference to matters of public interest, I caused to be printed & published of & concerning pltf. & others in the several newspapers in the said interrogatories mentioned the words in such interrogatories referred to, honestly believing the same to be true & without malice":—*Held*: a further answer should be given to No. 4, giving the date of the alleged

publication.—*MALONE v. FITZGERALD* (1886), 18 L. R. Ir. 187.—*IR*.

1877 iii. — — —.]—In an action for slander deft. who was a member of the Dublin Corpn., pleaded privilege. In reply to interrogatories asking deft. what information he possessed which induced him to believe in the truth of the allegations complained of, & from whom he obtained such information, the deft. said that he obtained his information from speeches made at meetings of the corpn. & from a newspaper report of one of such meetings:—*Held*: the deft. should give the names of the speakers upon whose speeches he relied & identify the newspaper report.—*Moore, J., Ireland*.—*IRWIN v. O'BEIRNE* (1919), 53 I. L. T. 104.—*IR*.

a. — — — Must indicate defects in answer.]—Where an interrogatory contains a number of questions, each complete & distinct in itself, some of which are fully answered, an exception for insufficiency must not be to the whole answer, but must point out in what

particular the interrogatory is not sufficiently answered.—*BURPEE v. AMERICAN BOBBIN SPOOL & SHUTTLE Co.* (1892), N. B. Dig. 656.—*CAN*.

b. Waiver of objection to answer.]—Payment of the allowance after answers filed to pltf.'s interrogatories is a waiver of any objections to the answers, & pltf. cannot file further interrogatories without leave of ct.—*MALONE v. HANDY* (1836), 5 O. S. 310.—*CAN*.

c. Answers disingenuous & evasive.]—Where the answers of deft. to interrogatories were disingenuous & evasive, & certain information peculiarly within his knowledge or under his control was not disclosed by him:—*Held*: unless deft. made a sufficient answer to the interrogatories within a stated period, his defence should be struck out & judgment entered against him.—*RAND v. WHITE* (1895), 40 N. S. R. 145.—*CAN*.

d. Answer of corporation—Whether opinions of officers may be called for.]—Pltf.'s claim was for the price

(2) Delay in applying for an order for fuller answers to interrogatories will be held, unless justified, a ground of objection to the application.—**THE MARY (OR ALEXANDRA)** (1869), 17 W. R. 627.

1886. ———.]—Where a person interrogated has answered insufficiently & has been ordered to further answer by *vivâ voce* examination, he can only be required to give *vivâ voce* such an answer to the particular interrogatories mentioned in the order as would have been sufficient if it had been given by his affidavit in answer to interrogatories. The costs of any examination exceeding these limits must be paid by the party examining.—**LITCHFIELD v. JONES** (1884), 54 L. J. Ch. 207; 51 L. T. 572; 33 W. R. 251.

1887. ———.]—**Irrelevancy.**]—**PEYTON v. HARTING**, No. 1786, *ante*.

1888. ———.]—**Costs.**]—Where, in consequence of the party interrogated answering insufficiently, an order was made by the master for his examination *vivâ voce* before a special examiner:—**Held**: there was power under R. S. C., Ord. 31, r. 10, & Ord. 55, r. 1, or the general practice of the ct., to make it a term of the order that the costs of, & occasioned by, the application should be paid by the party interrogated "in any event."—**VICARY v. GREAT NORTHERN RY. CO.** (1882), 9 Q. B. D. 168; *sub nom.* **VICKARY v. GREAT NORTHERN RY. CO.**, 51 L. J. Q. B. 462.

Annotation:—**Refd.** **Mitchell v. Darley Main Colliery Co.** (1883), 10 Q. B. D. 457.

1889. ———.]—**LITCHFIELD v. JONES**, No. 1886, *ante*.

SECT. 10.—USING ANSWER AT TRIAL.

1890. Rights of plaintiff & defendant.]—Where a passage read by a pltf. from an answer refers to another passage, that other passage is to be read only for the purpose of explaining or qualifying

of an incinerating machine bought by defts., who refused payment on the ground that the machine would not do the work contracted for. Pltfs. delivered interrogatories, the answers to which did not satisfy pltfs. On pltfs.' application for further details of information to be given by defts.:—**Held**: pltfs. were not entitled to an order requiring defts. to furnish estimates or opinions of their officers as to the quantity of manure produced throughout the city, although such officers had means of forming such opinions.—**DECARIE MANUFACTURING CO. v. WINNIPEG CITY** (1909), 18 Man. L. R. 663.—**CAN.**

e. Must be made within reasonable time.]—Application for an order requiring a further answer to interrogatories, must be made within a reasonable time; & in considering what is a reasonable time the ct. will have regard to the period (namely, six weeks) limited by the former practice for taking exceptions for insufficiency; & in ordinary cases applications for a further answer should be made within such period of six weeks.—**LLOYD v. MORLEY** (1879), 5 L. R. Ir. 74.—**IR.**

PART IV. SECT. 10.

1. Rights of plaintiff & defendant—**To use part.**]—Where an interrogatory asked whether certain things were not done in one or two ways stated "or how otherwise" & the answer was given that they were done partly in each of the two ways stated & partly in other ways set out, the ct. allowed the interrogatory & the answer to be read in evidence omitting from the

question "or how otherwise" but admitted them as an admission only that they were partly done in each of the two ways stated.—**NOTT v. DAVIS** (1893), 19 V. L. R. 485.—**AUS.**

g. ———.]—Where the examination for discovery of an officer of a company is used at the trial, the whole examination must be put in & the parties wishing to use the same cannot put in certain questions only.—**WESTMINSTER WOODWORKING CO. v. STUYVESANT INSURANCE CO.** (1915), 32 W. L. R. 802; 8 W. W. R. 112; 9 W. W. R. 418; 25 D. L. R. 284; 22 B. C. R. 197.—**CAN.**

h. ———.]—It was argued that the ruling of the trial judge as to the admission in evidence of the examination for discovery of deft. S. was erroneous, that the whole of the examination, so far as it related to a certain conversation, parts of which had been read, should have been read:—**Held**: the contention was not well-founded when a part of an examination is being read, counsel for the opposite party, desiring to have other parts of the examination read, must point out the parts.—**BASIL v. SPRATT** (1919), 44 O. L. R. 155; 15 O. W. N. 171.—**CAN.**

k. ———.]—Pltf. may read part of deft.'s answer to a personal interrogatory.—**SHERROCK v. CHARTRES** (1831), 2 I. Eq. R. 230, n.—**IR.**

l. ———.]—**To use deposition of officer of one party—Party not taking part in examination.**]—**Semble**: the depositions of an officer of a co. upon examination for discovery can only

the thing in respect of which the reference is made, & not for the purpose of introducing new facts, which do not explain or qualify that thing, though such new facts be connected, in grammatical construction, with that which must be read.—**BARTLETT v. GILLARD** (1827), 3 Russ. 149; 6 L. J. O. S. Ch. 19; 38 E. R. 532, L. C.

Annotations:—**Mentd.** **Rowe v. Rowe** (1848), 2 De G. & Sm. 294; **Edmunds v. Low** (1857), 3 K. & J. 318; **Atkinson v. Littlewood** (1874), L. R. 18 Eq. 595; **Fairer v. Park** (1876), 3 Ch. D. 309.

1891. ———.]—If pltf. read a passage from deft.'s answer as evidence of a particular fact, deft. has no right to read subsequent matter connected with it by such words as "but" & "and," unless the subsequent matter be explanatory of the passage read by pltf.—**DAVIS v. SPURLING** (1829), 1 Russ. & M. 64; Tam. 199; 39 E. R. 25.

Annotations:—**Mentd.** **A.-G. v. Chesterfield** (1854), 18 Beav. 596; **Blagrove v. Routh** (1856), 2 K. & J. 509; **Gething v. Kelghley** (1878), 9 Ch. D. 547.

1892. ———.]—If a pltf. reads a passage in an answer, which does not refer to but is qualified by a subsequent passage, deft. may read the latter passage.—**RUDE v. WHITCHURCH** (1830), 3 Sim. 562; 57 E. R. 1109.

1893. ———.]—**NURSE v. BUNN** (1832), 5 Sim. 225; 58 E. R. 321.

1894. ———.]—**LYELL v. KENNEDY**, No. 384, *ante*.

1895. Interrogatories in former suit against same defendant—Admissible without proving signature.]—An examined copy of answers to interrogatories made in a former suit by one of the parties to an action is admissible in evidence against him without putting in the interrogatories to which they are answers, or proving the party's signature to the original answers.—**FLEET v. PERRINS** (1868), L. R. 3 Q. B. 536; 37 L. J. Q. B. 233; 19 L. T. 147; *affd.* (1869), L. R. 4 Q. B. 500, Ex. Ch.

Annotations:—**Mentd.** **Lloyd v. Pughe** (1872), 8 Ch. App. 88; **Jones v. Cuthbertson** (1873), L. R. 8 Q. B. 504; **British Mutoscope & Biograph Co. v. Homer**, [1901] 1 Ch. 671.

at all, when they have taken part in the examination.—**LEITCH v. GRAND TRUNK RY. CO.** (1888), 12 P. R. 541, 671; 13 P. R. 369.—**CAN.**

m. ———.]—**Not examined by counsel for that party.**]—Before delivery of his statement of defence one of defts. obtained an order to examine an officer of pltfs. for discovery, & examined him thereunder, but he was not further examined by counsel for pltfs.:—**Held**: such deft. could read the depositions so taken, as evidence at the trial of the action.—**UNION BANK v. STARRS** (1889), 13 P. R. 108.—**CAN.**

n. For what purpose available—**To contradict person interrogated.**]—The examination of a party to an action, taken for the purpose of discovery, may be used at the trial to contradict the same party, but cannot be put in evidence as an admission.—**ARNOLD v. CALDWELL** (1884), 1 Man. L. R. 155.—**CAN.**

o. Right of court—To use parts not put in evidence by counsel.]—A judge in charging a jury may read to them parts of an examination for discovery additional to parts put in evidence by counsel.—**ADAMS v. NATIONAL ELECTRIC TRAMWAY & LIGHTING CO.** (1893), 3 B. C. R. 199.—**CAN.**

p. ———.]—Deft. being absent at the time of trial, & counsel having put in evidence for pltf. parts of deft.'s examination for discovery, deft.'s counsel desired the trial judge to look at & direct certain other parts of the examination to be put in evidence:—**Held**: the application must

Sect. 10.—Using answer at trial. Part V. Sect. 1: Sub-sects. 1 & 2.]

1896. Answers may be read—Without producing interrogatories—If interrogatories lost.]—Answers to interrogatories may be read without producing the interrogatories, if they cannot be found.—*ROWE v. BRENTON* (1828), as reported in 8 B. & C. 737; 108 E. R. 1217.

Annotations:—Reid. Evans v. Taylor (1838), 7 Ad. & El. 617.

Mentd. Doe d. Carthew v. Brenton (1830), 4 Moo. & P. 186; *Whittingham v. Bloxham* (1831), 4 C. & P. 597; *R. v. Richmond Manor* (1841), 5 Jur. 605; *Anglesey v. Hatherton* (1842), 10 M. & W. 218; *Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520; *Doe d. Dand v. Thompson* (1845), 7 Q. B. 897; *Rogers v. Brenton* (1847), 10 Q. B. 26; *Ex p. Exeter, Bp., Gorham v. Exeter, Bp.* (1850), 10 C. B. 102; *Shaw v. Beck* (1853), 8 Exch. 392; *Jessop v. Jessop* (1861), 30 L. J. P. M. & A. 193; *A.-G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381; *Dixon v. Farrer* (1886), 18 Q. B. D. 43; *Sutton Harbour Improvement Co. v. Plymouth Town Grdns.* (1890), 63 L. T. 772; *Mercer v. Denne*, [1905] 2 Ch. 538.

Part V.—Non-Compliance with Order.

SECT. 1.—CONTEMPT OF COURT.

SUB-SECT. 1.—IN GENERAL.

1897. Contempt of court—Production of documents.]—The common direction that a party shall produce before the master all books & papers relating to the matters in question, as the master shall direct, entitles the master to require, by his warrant, that all such books & papers generally shall be left in his office; & a refusal to leave them, in pursuance of such a warrant, is a disobedience to the order of the ct. which has directed their production.—*SHIRLEY v. FERRERS (EARL)* (1836), 1 My. & Cr. 304; 5 L. J. Ch. 293; 40 E. R. 391, L. C.

1898. — Answer to interrogatories.]—In a cause in the Ct. of Common Pleas at Lancaster, an order was granted by the district prothonotary to administer interrogatories to pltf. to be answered within ten days. The order with the interrogatories was served on pltf.'s attorneys, & an order for further time to answer obtained

by them. The interrogatories not having been answered within the further time, a rule was obtained in the Ct. of Q. B. for an attachment against pltf., on the ground that pltf. had by not answering the interrogatories been guilty of a contempt under O. L. P. Act, 1854 (c. 125), ss. 51, 100, & that by force of 32 & 33 Vict. c. 37, ss. 6, 7, & 15, the proper mode of proceeding was by rule in any one of the superior cts. On cause being shown, the ct. held the proceedings regular, & made the rule absolute.—*COSTON v. BLACKBURN* (1872), L. R. 8 Q. B. 54; 27 L. T. 117.

Annotation:—Apld. Morgan v. Alexander (1875), L. R. 10 C. P. 184.

SUB-SECT. 2.—ATTACHMENT.

See R. S. C., Ord. 31, rr. 21, 22, 23, &, generally, CONTEMPT OF COURT, Vol. XVI., pp. 46 et seq.

1899. Party defaulting may be attached —

MARRIOTT (1896), 5 R. C. R. 157.—CAN.

q. — To suppress answer to leading interrogatory.]—*Semble:* when an interrogatory is leading, the ct. will, at the hearing, suppress the deposition to that interrogatory. Where, however, only part of an interrogatory is leading, the ct. will not suppress more of the deposition than replies to that part.—*WRIGHT v. GRIFFITH* (1851), 1 L. Ch. R. 695; 3 Ir. Jur. 138.—IR.

r. Right of one defendant — To use deposition of co-defendant—With conflicting interest.]—When a *prima facie* liability to pltf. is made out against one deft., then, upon the issue of whether another deft. is also liable as being his partner therein, such defts., as between themselves, are "opposite parties," within Rule 723, upon the issue involved, as it is the interest of the first that the second should be held as a contributor to the obligation, while it is the interest of the latter to be discharged, &, therefore, the examination before trial of one of such defts. for discovery is evidence at the trial on behalf of the other.—*BRITISH COLUMBIA IRONWORKS v. BUSE* (1896), 4 B. C. R. 419.—CAN.

PART V. SECT. 1, SUB-SECT. 1.

a. Notice of motion to commit—Necessity for personal service.]—When a party neglects to comply with the terms of an order for the production of books & papers, the proper mode of proceeding is to serve personally a notice of motion to commit.—*PATTERSON v. BOWES* (1853), 4 Gr. 44.—CAN.

t. Duty of party to inform himself—Failure to discharge—Matters interrogated on known to agent.]—If the ct. decides that the party examined has not discharged his duty of informing himself on matters within the know-

ledge of agents, etc., the order granted should not be in the nature of a *mandamus* to compel him to inform himself, but for an order that he attend & make sufficient answer to the questions not so answered before, or in the alternative be committed for contempt. The notice of motion should particularise the answers complained of.—*BADGER v. TOROSOFF*, [1919] 1 W.W.R. 919; 12 Sask. L. R. 98.—CAN.

a. Non-production of documents—Whether contempt purged—By evidence that documents destroyed.]—A prisoner committed to gaol for contempt of ct. in not producing a book which he had been ordered to produce cannot purge his contempt by showing either that the book has been burnt by some other person without his knowledge or connivance, or that he left it in a certain place & was afterwards unable to find or trace it. In such circumstances prisoner should not be released unless he pays all the costs occasioned by his misconduct in connection with the lost book, although an application for release without such payment might be entertained if it were shown that, by reason of poverty such costs could not be paid.—*COTTER v. OSBORNE* (1907), 17 Man. L. R. 248.—CAN.

b. — Relevancy must be established—Before court will punish.]—Where the ct. is moved, under 22 Vict. c. 20, s. 1, to punish a person for disobedience of an order it must be satisfied that the entries in the document are relevant to the inquiry, & ought to have been disclosed.—*R. v. BORRETT* (1905), 24 N. Z. L. R. 584.—N.Z.

c. Right of party in contempt—To attack opponent's proceedings—How limited.]—A rule to refer a bill for prolixity obtained by deft. against whom there was process for want of his answer, will be discharged with costs,

a party in contempt being disentitled generally to move for any purpose except to show irregularity in the service or process, & the practice in Ireland, according to which deft. may demur to the bill after he is in contempt, & until the line of process is gone through to a commission of rebellion sealed, affords no analogy, & is not to be extended.—*HOWARD v. NEWMAN* (1828), 1 Mol. 221.—IR.

d. Failure to purge contempt—Whether evidence in mitigation receivable.]—When a person adjudged to be in contempt fails to purge such contempt by his answers to personal interrogatories administered to him by prosecutor, the ct. will proceed to pass sentence, but before doing so, will give the party so in contempt an opportunity of filing affidavits in mitigation of punishment.—*Re MATTHEWS* (1860), 12 I. C. L. R. 273; 12 Ir. Jur. 322.—IR.

PART V. SECT. 1, SUB-SECT. 2.

1899 i. Party defaulting may be attached—Discovery.]—Deft. before action, which was for slander imputing to pltf. adultery with the wife of deft.'s brother D., procured in Melbourne as the agent in D. who was petitioner in a divorce suit, a statutory declaration from C. deposing to the fact of adultery & made affidavit that he had the declaration in his possession. The action was afterwards commenced & an application in the action for inspection was opposed by deft. on the ground that the document had been given to D. & D. had handed it to his solrs. who were also deft.'s solrs. in the action. An order for inspection was granted & not being complied with by deft., was made a rule of ct. & subsequently a writ of attachment was issued against deft. for disobedience of the rule. The document was produced at the trial of the action on a *subpoena*

Discovery.]—TRIGG v. TRIGG (1759), Dick. 325; 1 Sim. & St. 274, n.; 21 E. R. 294.

1900. ———.]—PRICE v. PRICE, No. 358, ante.

1901. ———. Although applicant requests & is refused inspection—At defendant's office.]—An order had been made upon deft. for production of documents. Pltf. went to the office of deft., where he was shown a letter-book, of which inspection was refused until counsel's opinion had been taken. Deft. subsequently asserted that he had lost the book:—*Held*: pltf. was entitled to an attachment against deft. notwithstanding the circumstance of having gone to his office for the purpose of inspection.—MORNINGTON v. KEENE (1856), 4 W. R. 793.

1902. ———. Interrogatories.]—GEARY v. BUXTON, No. 1810, ante.

1903. ———.]—Where a married woman had upon her own application obtained an order to answer separately from her husband & made default in answering, an attachment was issued against her.—BULL v. WITHEY (1863), 32 L. J. Ch. 633; 8 L. T. 495; 9 Jur. N. S. 595.

1904. ———.]—COSTON v. BLACKBURN, No. 1898, ante.

1905. ———.]—C. L. P. Act, 1854 (c. 125), s. 46, enacts that "upon the hearing of any motion or summons," it shall be lawful for the ct. or a judge at their or his discretion from time to time to order the production of documents or the oral examination of witnesses, before such ct. or judge or before a master:—*Held*: (GROVE, J., *dubitante*), the terms "hearing of any motion" included the application for a rule *nisi*, & consequently, an order for the examination of witnesses might be made upon a motion for an attachment against deft. for not answering interrogatories.—MORGAN v. ALEXANDER (1875), L. R. 10 C. P. 184; 44 L. J. C. P. 167; 32 L. T. 34; 23 W. R. 321.

Annotation:—Apld. Moline v. Tasmanian Ry. (1875), 32 L. T. 828.

1906. ———. Unless party entitled to order waives compliance—Signing final judgment before interrogatories answered.]—Interrogatories having been delivered to deft. in an action of detinue, & still remaining unanswered, a judge's order was made by consent, whereby pltf. was to be at liberty to sign final judgment for £1,000 damages & costs, on the terms that execution was not to issue if the goods detained were delivered up within a certain time. Pltf. signed final judgment, & the goods not being delivered up, obtained an order for the issue of execution for return of the chattels detained. An application under these circumstances having been made for an attachment against deft. for not answering the interrogatories:—*Held*: the consent to the final judgment was an abandonment by pltf. of his right to have the interrogatories answered, & the application must therefore be refused.—HAYNE v. PRATT (1871), L. R. 6 C. P. 105; 40 L. J. C. P. 119; 23 L. T. 809; 19 W. R. 437.

duces tecum by one of the solrs.:—*Held*: deft. was guilty of contempt in not obeying the order for inspection & he was ordered to pay a fine of £50 & all the costs.—R. v. DIBBS (1880), 1 N. S. W. L. R. 17.—AUS.

1899 ii. ———.]—Where a decree directs a deed to be lodged, a motion or application to the ct. in that behalf is unnecessary. It is only requisite that the part of the decree which directs deft. to lodge the deeds should be abstracted & served on deft., & if he do not comply with the direction in the decree he may be attached.—RUT-

LEDGE v. RUTLEDGE (1838), Craw. & D. Abr. C. 461.—IR.

1902 i. ———. Interrogatories.]—Where an officer of a corpn.-party has declined to answer questions asserted to be proper, the correct practice is for the examining party to move to commit the officer, or for a writ of attachment; & while if it be desired actually to commit the recalcitrant, the motion should be made in ct., it may be in chambers if all that is desired be an adjudication upon the propriety of the refusal.—SHAW v. UNION TRUST Co., LTD. (1915), 9 O. W. N. 278;

1907. Order not made—Discovery—Party ready to comply.]—ANON. (1875), No. 1925, post.

1908. ———. Costs granted to applicant.]—Pltf. procured the usual order for defts. to produce certain deeds within a particular time, but did not take the usual steps to enforce it, on account of defts. submitting to perform the order. Subsequently defts. not having produced a particular deed, pltf. gave notice of motion to produce the same, & for defts. to pay the costs of the application. Defts. immediately produced the deed, but refused to pay the costs of the application. Upon motion by pltf. for defts. to pay the costs:—*Held*: pltf. was entitled to the costs of the motion, made necessary by the non-compliance of defts. with the order, although pltf. had not taken the regular steps to enforce it.—MAW v. MARSDEN (1840), 4 Jur. 1079.

1909. ———. ———.]—On May 20, 1881, an order was made for defts. within seven days after service, to file an affidavit as to documents. The copy served had no such indorsement as is required by Cons. Ord. XXIII., r. 10. Defts. filed successively three affidavits, which were successively held insufficient, & on Feb. 10, 1882, filed a fourth. A summons was taken out, to consider its sufficiency, & on its being attended on Feb. 24, defts.' solr. stated that the draft of a further affidavit had been sent into the country, & that the affidavit would be filed as soon as possible, & requested an adjournment. The chief clerk refused to adjourn; held the affidavit of Feb. 10, to be insufficient, & ordered defts. to pay the costs. On Feb. 25, pltf. served notice of motion for attachment for Mar. 3. On Feb. 28, defts. filed a further affidavit, & on Mar. 11, asked pltf.' solrs. whether they proposed to withdraw their notice of motion. Pltf.' solrs. replied that they did not, as their briefs had been delivered before the affidavit was filed, but that they would consider any proposal defts. had to make. Defts.' solr. wrote in answer making no offer to pay any costs, but saying that they should deliver their briefs:—*Held*: pltf. were right in giving their notice of motion, & as defts. had made no offer to pay any costs, pltf. were entitled to bring on their motion, & must have the costs of it.—THOMAS v. PALIN (1882), 21 Ch. D. 360, C. A.

1910. ———. Document privileged.]—On a motion for an attachment for refusal of production & inspection of documents, pursuant to order, or for immediate inspection, defts. objecting that the documents contained passages improper for inspection, the Lord Chancellor refused the application, but directed defts. to pay the costs of it.—JONES v. POWELL (1816), 1 Swan. 535, n.; 36 E. R. 495, L. C.

1911. ———. Production by servant of master's documents—Company secretary.]—In obedience to the instructions of his directors, & in disobedience of the order of the district prothonotary of the Common Pleas at Lancaster, & of the order of an arbitrator, the secretary of a

35 O. L. R. 146.—CAN.

o. Party defaulting attached—Ready to comply—Effect of delay in exhibiting interrogatories.]—If prosecutor does not exhibit interrogatories against a deft. in custody on an attachment for contempt, a rule will be granted for his discharge unless the interrogatories are filed within 10 days.—R. v. SALTER (1858), 4 All. 51.—CAN.

i. Order not made—Discovery—Irregularity in form of order disobeyed—Where an order for production in th

Sect. 1.—Contempt of court: Sub-sect 2. Sect. 2.]

railway co. refused to produce, before the arbitrator, numerous books & papers of the co., which the attorney of the pltf. in the cause referred swore to be material to pltf.'s case:—*Held*: the secretary, being in the position of a servant, was justified in obeying the orders of his masters not to produce the documents, & a rule to attach him for contempt discharged.—*CROWTHER v. APPLEBY* (1873), L. R. 9 C. P. 23; 43 L. J. C. P. 7; 22 W. R. 265; *sub nom.* *CROWTHER v. APPLEBY, Re SHARPLEY*, 29 L. T. 580; 38 J. P. 24.

Annotations:—*Consd.* *Eccles v. Louisville & Nashville Railroad Co.*, [1912] 1 K. B. 135. *Distd.* *Forbes v. Samuel*, [1913] 3 K. B. 706.

1912. ————.]—In this action, which was pending in a foreign ct., an order was made under the Foreign Tribunals Evidence Act, 1856 (c. 113), for the examination in this country of a witness & the production of documents by him. Upon his examination the witness refused to produce documents upon the ground that, so far as they were in his possession, custody, or control, they were so only in his capacity as a servant & he had no authority from his employer to produce them. He had not asked, & refused to ask, the permission of his employer, who had not forbidden him to produce the documents. The employer was not a party to the proceedings:—*Held*: an order for a writ of attachment ought not to be made against the witness, who was not bound to produce the documents of his employer.—*ECCLES & Co. v. LOUISVILLE & NASHVILLE RAILROAD CO.*, [1912] 1 K. B. 135; 81 L. J. K. B. 445; 105 L. T. 928; 28 T. L. R. 67; 56 Sol. Jo. 107, C. A.

1913. ———— *Statement of parties names required*—*Ord. 16, r. 10.*]—The provisions of Jud. Act, 1875 (c. 77), *Ord. 31, r. 20*, as to attachment for disobedience of orders "to answer interrogatories, or for discovery or inspection of documents," do not apply to orders for the statement of the names of partners under *Ord. 16, r. 10*, or to orders for sworn accounts under *Ord. 15, r. 1.*—*PIKE v. KEENE & BYNE* (1876), 35 L. T. 341; 24 W. R. 322; 2 Char. Pr. Cas. 262.

1914. ———— *Party unable to comply.*]—The ct. will not order a solr. to be imprisoned for contempt in not obeying an order to produce documents, where it appears that they are in the possession of third parties, & he is unable to obtain them, even though it arises from his own default.—*Re WILLIAMS* (1861), 3 De G. F. & J. 104; 30 L. J. Ch. 610; 4 L. T. 103; 25 J. P. 484; 7 Jur. N. S. 323; 9 W. R. 393; 45 E. R. 818, L. JJ.; *subsequent proceedings, sub nom.* *WILLIAMS v. SMITH* (1863), 14 C. B. N. S. 596.

Annotation:—*Folld.* *North v. Huber* (1861), 30 L. J. Ch. 666.

1915. ————.]—*WILSON v. RAFFALOVICH*, No. 141, *ante*.

1916. ———— *Interrogatories—Party ready to comply—Costs to applicant.*]—Interrogatories were

form given as number 98 of the sched. to King's Bench Act (Man.) omits the words of Rule 425 under which the order is made, " & to produce & deposit the same with the proper officer for the usual purpose," deft. who fails to deposit the documents is not liable to attachment or to have his defence struck out.—*A.-G. FOR MANITOBA v. KELLY* (1915), 33 W. L. R. 233, 963; 9 W. W. R. 863; 10 W. W. R. 131.—CAN.

1919 I. ———— *Interrogatories—Party out of jurisdiction.*]—Upon a motion for an attachment against pltf.s., who were out of the jurisdiction, for not sufficiently answering interrogatories, it was ordered that further answers should be

filed within a fortnight, & the action stayed in the meantime. When a party is interrogated as to his knowledge, information, & belief, an answer as to knowledge & information, but not as to belief, is not sufficient. A general answer to a particular interrogatory is not sufficient. Upon such motion, it is not open to the party against whom the attachment is sought to fall back upon the immateriality of the interrogatories, unless it appears on the face of them that they have been framed for the purpose of delay, & are not connected with the subject-matter of the action. The proper course, if interrogatories are immaterial, or otherwise objectionable,

delivered to deft. under a judge's order; & the time for answering the same was enlarged until a peremptory order was made that deft. should answer upon a certain day. A rule *nisi* for an attachment for not so answering having been obtained, upon cause being shown, the answers being ready to be filed, the rule was ordered to be discharged, if the answers should be filed within twenty-four hours; costs to be pltf.'s costs in the cause in any event.—*RAINSFORD v. CAMPBELL* (1860), 2 L. T. 432.

1917. ————.]—Where a party ordered to answer interrogatories has not done so in due time, but the ct. see that, although there is in strictness no sufficient excuse, there has been no intention to disobey the ct., & the answers are ready for delivery, a rule for an attachment will not be made absolute, & the ct. may, in its discretion, make the costs of the rule costs in the cause.—*WINDLE v. LANE* (1860), 29 L. J. Ex. 245.

----- *If order obeyed.*]—The ct. will not grant an attachment against a party for neglecting, until after the time allowed has expired, to answer interrogatories delivered under Common Law Procedure Act, 1854 (c. 125), s. 51, provided he has filed answers before the application for an attachment is made.—*CURRAN v. ELPHINSTONE* (1855), 26 L. T. O. S. 74; 4 W. R. 50.

1919. ———— *Party out of jurisdiction.*]—Where an order has been made that a party to a suit, a foreigner, shall answer interrogatories, & there has been no answer, but it does not appear that the party was in this country when the order was made, it being doubtful whether he is in contempt, a rule for an attachment will not be granted.—*VON HOFF v. HOERSTER* (1858), 27 L. J. Ex. 299.

1920. ———— *No person designated to answer—Company.*]—*BUTTON v. SOUTH EASTERN RY. CO.*, [1868] W. N. 20.

Preliminary requirements of order for discovery—Order must be specific.]—See *CONTEMPT OF COURT*, Vol. XVI., p. 49, Nos. 527, 528.

——— *Indorsement of warning on order.*]—See *CONTEMPT OF COURT*, Vol. XVI., p. 59, No. 674.

1921. ———— *Service of order—Necessity for personal service—Master's four day order.*]—*HOBSON v. SHERWOOD* (1843), 6 Beav. 63; 12 L. J. Ch. 447; 1 L. T. O. 184; 7 Jur. 687; 49 E. R. 748.

———.]—See *CONTEMPT OF COURT*, Vol. XVI., p. 55, Nos. 611–616.

1922. ———— *Service of rule nisi—Personal service necessary.*]—An attachment for not answering interrogatories under the C. L. P. Act, 1854 (c. 125), will not under any circumstances be granted unless it appear that personal service of the rule *nisi* has been effected.—*RUSSELL v. DODD* (1857), 5 W. R. 267.

———.]—See *CONTEMPT OF COURT*, Vol. XVI., pp. 64–67, Nos. 721–776.

is to move to strike them out.—*REYNOLDS v. BLOOMFIELD* (1858), 8 I. C. L. R. App. 14; 11 Ir. Jur. 31.—IR.

g. ———— *Designed to entrap opponent.*]—Where an interrogatory calculated to entrap deft. is framed in too vague a manner, a motion for an attachment against deft. for not answering it will not be acceded to by the ct., & will be refused with costs.—*CARROLL v. HUGHES* (1860), 13 Ir. Jur. 40.—IR.

h. *Proceedings to be taken in court—Not in chambers.*]—Where a party to be examined refuses to produce books, etc., as required by the

1923. Application for—Who may make—Liquidator of company or party interested—Although not original applicant.]—An order having been made by the Ct. of Ch. under Cos. Act, 1862 (c. 89), for the compulsory winding up of a co. & the appointment of an official liquidator, he, in pursuance of an order of the same ct., brought an action in the name of the co. against a shareholder for arrears of calls. Deft. obtained a judge's order to deliver interrogatories to the directors under C. L. P. Act, 1854 (c. 125), s. 51, which enacts that either party to a cause may deliver interrogatories to the opposite party, " & require such parry, or in the case of a body corporate any of the officers of such body corporate," to answer them, & subsequently another judge's order to stay proceedings in the action until answers were given. The ct. refused an application by the official liquidator to set aside the orders:—*Held*: the directors of the co., at the time when the order for winding up was made, were " officers " within the meaning of this sect. & an attachment against them for not answering the interrogatories might be granted at the instance of the official liquidator.—*MADRID BANK v. BAYLEY* (1866), L. R. 2 Q. B. 37; 8 B. & S. 29; 36 L. J. Q. B. 15; 15 L. T. 292; 15 W. R. 159.

1924. ——— Plaintiff against co-plaintiff.]—*SEAL & EDGELOW v. KINGSTON*, No. 140, *ante*.
—— When applicant himself in contempt.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 91, Nos. 1145–1146.

—— Must show who is in contempt.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 69, No. 806.

Arrest—Not if order complied with.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 78, No. 954.

SECT. 2.—ACTION DISMISSED.

See R. S. C., Ord. 31, r. 21.

1925. General rule.]—R. S. C., Ord. 30, r. 20, enabling the judge at chambers to dismiss the action for want of prosecution, or strike out the defence for failure to answer interrogatories, is a highly penal enactment & only to be exercised in the last resort.

I have not yet granted an application of this kind, nor shall I do so when the parties really intend to answer (*LUSH, J.*).—*ANON.* (1875), 20 Sol. Jo. 57; Bitt. Prac. Cas. 13; 1 Char. Cham. Cas. 115.

1926. ———.]—The Ct. of Ch. has not only full power to stay all proceedings in a suit till pltf. has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself; & where money has been paid into ct., may direct the payment of that money out of ct. to the party entitled to it.—*LIBERIA REPUBLIC v. ROYE* (1876),

notice to produce, served with the order to examine under R. S. O., 1877, c. 50, s. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the ct. & not before a judge in chambers. *Semble*: the action could not be dismissed under R. S. O., 1877, c. 50, s. 170a, 41 Vict. c. 3, s. 9, for disobedience by pltf. of the order to produce.—*MERCHANTS BANK v. PIERSON* (1879), 8 P. R. 123.—*CAN.*

PART V. SECT. 2.

1925 1. General rule.]—Under C. S. c. 49, s. 31, & Act 45 Vict. c. 8, s. 2, the

remedy of a deft. upon an insufficient answer is not to except thereto, but to move within a reasonable time to dismiss the bill upon 14 days' notice of motion.—*DOWD v. DOWD* (1889), (1825–97), N. B. Dig. 654.—*CAN.*

k. Offer to remedy default—Discretion of court.]—Upon a motion to dismiss the action for pltf.'s non-attendance to be examined for discovery pursuant to appointment, pltf. offered to submit herself for examination at any time at her own expense. The master in chambers, nevertheless, dismissed the action with costs, pltf.'s claim not being, in his opinion, an honest or fair one.—*DENHAM v. GOOCH* (1890), 13 P. R. 344.—*CAN.*

1. Grounds justifying non-compli-

1 App. Cas. 139; 45 L. J. Ch. 297; 34 L. T. 145; 24 W. R. 967, H. L.

Annotations:—*Refd. Higginson v. Hall* (1879), 10 Ch. D. 235; *Nelson v. Nelson Line* (Liverpool), [1906] 2 K. B. 217.

1927. Court has discretion.]—Ord. 31, r. 20, of the Rules of Ct., 1875, does not make it imperative on the ct. to dismiss the action of a pltf. who has failed to comply with an order for the production of documents.—*HARTLEY v. OWEN* (1876), 34 L. T. 752; 3 Char. Pr. Cas. 240.

Annotation:—*Refd. Wilson v. Raffalovich* (1881), 7 Q. B. D. 553.

1928. ———.]—*KENNEDY v. LYELL* (No. 5), [1882] W. N. 137, C. A.

1929. Plaintiff trying to avoid giving discovery.]—*DANVILLIER v. MYERS*, [1883] W. N. 58, C. A.

1930. Non-compliance due to infirmity.]—Pltf., subsequently to the commencement of the action, became incapable, from infirmity, of transacting business. Defts. obtained orders that pltf. should make an affidavit of documents, & that defts. should be at liberty to administer interrogatories. Pltf.'s brother who for many years had managed pltf.'s business affairs, made an affidavit of documents & answered the interrogatories. Defts. took out a summons under Ord. 31, r. 21, that the action might be dismissed with costs on the ground of non-compliance with the orders. Pltf.'s brother also took out, on behalf of pltf. a summons for leave to amend by adding himself as next friend, & that the two affidavits which he had made might be accepted as compliance with the said orders of the ct.:—*Held*: in the absence of evidence that the action was commenced without pltf.'s sanction, no order could be made on defts.' summons, & pltf.'s summons must be allowed. But as this was by way of indulgence to pltf., costs of both summonses to be paid by pltf.—*CARDWELL (LORD) v. TOMLINSON* (1885), 54 L. J. Ch. 957; 52 L. T. 746; 33 W. R. 814.

1931. Action provisionally dismissed—Time limit for interrogatories.]—Interrogatories for the examination of deft. were delivered by pltf. on Jan. 17. On Feb. 5, deft. not having filed answers, an order was made that if he should not file answers within three days judgment might be signed against him. On Feb. 9, no affidavit having been filed by deft., pltf. signed judgment under this order. On application by deft. to set aside the judgment he stated on affidavit that on Feb. 9, a copy of the order of Feb. 5, had been left at his house & received by him, & that he in consequence filed on Feb. 11, & as he supposed within the three days named in the order, answers to interrogatories which he had sworn on Jan. 28. No affidavit showing that he had a defence on the merits was filed by deft.:—*Held*: the order did not require to be served; the judgment was therefore regular; & in the absence of an affidavit showing that he had a defence on the merits, deft. was not entitled to have the judgment set aside.—

*ance—Irrelevancy.]—*The judge refused to dismiss an action for refusal to answer certain questions on discovery, holding that they were irrelevant.—*CLARK v. ROBINET* (1913), 24 O. W. R. 399; 4 O. W. N. 1092; 10 D. L. R. 826.—*CAN.*

m. ———.]—Where resp., against whom an order for discovery had been made, refused to disclose his bank pass-book & cheque counterfoils under the *bond fide* belief that they were not relevant:—*Held*: on an application for his attachment for contempt of ct., appct. was bound by resp.'s statement on oath as to the relevancy of the documents, & had adopted a wrong procedure in applying for an order for personal attachment.

Sect. 2.—Action dismissed. Sects. 3 & 4.]

FARDEN *v.* RICHTER (1889), 23 Q. B. D. 124; 58 L. J. Q. B. 244; 60 L. T. 304; 37 W. R. 766, D. C.

1932. — Time for appealing enlarged.]

—A judge has jurisdiction under Ord. 57, r. 6, to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order has taken effect & the action has therefore become dismissed; & he has also jurisdiction when he has so enlarged the time for appealing to vary or amend the order dismissing the action, & in the exercise of such jurisdiction his discretion is not limited by any fixed or arbitrary rules.—CARTER *v.* STUBBS (1880), 6 Q. B. D. 116; 50 L. J. Q. B. 161; 43 L. T. 746; 29 W. R. 132, C. A.

*Annotations:—*Mentd. Gilder *v.* Morrison (1882), 30 W. R. 815; *Re* Manchester Economic Bldg. Soc. (1883), 24 Ch. D. 488; Bradshaw *v.* Warlow (1886), 32 Ch. D. 403.

1933. — Time for doing any act enlarged.]—By the combined operation of Ord. 54, r. 4, & Ord. 57, r. 6, the ct. or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited & the lapse of the four days' time for appealing, where the justice of the case requires it. On Mar. 26, a master made an order dismissing an action for want of prosecution unless an affidavit in answer to interrogatories was filed on Mar. 31. The affidavit was not filed on that day; but on the day following, a summons was taken out for further time to answer the interrogatories:—*Held*: it was still competent to the ct. or a judge to enlarge the time for moving to set aside or vary the order of 26th of March.—BURKE *v.* ROONEY (1879), 4 C. P. D. 226; 48 L. J. Q. B. 602; 43 J. P. 750; 27 W. R. 915.

*Annotations:—*Apprvd. & Foll'd. Carter *v.* Stubbs (1880), 6 Q. B. D. 116. *Apld.* Metcalfe *v.* British Tea Assn. (1881), 46 L. T. 31. *Refd.* *Re* Macintosh, Dixon (1903), 88 L. T. 820; *R. v.* Lewis, [1906] 2 K. B. 307.

1934. Action re-instated after dismissal—Non-compliance by nominal plaintiff—Real plaintiff offers admission.]—ASSICURAZIONE GENERALE *v.* S.S. BESSIE MORRIS CO., LTD. (1891), 7 T. L. R. 415, D. C.

SECT. 3.—DEFENCE STRUCK OUT.

See R. S. C., Ord. 31, r. 21.

1935. Court has discretion.]—TWYCROFT *v.* GRANT, [1875] W. N. 201; Bitt. Prac. Cas. 10; 1 Char. Cham. Cas. 114; *subsequent proceedings*, Bitt. Prac. Cas. 38.

1936. —.]—Where differences had arisen between the real & nominal defts., & it became necessary to have two solrs. for the defence instead of one, the judge at chambers refused to strike out the defence for failure to answer pltf.'s interrogatories, but gave defts. a week more in which to answer.—ANON., [1875] W. N. 204; Bitt. Prac. Cas. 22; 1 Char. Cham. Cas. 116.

Semble: the proper procedure was to have applied for inspection or for an order for production under some other sub-section of Rule 333.—TAIT *v.* BOTHWELL (1912), C. P. D. 60.—S. AF.

n. — Time of examination in-sufficiently specified.]—*Semble*: the failure of pltf. to appear to be examined for discovery pursuant to an order, made after his previous failure to appear pursuant to appointment, ordering him to appear at his own expense & attend for his examination for discovery at a certain place, within

thirty days from that date, no time being fixed or examiner named, & no subsequent appointment being taken out, is not sufficient ground for dismissing his action.—GRANT *v.* BROWN (1920), 3 W. W. R. 865.—CAN.

PART V. SECT. 3.

1940 i. Judgment in default of defence—May be obtained at same time.]—Where the answers of deft. to certain interrogatories were disingenuous & evasive, & certain information peculiarly within his knowledge or under

1937. —.]—An English testator had executed a deed in favour of creditors which comprised real estate in Trinidad, but, through valid according to the law of England, did not pass the legal estate of the land in Trinidad to the trustee of the deed, because it was not executed as required by the law of Trinidad. The testator died intestate as to real estate, & the legal estate was vested in M. a British subject residing in Trinidad, & in the other defts. who resided in England. An action was brought by the trustee of the deed & another creditor to enforce the trusts of the deed against the real estate in Trinidad. Pltfs. had been advised by a barrister practising in Trinidad, & they alleged in their statement of claim that under the law of Trinidad the deed bound the beneficial interest of the debtor, & of all persons claiming through him in the real estate in Trinidad; & pltfs. claimed to have such estate vested in the trustee of the creditors' deed, & to have that property sold under the direction of the ct. to pay the creditors under the trusts of the deed. Pursuant to leave the writ was served in Trinidad on M. & he appeared & delivered a defence denying pltfs.' allegation that the beneficial interest in the land was bound. This defence was afterwards struck out under Ord. 31, r. 21, because deft. failed to obey an order to give discovery. By arrangement with the other defts. the action came on for trial when pltfs. contended that M. was in the same position as if he had admitted the allegation in the statement of claim:—*Held*: as the defence had only been struck out for a collateral reason, the law of Trinidad had not been sufficiently proved to justify the ct. in deciding; & the action must stand over generally, with liberty to apply, with a view to proceedings being taken against M. in Trinidad.—JENNEY *v.* MACKINTOSH (1889), 61 L. T. 108, L. JJ.

1938. Judgment may subsequently be set aside.]

—GIBSON *v.* SYKES (1884), 28 Sol. Jo. 533, D. C.

1939. — If sufficient reason shown.]—Deft. to an action disobeyed an order to produce documents for inspection; her defence was struck out, & judgment given against her in default of a defence. There was evidence that her solr. had explained to her the effect of the order for production & the consequence of disobeying it. The ct. refused to set aside the judgment on any terms.—HAIGH *v.* HAIGH (1885), 31 Ch. D. 478; 55 L. J. Ch. 190; 53 L. T. 863; 34 W. R. 120; 2 T. L. R. 88.

1940. Judgment in default of defence—May be obtained at same time.]—Where a pltf. moves, under Ord. 31, r. 21, to have a deft.'s defence struck out for non-compliance with an order to answer interrogatories, there is no objection to his joining with such motion a motion for judgment as upon his statement of claim in default of defence, but such motion for judgment must be set down & two separate orders should be made.—SALOMON *v.* HOLE (1905), 53 W. R. 588.

1941. Default by trustee.]—In an action to remove a trustee, deft. having failed to file an

his control was not disclosed by him, an application was made under Ord. 30, r. 20, to strike out his defence. The judge ordered that, unless deft. made a sufficient answer to the interrogatories within a stated period, his defence should be struck out & judgment entered against him.—RAND *v.* WHITE (1895), 40 N. S. R. 145.—CAN.

o. Party out of jurisdiction.]—Where a deft. resides out of Ontario, & is only in it for temporary purpose, his attendance to be examined for discovery can only be obtained, under

affidavit of documents, his defence was struck out & an order was afterwards made on motion for judgment as in default of pleading removing him from the office of trustee & vesting his estate in the other trustees.—*FISHER v. HUGHES* (1877), 25 W. R. 528.

SECT. 4.—OTHER CASES.

1942. Sequestration.]—*SMALLBROOKE v. DON-NEGAL* (LORD) (1795), 3 Anst. 647; 145 E. R. 994.

rule 477, by a judge's order upon notice, & not by appointment under rule 443. An order was made under rule 447 for the examination in Ontario of deft. who resided in British Columbia & who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member. Although this order could not be enforced by attachment against deft. while the House was in session, in the event of his refusing or neglecting to attend, it could be enforced, under rule 454, by striking out his defence.—*COX v. PRIOR* (1899), 18 P. R. 492.—CAN.

p. Default by officer of company—*Whether court has power to strike out defence.]—*There is no power to strike out the statement of defence of an incorporated co. for the default of an officer of such co. in not attending for examination for discovery.—*BADGEROW v. GRAND TRUNK RY. Co.* (1889), 13 P. R. 132.—CAN.

q. ———.]—There is no power to strike out the statement of defence of an incorporated co. for the default of an officer of such co. in not attending for examination for discovery, although the officer resides out of jurisdiction.—*CENTRAL PRESS ASSOCN. v. AMERICAN PRESS ASSOCN.* (1890), 13 P. R. 353.—CAN.

r. What amounts to non-compliance—Documents not under party's control.]—A deft. should not have his defence struck out for non-production of documents which are not in any way in his custody or control, but are in the custody of the officials of an incorporated body, having its head office in a foreign country & not being a party to the action.—*VULCAN IRON WORKS v. WINNIPEG LODGE No. 122, IRON- MOULDERS' UNION OF NORTH AMERICA* (1908), 18 Man. L. R. 137; 9 W. L. R. 208.—CAN.

s. ——— Defaulting party led to believe discovery not urgent—Conduct of opponent.]—Upon appeal from an order striking out the defence for the default of defts. in making discovery:—*Held:* as, subsequent to the service upon defts. of an order for production of documents, there were several interviews from which defts. might have inferred that plffs. were not insisting upon immediate compliance with the order, there should have been, before plffs. moved as upon default, some further intimation that plffs. wished the order to be complied with at once; to put deft. in default for the non-attendance of their officer upon an adjourned examination, it was not enough to show by affidavit that the officer was not at the examiner's chambers at the time appointed; it should be shown also that the examiner was there; & no certificate from the examiner being produced, default was not established; defts. were not in default because their officer had refused to answer questions upon the first sitting for examination, the examination never having been closed, & defts. not being responsible, or alone

responsible, for the failure to continue it.—*ANDERSON v. IMPERIAL DEVELOPMENT Co.* (1910), 18 W. L. R. 51.—CAN.

t. ——— Insufficient payment of conduct money to defaulting party.]—An order striking out the defence, for non-attendance of deft. for examination for discovery, was set aside, because deft. had not been paid sufficient conduct money.—*PARSONS v. FRANCIS* (1913), 24 W. L. R. 938; 4 W. W. R. 1015, 1216; 11 D. L. R. 847; 18 B. C. R. 157.—CAN.

a. ——— Party incapacitated by illness from complying.]—Where a party is incapacitated from making discovery on oath, an order may be made, not directly against a person not a party, but against the party, that some other person shall give discovery on his behalf; & in this case, where one of defts. was incapacitated through illness from making the usual affidavit of documents, an order refusing to strike out his defence for default of such an affidavit was affirmed, with leave to apply for an order for discovery from some other person on that deft.'s behalf.—*COLONIAL INVESTMENT Co. v. SMITH* (1914), 28 W. L. R. 419.—CAN.

b. Defendant to counterclaim—Out of jurisdiction—Failure to attend for examination.]—A person for whose benefit an action is brought or the assignor of a chose in action can only be examined for discovery when such person is within Ontario; but a deft. by counterclaim, resident within a foreign jurisdiction, may under Rule 328, be ordered to come within Ontario & submit to examination for discovery upon matters relating to the counterclaim & if he fails to so attend his defence to the counterclaim may be struck out.—*STOCKBRIDGE v. McMARTIN* (1916), 27 O. W. R. 401; 38 O. L. R. 95.—CAN.

PART V. SECT. 4.

c. Whether notice should specify documents—In respect of which default made.]—On a motion to commit for non-production of certain documents after an insufficient affidavit on production has been filed, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced, though the ct. considered such the better course. On such notice, the ct. will grant the more limited relief, & order further production, but without costs.—*FISKEN v. SMITH* (1870), 2 Ch. Ch. 491.—CAN.

d. ———.]—To render a person liable for disobedience of a notice under s. 15 of Bombay Act IV. of 1868, it is necessary that the documents required for inspection should be therein specified. Disobedience of an order to produce evidence under Bombay Act I. of 1865, s. 14 (2), does not render a person liable to criminal prosecution, but simply to an adjudication in the absence.—*R. v. MANIKRAM SURAJRAM* (1874), 11 Bom. 231.—IND.

1943. —.]—The ct. will order a sequestration to issue against a deft., who is in contempt, for not putting in an examination to interrogatories before the master.—*LUPTON v. HESCOTT* (1823), 1 Sim. & St. 274; 57 E. R. 111.

1944. Solicitor struck off roll.]—Upon a report by the master, that the matters contained in interrogatories were not answered by an attorney of this ct., the ct. may order that he be struck off the roll.—*Re HOLMES* (1848), 11 L. T. O. S. 241, 267; 12 Jur. 657.

e. When court not empowered to make order not complied with.]—Where, after judgment in an action in the common pleas division, an issue on a garnishee application was directed to be tried under rule 373, O. J. Act, by a county judge & jury:—*Held:* such judge had no jurisdiction to make an order to produce before trial, & consequently no authority to make any order on a failure to produce.—*COCHRANE v. MORRISON* (1885), 10 P. R. 606.—CAN.

f. Party given time to remedy default—At own expense.]—The president of plff. co. lived in the United States, but being in Toronto, he was there subpoenaed on Apr. 22, to attend on Apr. 28, for examination for discovery before a special examiner at Toronto. He was paid \$1, & made no objection as to the amount, nor did he object that he was prevented by any engagements from attending, but he failed to attend:—*Held:* he should have attended on the day appointed, & the fact that there were then pending against him, at the instance of a stranger to the action proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; & he was ordered to attend at his own expense.—*SMITH Co. v. GREY* (1886), 11 P. R. 345.—CAN.

g. ———.]—Motion by deft. under Con. Rule 454 to dismiss action for failure of plff. to attend for examination for discovery. Plff. had no reasonable excuse to offer for non-attendance. The master ordered plff. to attend at his own expense on 48 hours' notice to his solrs., which order was affirmed on appeal.—*ROGERS v. NATIONAL PORTLAND CEMENT Co.* (1912), 23 O. W. R. 264; 4 O. W. N. 299; 6 D. L. R. 858, 909.—CAN.

h. Non-compliance amounting to admissions—Whether evidence in subsequent action between same parties.]—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225, C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.—*DUROCHER v. DUROCHER* (1897), 27 S. O. R. 363.—CAN.

k. When not contumacious.]—It is a proper & convenient practice to apply to the ct. to enforce an order for inspection when the resistance is not contumacious.—*STAR MINING & MILLING Co. v. WHITE Co.* (1902), 9 B. C. R. 422.—CAN.

l. In respect of title deeds—Receiver appointed.]—Deft. in a foreclosure suit not having complied with the order in the decree to bring in the title deeds, the ct. on motion referred it to the master to appoint a receiver, although the decree was merely for a sale, & did not direct a receiver to be appointed.—*HARRIS v. SHEE* (1844), 6 I. Eq. R. 543.—IR.

Part VI.—Costs.

1945. Costs of interrogatories—Whether payable before answer made.]—BERKELEY v. STANDARD DISCOUNT CO., No. 1802, *ante*.

—.]—See R. S. C., Ord. 31, r. 3.

1946. Costs of inspection—Discretion of master—Review by court.]—A master, on taxation, disallowed more than half the fees paid by the successful party to an arbitration on taking up the award, & the whole of the fees charged by such lay arbitrator for a legal assessor, to whose appointment the parties had neither consented nor objected; also a charge made for copies of evidence, which could not have been taken by counsel, he being alone in the case, & one for copies of original documents put in by the unsuccessful party, & further, the cost of affidavit of increase.

The master had, however, allowed to the successful party the costs of inspection & production of documents:—*Held*: these matters were all in the discretion of the master, & the ct. ought not to order him to review his taxation as to any one of them, even though it were shown that as to the lay arbitrator's fees he had failed to take any steps to ascertain what would have been a fair charge for him to have made for his services.—*Re WESTWOOD, BAILLIE & CO. & CAPE OF GOOD HOPE GOVERNMENT* (1886), 2 T. L. R. 667, D. C.

—.]—See R. S. C., Ord. 65, r. 27 (17) (a).

Security for costs.]—See R. S. C., Ord. 31, r. 26, as amended R. S. C., July, 1905, & Revision 1917, & rr. 27, 27A.

PART VI.

m. Costs of interrogatories—Time during which attachment for contempt suspended.]—Where an attachment for contempt was ordered by the Crown to remain in the clerk's office until the first day of the following term, on deft.'s attorney undertaking that he would then appear in ct., the party obtaining the attachment is not entitled to costs of interrogatories before the time appointed for deft. to appear.—*Ex p. LOANE, Ex p. GROVES* (1883), 22 N. B. R. 629.—CAN.

n. — What is included
—A party subpoenaed to attend on an examination for discovery should be paid not only his railway fares or mileage both ways, but also his witness fees for as many days as he will certainly be absent from his home in attending on the examination & returning home.—*UNGER v. LONG* (1889), 12 Man. L. R. 454.—CAN.

o. — Effect of negligence by party.]—Upon appeal from an order striking out the defence for the default of defts. in making discovery:—*Held*: as, subsequent to the service upon defts. of an order for production of documents, there were several interviews from which defts. might have inferred that plffs. were not insisting upon immediate compliance with the order, there should have been, before plffs. moved as upon default, some further intimation that plffs. wished the order to be complied with at once, & as defts. were negligent & did not properly meet the demands made upon them, they should, therefore, pay the costs.—*ANDERSON v. IMPERIAL DEVELOPMENT CO.* (1910), 16 W. L. R. 51.—CAN.

p. — Answers not used at trial.]—Defts. obtained discovery in the course of the action by examining plffs.' engineer, as an officer, & by plffs.' affidavit on production. In addition, they examined, out of the jurisdiction, R., a past officer of plffs., & afterwards called him as a witness at the trial. No part of his examination for discovery was used at the trial, nor did defts. apply for leave to use it:—*Held*: defts. were not entitled to tax against plffs. the costs of examining R. for discovery.—*WINNIPEG CITY v. WINNIPEG ELECTRIC RY. CO.* (1913),

23 W. L. R. 49; 1 W. W. R. 964; 23 Man. L. R. 533.—CAN.

q. — When party's success not due to interrogatories.]—Pltf. succeeded at the trial of this action upon the single point that a bye-law of deft. assocn. was unreasonable, because it was too wide, in that it forbade, under penalty, members from becoming employees of a co. that did not carry on business in accordance with the rules of the assocn.:—*Held*: as pltf. succeeded only on a point disclosed on the face of the pleadings, he was not entitled to the costs of the examinations for discovery.—*MATHEWSON v. KELLY* (1914), 26 W. L. R. 691; 18 D. L. R. 228.—CAN.

r. — Party's misapprehension as to necessity as witness—Of person interrogated.]—Pltf. was given damages for defts.' failure to supply sand & gravel pursuant to contract, the damages allowed being for increased amounts paid by pltf. to procure the material; but he was not allowed for additional loss through having to continue the employment of a large number of skilled workmen for many days while he was waiting for material or for delays through bad weather in the fall after the time when he could have completed his work, but for defts.' default, such damages being too remote. Pltf. made a number of motions for delay of trial by reason of absence of one K., who he claimed was the agent of defts. & bound defts. by acceptance of an order, & was a necessary witness. The evidence of K. was finally procured through interrogatories. The ct. found that whether or not the order bound defts., a contract was subsequently made by pltf. with defts. on the basis of that order; so that it never was necessary to delay the trial on account of K.'s absence, or to take his evidence. Pltf. was therefore not allowed costs of the interrogatories & defts. were given costs for the motions for delay of trial.—*STEWART v. STONEWALL GRAVEL, LTD.*, [1919] 1 W. W. R. 344.—CAN.

s. — As between co-defendants—Whether successful defendant may include in costs against plaintiff.]—Where deft. recovers costs against pltf. & seeks to include therein costs incurred in proceedings for discovery between said deft. & his co-deft., with

the incurring of which costs pltf. beyond bringing both defts. into ct., had nothing to do, said deft. is entitled to include the costs of such discovery proceedings having to do with the points on which the interest of defts. were adverse. But he is not entitled to costs incurred in inquiry between co-defts. into matters not directly concerned with the points of conflict between them. The question on what points co-defts. were adverse in interest to each other should be determined, not by the result of the trial, but by the situation which existed when the costs were incurred.—*ROSE & LAFLAMME, LTD. v. CAMPBELL, WILSON & STRATHDER, LTD. & GRAND TRUNK PACIFIC RY. CO.*, [1923] 4 D. L. R. 92; 2 W. W. R. 1067.—CAN.

t. Costs of discovery—Incomplete affidavit.]—Where it was clear that a discovery affidavit was incomplete the ct. made an order for further discovery & mulcted resp. in costs.—*COLLISON, LTD. v. DICKMAN* (1916), C. P. D. 117.—S. AF.

a. Taxation of costs—Discretion of taxing officer—Review by court.]—Where a rule of ct. merely provides that the allowance or disallowance of certain costs is a matter within the discretion of the taxing officer, it is in his capacity as taxing officer that he allows or disallows them, unless the rules clearly indicate that in doing so he is acting in some other capacity. Since Rule 304 of the King's Bench Rules leaves the question of the costs of an interlocutory *via voce* examination or cross-examination in the hands of the taxing officer, when it is not dealt with at the trial by the judge, & omits to provide for an application to the taxing officer prior to taxation, it contemplates that it is in his capacity as taxing officer, & upon a taxation, that he is to exercise the discretion vested in him by the rule; an appeal therefore lies from him to the local master. Under Rule 304 the taxing officer is exercising a jurisdiction concurrent with that given to a judge of the ct. & therefore no appeal or review of taxation lies from him to another judge of the ct., but the appeal, if any, should be to the Ct. of Appeal.—*CANADIAN BANK OF COMMERCE v. EYE* (1918), 3 W. W. R. 823; 43 D. L. R. 464; 11 Sask. L. R. 468.—CAN.

DISEASES.

See ANIMALS ; FACTORIES AND SHOPS ; MASTER AND SERVANT ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

DISENTAILMENT.

See REAL PROPERTY AND CHATTELS REAL.

DISFRANCHISEMENT.

See ELECTIONS.

DISHONOUR.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

DISINTERMENT.

See BURIAL AND CREMATION ; CORONERS.

DISORDERLY CONDUCT.

See CRIMINAL LAW AND PROCEDURE ; MAGISTRATES.

DISORDERLY HOUSE.

See CRIMINAL LAW AND PROCEDURE.

DISSENTERS.

See CHARITIES ; ECCLESIASTICAL LAW.

DISSOLUTION.

See COMPANIES ; CORPORATIONS ; HUSBAND AND WIFE ; PARLIAMENT ; PARTNERSHIP.

DISTRESS.

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Part I.—In General.

1. In the nature of a pledge.] — GOMERSALL v. MEDGATE (1610), Yelv. 194; 80 E. R. 128; *sub nom.* GOMERSALE v. WAYTS, Cro. Jac. 255.
Annotation :—*Mentd.* Clark v. Gilbert (1835), 2 Scott, 520.

2. —.]—If a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere & take it out of his possession without rendering himself liable either for a rescue or for a pound breach.

Pltfs., the owners of a colliery, having distrained two horses belonging to *deft.* for rent in arrear from H., the lessee of the colliery, impounded them in the stable of an inn about half a mile from the pit. Two days afterwards *pltfs.*' servant brought the horses to the colliery for the purpose of letting them down into the pit where they had been accustomed to work. One of the horses was placed in a moveable stable near the pit's mouth & the other in a skip ready to be let down into the pit. *Deft.* then forcibly took away both horses :—*Held* : distrainer having misused the distress, *deft.* was

at liberty to retake his property without being liable for a rescue or pound breach.

All that the distrainer of goods obtained at common law was not the property in the goods but a sort of pledge; & the law directs how that pledge is to be used (MARTIN, B.).

If a distrainer abuses a distress by working it, the owner may interfere & prevent it, & no action can be maintained against him for pound breach or rescue.—SMITH v. WRIGHT (1861), 6 H. & N. 821; 30 L. J. Ex. 313; 25 J. P. 744; 7 Jur. N. S. 1167; 158 E. R. 338.

3. Not exercisable against the person.]—The body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment (*per CUR.*).—FOSTER v. JACKSON (1615), Hob. 52; 80 E. R. 201.

Annotations :—*Reid.* Vaspor v. Edwards (1701), 12 Mod. Rep. 658; Canadian Prisoners' Case, Watson's Case, *Re* Parker, R. v. Batchelor (1839), 3 State Tr. N. S. 963. *Mentd.* R. v. Patrick (1667), 2 Keb. 164; Phillips v. Bury (1694), Skin. 447; R. v. Baden (1694), Show. Parl. Cas. 72; R. v. Gripe (1696), 1 Ld. Raym. 256; Barber v.

PART I.

1 i. In the nature of a pledge.]—Right of distress is not a security held by a creditor in respect of a debt.—WEST v. LEE SOON & LEE SHUN (1915), 32 W. L. R. 961; 9 W. W. R. 644; 24 D. L. R. 813; 8 Sask. L. R. 243.—CAN.

a. By express agreement—*Arrears of mortgage interest.*]—*Pltf.* mortgaged his land to S. Co. by a mtge. which contained a distress clause, & gave a second mtge. to *deft.*, by which it was agreed between them that if default was made in payment of interest to the co., *deft.* should be at liberty to pay it, & should have the same remedies

for its recovery from the mtgor. that the co. had. Default having been made, the co. exercised their power of sale, & *deft.* became the purchaser. After signing a contract for the purchase he distrained the goods of *pltf.* for the interest that had fallen in arrear to the co. Shortly afterwards he obtained a formal conveyance of

Palmer (1697), 1 Ld. Raym. 693; Beal v. Simpson (1697), 1 Ld. Raym. 408; Thorp v. Thorp (1701), 12 Mod. Rep. 455; Worsenholm v. Berks Manucaptors (1701), 12 Mod. Rep. 599; Beacon v. Peck (1719), 11 Mod. Rep. 311; Lancaster v. Fielder (1727), 2 Ld. Raym. 1451; Bank of England v. Morrice (1736), Lee temp. Hard. 219; R. v. Cotton (1751), Park. 112; Hawks v. Crofton (1758), 2 Burr. 698; Camplin v. Bullman (1761), Park. 198; Mitchell v. Torup (1766), Park. 227; Giles v. Grover (1832), 9 Bing. 128; Lucas v. Nockells (1833), 10 Bing. 157; Bircham v. Tucker (1840), 8 Scott, 469; Thompson v. Parish (1859), 5 C. B. N. S. 685; Lehaine v. Philpott (1875), 33 L. T. 98.

4. Right of Crown.]—The King may distrain in any part of the land; he is not bound by the decree to a particular place (*per* CUR.).—CALTHORP v. HEYTON (1675), 2 Mod. Rep. 54; 86 E. R. 937.

Annotations:—*Mentd.* Dennett v. Atherton (1872), L. R. 7 Q. B. 316; Tebb v. Cave (1900), 82 L. T. 115.

5. —.]—(1) Grantee of fee farm rents has the same power of distress as the King had; & so may distrain on other land of the tenant, though not subject to the rent; (2) the King may reserve rent out of things incorporeal, & may distrain for this rent on any other lands of the tenant; but not on such other lands of the tenant as are let out by tenant, or extended:—*Qu.*: if he may distrain on other lands of the tenant under sequestration.—A.-G. v. COVENTRY CORPN. (1715), 1 P. Wms. 306; 2 Vern. 713; 24 E. R. 402, L. C.

Annotations:—*Generally, Mentd.* Walker v. Bell (1816), 2 Madd. 21; Russell v. East Anglian Ry. (1850), 3 Mac. & G. 104.

6. Right of grantee of Crown.]—The heir cannot recover rent due in the lifetime of the ancestor. When the King grants over a rent service he cannot empower the grantee to distrain.—HALLELY v. GASER (1672), 1 Freem. K. B. 37; 89 E. R. 30.

7. —.]—A.-G. v. COVENTRY CORPN., No. 5, *ante*.

Crown leases & rents reserved to Crown.]—*See, generally, CONSTITUTIONAL LAW*, Vol. XI., p. 583, No. 843 *et seq.*

8. By bye-law—Founded on customary right.]—Where deft. justifies taking a distress by virtue of a bye-law made under a customary right, if the bye-law ordains the distress, he need not show a customary right to distrain.—LAMBERT v. THORNTON (1695), 1 Ld. Raym. 91; 91 E. R. 957.

9. By express agreement—Arrears of mortgage interest—Grantor without legal estate.]—By indenture between pltf. & deft., deft. appointed under a power, that certain lands should remain to the use of himself & his heirs, subject to a proviso that if pltf. should pay deft. £800 by a certain day, deft. should convey the land to pltf., with a covenant that until default in payment, pltf. should continue to hold the land; & a proviso, that when the interest of the mortgage money should be in arrear, deft. should be at liberty to enter the land in question & distrain for the same:—*Held*: the distress was good, this being to be looked on in the light of an agreement between the

parties, that deft. should enter & take pltf.'s goods if the payment were in arrear, & therefore, pltf. could not object that he had no legal estate in the land, to enable him to grant a power of distress.—CHAPMAN v. BEECHAM (1842), 3 Q. B. 723; 3 Gal. & Dav. 71; 12 L. J. Q. B. 42; 6 Jur. 968; 114 E. R. 683.

Annotations:—*Consd.* Brown v. Metropolitan Counties, etc. Soc. (1859), 1 E. & E. 832. *Refd.* Pollitt v. Forrest (1847), 11 Q. B. 949.

10. —.]—(1) A party seized of a copyhold estate, agreed to surrender the same to a mtgee. who was to be admitted, for securing £1,400 & interest; it was covenanted that in case of default in payment, the mtgee. should be at liberty to enter upon the premises, & distrain, in the same way as a landlord could upon premises let by him upon lease; the surrender & admittance were effected, the mtgor. became bkpt., the interest was in arrear, & the mtgee. entered & distrained for the same—the goods of the assignees:—*Held*: the goods of the assignees were not liable to be so distrained under the covenant, & after the admittance of the mtgee., in pursuance of the surrender, the rent charge for which the seizure was made had become thereby merged.

(2) The interest of a mtgor. in possession is not a legal estate at all, & consequently cannot support a rentcharge with powers of distress.—FREEMAN v. EDWARDS (1848), 2 Exch. 732; 17 L. J. Ex. 258; 11 L. T. O. S. 271; 154 E. R. 685.

Annotation:—*As to* (2) *Refd.* Jolly v. Arbuthnot (1859), 4 De G. & J. 224.

— Bill of sale—Necessity for registering instrument as bill of sale.]—*See* BILLS OF SALE, Vol. VII., p. 14, Nos. 58–60; p. 24, Nos. 113–117.

By customary right.]—*See* CUSTOM & USAGES, Vol. XVII., p. 18, Nos. 176–178.

Heriot custom.]—*See* COPYHOLDS, Vol. XIII., p. 96, Nos. 1223–1226.

11. Not applicable to a penalty.]—COOPER v. TWIBILL (1812), 3 Camp. 286, n., N. P.

12. Whether equity will assist—When remedy by distress provided—In absence of fraud.]—Pltf. had £120 *per annum* rentcharge settled for her jointure; & there being a great arrear, & not sufficient distress on the land; pltf. brought her bill that deft. the devisee of the inheritance, might set out sufficient distress; or that pltf. might hold & enjoy till paid the arrears:—*Held*: when the party has provided one remedy, viz. by distress, the ct. will not give her another, unless some fraud be proved in letting the land lie fresh, or depasturing the land in the night time only.—CHAMPERNOON v. GUBBS (1700), 2 Vern. 382; Prec. Ch. 126; 23 E. R. 844.

13. Is a legal right—As opposed to equitable.]—WALTERS v. NORTHERN COAL MINING Co., No. 99, *post*.

14. —.]—Distress is a legal remedy & depends on the existence at law of the relation of landlord & tenant; but the agreement between the same parties, if specifically enforced, enacted that relation (FARWELL, J.).—MANCHESTER

the land expressed to be under the power of sale in the co.'s mtge.:—*Held*: pltf.'s estate having paid the mortgage debt to the co. in full, deft. could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor.—HARRON v. YEMEN (1883), 3 O. R. 126.—CAN.

11 i. Not applicable to a penalty.]—A lease contained a covenant by the lessee not to break up the land without the previous consent in writing of the lessor. If the lessee broke up the

land without consent, he agreed to pay a penal rent of £10 for every acre so broken up. The lessee having applied for leave to break up the land, the lessor addressed to him two letters, which were in substance a statement, that if the lessee broke up the lands in that year with certain seeds, & pursued a specified system of culture during the two following years, the lessor would not seek to enforce the penalty in the lease for breaking up the lands. The lessee having broken up the lands, but not having carried out the required mode of husbandry, the lessor dis-

trained for the penal rent for the first year. The lessee replevied:—*Held*: the lessor could not distrain for the penal rent, although the conditions were not fulfilled; his remedy was by an action against the lessee for the non-performance of those conditions.—WHITMORE v. SEGRAVE (1848), 10 I. L. R. 609.—IR.

12 i. Whether equity will assist—When remedy by distress provided—In absence of fraud.]—DONERAILLE v. CHARTRES (1784), 1 Ridg. Parl. Rep. 122.—

BREWERY Co. v. COOMBS, [1901] 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299.

Annotations:—*Reid*. Rickett v. Green (1909), 79 L. J. K. B. 193. *Mentd.* Torkington v. Magee, [1902] 2 K. B. 427; Gilbey v. Cossey (1912), 106 L. T. 607; Wedd v. Porter, [1916] 2 K. B. 91; Blane v. Francis, [1917] 1 K. B. 252; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; Cole v. Kelly, [1920] 2 K. B. 106; Gray v. Spyer, [1922] 2 Ch. 22.

15. *Implies an antecedent right of action.*—A private Act of Parliament imposed a duty of 2s. per chaldron upon all coal imported & landed at the town of H., or otherwise brought or delivered within the limits of the town. The Act also gave a remedy against the shipowner by distraining the ship & tackle as well as the coals, in default of

payment. At the time that the Act was passed no coals were brought into H. except by sea:—*Held*: coals brought into the town by railway were liable to the duty, & not only sea-borne coals; & the railway co., as the persons who brought the coals into the town, were primarily liable to pay the duty.

A power of distress implies an antecedent right of action (LORD O'HAGAN).—*GREAT EASTERN Ry. Co. v. HARWICH CORPN.* (1879), 41 L. T. 533; 44 J. P. 104, H. L.

Whether operating as a waiver of forfeiture—*Action to recover possession—Common Law Procedure Act, 1852 (c. 76), s. 210.*—*See LANDLORD & TENANT.*

Part II.—Distress for Rent.

SECT. 1.—DIFFERENT KINDS OF RENT.

16. *Rent service.*—ANON. (undated), Plowd. Quæries 59; 75 E. R. 940.

Church cleaning—Bell ringing.]

Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which "a distress" may be made, within Real Property Limitation Act, 1833 (c. 27), ss. 1, 8. So the service, under the like circumstances, of ringing the church bell at stated hours from Michaelmas to Christmas.—*DOE d. EDNEY v. BENHAM*, *DOE d. EDNEY v. BILLET* (1845), 7 Q. B. 976; 14 L. J. Q. B. 342, 343; 5 L. T. O. S. 408; 10 J. P. 38, 39; 9 Jur. 662; 115 E. R. 756.

Annotations:—*Mentd.* Rumball v. Munt (1846), 10 Jur. 539; St. Nicholas, Deptford v. Sketchley (1847), 17 L. J. M. C. 17.

18. — *Not where penalty reserved by lease.*—*Replevin.* Avowry, that A. held land as tenant to B. under a demise, subject to certain rents, provisions, conditions & stipulations (*inter alia*), that H. should not during the continuance of the tenancy sell any hay off the premises, under the penalty of 2s. 6d. for each yard of hay so sold, to be recovered by distress as for rent in arrear. Averment of the sale of 800 yards of hay by A., contrary to the said stipulation, by reason whereof a sum of money at 2s. 6d. per yard became due to B.; non-payment thereof; & a distress for the same. Plea, *non tenuit*. Verdict for debt, & judgment under 17 Car. 2, c. 7:—*Held*: on appeal the sum distrained for not being a rent service, the judgment under 17 Car. 2, c. 7 was erroneous although after verdict the avowry might have sustained a judgment for debt at common law.—*POLLITT v. FORREST* (1848), 11 Q. B. 962; 17 L. J. Q. B. 291; 11 L. T. O. S. 414; 12 Jur. 560; 116 E. R. 732, Ex. Ch.

Annotations:—*Reid*. Robins v. Evans (1863), 2 H. & C. 410; Yeoman v. Ellison (1867), L. R. 2 C. P. 681. *Mentd.* Freeman v. Edwards (1848), 2 Exch. 732; Grey v. Friar (1850), 14 Jur. 1105; Phillips v. Jones (1850), 15 Q. B. 859; Elliott v. Bishop (1855), 11 Exch. 321; Parr v. Jewell (1855), 16 C. B. 684; Hooper v. Lane (1857), 6 H. L. Cas. 443.

— *Heriot.*—*See COPYHOLDS*, Vol. XIII., p. 95, Nos. 1183–1201.

Rentcharge.—*See, generally, RENTCHARGES & ANNUITIES.*

Tithe rentcharge.—*See ECCLESIASTICAL LAW.*

19. *Rent-seck.*—ANON. (undated), Plowd. Quæries 12; 75 E. R. 873.

20. —.]—*VIGERS v. ST. PAUL'S (DEAN)*, No. 36, *post*.

— *Made equivalent to rentcharge.*—*See Sect. 2, sub-sect. 2, post.*

21. *Alternative rent—Determined by election of parties.*—ANON. (1369), Jenk. 47; 145 E. R. 36.

22. *Fee farm rent.*—*BRADBURY v. WRIGHT*, No. 34, *post*.

23. —.]—*MUSGRAVE v. EMMERSON*, No. 35, *post*.

SECT. 2.—THE REMEDY BY DISTRESS.

SUB-SECT. 1.—AT COMMON LAW.

24. *Without covenant.*—*SWYNERTON v. MILLS* (1616), 1 Brownl. 178; 123 E. R. 740.

25. *Nature of right.*—*LYONS v. ELLIOTT*, No. 253, *post*.

26. *Distress for rentcharge.*—*LAMB v. WEST* (1632), Hut. 114; 123 E. R. 1139.

27. —.]—A distress may be taken for arrears of a rentcharge, created by will; although testator does not in terms give a power to distrain. That power is a consequence drawn by law from the rentcharge.

An express power to distrain is not necessary; it is a consequence (*per CUR.*).—*RODHAM v. BERRY* (1826), 4 L. J. O. S. K. B. 202.

SUB-SECT. 2.—BY STATUTE.

28. *Landlord & Tenant Act, 1730 (c. 28), s. 5—Scope of statute.*—A rent of sufficient amount, charged upon freehold land by deed, not containing a power of distress, is "free land or tenement" within 8 Hen. 6, c. 7; & although the remedy by real action is abolished, the grantee may distrain for it under sect. 5 of 1730 Act.—*DODDS v. THOMPSON* (1865), L. R. 1 C. P. 133; Hop. & Ph. 285; Har. & Ruth. 319; 35 L. J. C. P. 97; 12 Jur. N. S. 625; 14 W. R. 476.

Annotations:—*Apld.* Dawson v. Robins (1876), 2 C. P. D. 38. *Reid*. Nicholls v. Bulwer (1870), L. R. 6 C. P. 281; Drutt v. Christchurch Overseers (1883), 12 Q. B. D. 365.

PART II. SECT. 2, SUB-SECT. 1.

b. *Tenant must be in possession.*—A distress for rent is unlawful if the tenant is not in possession at the time.—*MEIGHEN v. ARMSTRONG* (1906), 16 Man. L. R. 5.—CAN.

PART II. SECT. 2, SUB-SECT. 2.

c. *Landlord & Tenant's Act, R. S. O. 1897 (c. 170), s. 34—Construction of.*—By a lease, rent was payable quarterly in advance. There was a proviso in the lease that if the lessee

should make any assignment for the benefit of creditors, the then current quarter's rent, & the next succeeding current quarter's rent should be at once due & payable. Thirteen days after a quarter's rent in advance had

29. **Lands Clauses Act, 1845 (c. 18), ss. 10 & 11.]**—A perpetual rent reserved as the consideration upon the sale of land, even though no power of distress is contained in the conveyance to the purchaser, is, upon a subsequent sale of the rent, not improperly described by the then vendor as a "rentcharge," inasmuch as a power of distress is conferred by Landlord & Tenant Act, 1730 (c. 28), s. 5.

In a contract for sale the subject-matter was described as an aggregate yearly rentcharge of £215 9s., payable in perpetuity by the Corpn. of Liverpool in respect of a waterpipe rent, created under the authority of the Liverpool Corpn. Waterworks Act, 1855, & secured by covenants of the corpn., & by a statutory charge on the rates leviable by the corpn. under their Acts. The abstract of title showed that in 1856 the vendor's predecessors in title, one of whom was an absolute owner, & the other a tenant for life under a settlement, had respectively granted lands & easements to the corpn. in consideration of two rents of £1 5s. & £250, respectively payable in perpetuity by the corpn., & that the corpn. had covenanted to pay those rents respectively. The rent comprised in the contract of sale consisted of the rent £1 5s. & £214 4s. part of the rent of £250. The vendor was tenant for life under a settlement, & had sold under his statutory powers. The Act of 1855, with which the Lands Clauses Consolidation Act, 1845, was incorporated, empowered the corpn. to purchase, either absolutely for a sum in gross, or at an annual or other rent, certain lands or any easement over the same; & the Act provided that the persons empowered by the Lands Clauses Consolidation Act, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands, for the purposes of this Act or the Acts incorporated therewith, or any easement over such lands:—*Held*: the rent sold was not improperly described as a rentcharge, & by virtue of sect. 11 of the Lands Clauses Consolidation Act, 1845, it was charged on the water rates leviable by the corpn.—*Re GERARD (LORD) & BEECHAM'S CONTRACT*, [1894] 3 Ch. 295; 63 L. J. Ch. 695; 71 L. T. 272; 42 W. R. 678; 7 R. 519, C. A.

30. — **Annuity charged on land.]**—An annuitant may distrain for arrears, though a term be vested in himself to secure the payment.—*FAIRFAX v. GRAY* (1779), 2 Wm. Bl. 1326; 96 E. R. 777.

31. — — —.]—Devise of lands to A. for life, remainder to B. in fee, subject to & charged with the payment of £20 a year to C. during her life, to be paid by A. as long as she should live, & after her decease to be paid by B.:—*Held*: a charge on the land, for which C. might distrain.—*BUTTERY v. ROBINSON* (1826), 3 Bing. 392; 11 Moore, O. P. 262; 4 L. J. O. S. O. P. 108; 130 E. R. 564.

Annotations:—*Appld.* *Sollory v. Leaver* (1869), L. R. 9 Eq. 22. *Consd.* *Roper v. Roper* (1876), 3 Ch. D. 714. *Reid.* *Payne v. Esdalle* (1888), 13 App. Cas. 613.

32. — — —.]—Testator gave an annuity, which he directed to be paid by his son; & subject to & charged with the payments of his debts & the legacies & annuity thereinbefore mentioned, he devised & bequeathed his real &

personal property to his son absolutely. The annuity fell in arrear, after having been regularly paid for twenty years, & the annuitant filed his bill to enforce payment, & moved for a receiver:—*Held*: the annuity being charged upon land, with a power of distress superadded by above Act, pltf. had power to help himself, & was not entitled to a receiver.—*SOLLORY v. LEAVER* (1869), L. R. 9 Eq. 22; 39 L. J. Ch. 72; 21 L. T. 453; 18 W. R. 59; *subsequent proceedings* (1871), 40 L. J. Ch. 398.

Annotations:—*Folld.* *Kelsey v. Kelsey* (1874), L. R. 17 Eq. 495. *Reid.* *Roper v. Roper* (1876), 3 Ch. D. 714.

33. — — —.]—Testator by his will bequeathed certain leaseholds to deft. upon condition that he paid thereout or out of the rents thereof an annuity of £70 by half-yearly payments to pltf. during his life. The leaseholds were of amply sufficient value to secure payment of the annuity. The annuity had been regularly paid since the death of testator. One half-yearly payment of the annuity being in arrear, the annuitant filed his bill to enforce payment thereof, & for appointment of a receiver:—*Held*: the annuity being charged on land of amply sufficient value to secure payment thereof, with a power of distress superadded by above Act, pltf. was not entitled to have a receiver appointed.—*KELSEY v. KELSEY* (1874), L. R. 17 Eq. 495; 30 L. T. 82; 22 W. R. 433.

34. — **Fee farm rent.]**—On a grant of a fee farm rent, "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee is entitled to receive the full rent, without deducting the land tax. Distress is not incident to a fee farm rent as such, except the case is brought within sect. 5, of above Act.—*BRADBURY v. WRIGHT* (1781), 2 Doug. K. B. 624; 99 E. R. 395.

Annotations:—*Appld.* *Musgrave v. Emmerson* (1847), 10 Q. B. 326. *Reid.* *Parish v. Sleeman* (1860), 1 De G. F. & J. 326; *Festing v. Taylor* (1862), 26 J. P. 261.

35. — — —.]—A cognisance in replevin acknowledged the taking as for a distress for arrears of a fee farm rent, alleging that B. "was seised, as of fee & right, of & in a certain annual fee farm rent of £1 9s. 3d., payable for & in respect of, & issuing & payable out of," the *locus in quo*. Title was then traced from B.; & it was alleged, that the rent "had been duly answered & paid for the space of three years within the space of twenty years next before Jan. 23, 1727:—*Held*: sufficient, after verdict, under sect. 5, of above Act, though neither the origin nor nature of the fee farm rent was further shown. Under sect. 5, of above Act, it is sufficient that the rent has been paid for three years severally complete, within the twenty years before the first day of the session of Parliament mentioned in that clause, though such three years be not consecutive.—*MUSGRAVE v. EMMERSON* (1847), 10 Q. B. 326; 16 L. J. Q. B. 174; 9 L. T. O. S. 36; 11 Jur. 732; 116 E. R. 126.

Annotation:—*Mentd.* *Doe d. Kinglake v. Bevis* (1849), 18 L. J. O. P. 128.

36. — **Rent-seck.]**—Henry VIII., being seised of lands in fee in right of his Crown, granted them, by letters patent, in tail male to W., reserving rent to himself, his heirs & successors. After the passing of 22 Car. 2, c. 6, & 22 & 23 Car. 2, c. 24, Charles II. by letters patent referring

become due, the lessee made an assignment for the benefit of his creditors:—*Held*: the expression "arrears of rent due for three months following the execution of such assignment" in the above sect. meant arrears of rent becoming due during the three months following the exe-

cution of such assignment; & the landlord was apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment, & he was entitled to be paid the amount

found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress.—*LAZIER v. HENDERSON* (1893), 29 O. R. 673.—CAN.

DISTRESS.

2.—*The remedy by distress: Sub-sects. 2 & 3.*

to & professing to pursue the former statute, granted the rent to trustees named in sect. 2 of 22 & 23 Car. 2, c. 24, their heirs & assigns; & the trustees granted the rent to a dean & chapter, & their successors for ever:—*Held*: (1) the grant to the trustees was not authorised by either statute, the rent being reserved upon an estate whereof the reversion was in the Crown, & therefore being within the exception in sect. 3 of 22 Car. 2, c. 6; (2) on demurrer to an avowry for a distress on the land by the dean & chapter, stating the conveyances as above, but not setting out the recitals or the terms of the grants, it was to be taken that the truth appeared on the face of the grant of the rent to the trustees, & therefore that the Crown did not appear to be deceived, as not having the power to grant the rent in fee simple, nor was the grant void on that account; but that it operated, not as a grant in fee simple, but of a rent determinable on the failure of the estate tail; (3) there was thus no ground for the objection, that a subject might have a right to distrain on the Crown when the reversion fell in; although the avowry alleged that the trustees became seised in fee of the rent; (4) the grant, in effect, by severing the rent from the reversion, converted it from a rent service to a rent seck; which, if paid for three years of the space mentioned in sect. 5 of above Act, might be distrained for.—*VIGERS v. ST. PAUL'S (DEAN)* (1849), 14 Q. B. 920; 19 L. J. Q. B. 84; 14 L. T. O. S. 446; 14 Jur. 1017; 117 E. R. 353, Ex. Ch.

Tithe rentcharge.—See ECCLESIASTICAL LAW.

SUB-SECT. 3.—BY CONTRACT.

37. *Proviso in lease.*—A proviso in a lease, that the lessor & his heirs may restrain, is equivalent to saying he may distrain.—*WOOD v. GERMONS* (1616), Cro. Jac. 390; 79 E. R. 334; *sub nom.* *MOODIE v. GARNANCE*, 3 Bulst. 153; Moore, K. B. 848; 1 Roll. Rep. 330, 367.

In mortgage deed—Under attornment clause.—See Sect. 4, sub-sect. 7, B. (a) i., *post*.

—Agreement other than attornment clause.—See Sect. 4, sub-sect. 7, B. (a) ii., *post*.

SECT. 3.—CONDITIONS PRECEDENT TO RIGHT TO DISTRAIN.

SUB-SECT. 1.—IN GENERAL.

38. *Condition must be fulfilled—House to be suitably furnished.*—A. let to B. a furnished house, at a certain rent payable in advance, from a certain future day, & agreed that it should be furnished suitably for a school:—*Held*: (1) suitable furnishing of the house was a condition precedent to the right to demand the rent; (2) if B. entered, & the house was not so furnished, A. could not distrain for the term; (3) *Qu.*: whether a verbal representation that the house will be suitably furnished, forms part of the contract or not, is a question for the jury.—*MECHELEN v. WALLACE* (1836), 7 Ad. & El. 54, n.; 6 Nev. & M. K. B. 316; 112 E. R. 391.

39. — *Lessor to produce receipt of superior landlord.*—The right of distress is not so inseparable an incident to a rent service that it cannot be postponed. Therefore, where A., a mesne landlord, let premises to an under-tenant by a written

agreement, which provided, among other things that no distress should be made till after A. had produced the receipt of the superior landlord, & A. afterwards distrained for his rent without producing such receipt:—*Held*: A.'s right was postponed, & deft. was liable as a trespasser.—*GILES v. SPENCER* (1857), 3 O. B. N. S. 244; 21 L. J. O. P. 237; 21 J. P. 727; 3 Jur. N. S. 820; 5 W. R. 883; 140 E. R. 734.

Annotation.—*Consd. Re River Swale Brick & Tile Work* (1883), 52 L. J. Ch. 638.

40. — *Property to be put in repair.*—Defts. agreed to let certain premises to pltf. for three years, the property to be put in repair by defts., & the first payment of rent, which was payable quarterly, to be made on completion of the repairs. Pltf. was given possession under the agreement, & at the end of nine months, when the repairs were still uncompleted, & no rent had been paid, defts. distrained for the rent. In an action by pltf. for wrongful distress defts. counterclaimed for use & occupation:—*Held*: (1) as no rent was due according to the terms of agreement the distress was illegal & pltf. was entitled to damages; (2) as pltf. went into possession under the agreement & not under an implied contract to pay what the premises were reasonably worth, the counterclaim for use & occupation failed.—*FOX v. SLAUGHTER* (1919), 35 T. L. R. 668; 63 Sol. Jo. 704.

SUB-SECT. 2.—RELATIONSHIP OF LANDLORD AND TENANT.

A. In General.

41. *Necessity for existing tenancy—Legal or equitable.*—*MANCHESTER BREWERY CO. v. COOMBS*, No. 14, *ante*.

42. — *Lessor without power to grant lease.*—By agreement between P. & H., P. agreed to grant to H. a lease of land & the buildings then standing thereon, & others to be erected thereon under the agreement, with the appurtenances, as they were & had been in the possession of H., for a term of years to commence at a day then past, at a specified rent, payable on days then to come; & P. agreed in four months to erect certain buildings on the land; & H. agreed to take the lease & execute a counterpart, & in the four months, to erect certain other buildings on the land; & it was agreed that the lease should be granted immediately after P. should obtain his lease of the premises from M. under a then subsisting agreement between P. & M.; & that the lease from P. to H. should contain like covenants, etc., to those in the lease from M. to P. & such other covenants as were usual in such leases; & H. agreed to pay the rent as if the lease from P. were already executed. If H. failed to pay such rent, or perform the agreement, the agreement was to be void so far as regarded the engagements of P.; & P. might retain, or re-enter upon, & dispose of, the premises. If P. failed to perform, etc., he was to pay £500 to H. as liquidated damages:—*Held*: the instrument did not amount to a present demise, inasmuch as P. appeared by the agreement to have no present power to grant a lease; & H. having entered & made default in payment of rent, P. could not distrain.—*HAYWARD v. HASWELL* (1837), 6 Ad. & El. 265; 1 Nev. & P. K. B. 411; Will. Woll. & Dav. 158; 6 L. J. K. B. 116; 1 Jur. 54; 112 E. R. 101.

43. — *Rent due to Board of Ordnance—Not distrainors.*—Defts. were partners in business; & one of them, in the name of the others, wrongfully ejected the tenant of a canteen, who held

under a lease from the Board of Ordnance, they, defts., being sureties for the payment of his rent & for his quiet tenantry.—*PETRIE v. LAMONT* (1841), Car. & M. 93.

Annotation:—*Mentd. Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

44. ——— At time of distress.]—*Trespass de bonis asportatis*. Plea, that before the said time, to wit, on June 25, 1843, defts. being seised in fee, demised a messuage to R. for three years, at a yearly rent of £75, payable quarterly, by virtue of which demise R. entered, & became & was possessed of the messuage for the term, & that, during the demise & the term thereby granted, a quarter's rent became due from R. & remained in arrear, wherefore defts. entered & took the goods in the messuage as a distress for rent:—*Held*: the plea was bad, for not showing distinctly that the tenancy of R. was subsisting at the time of the distress.

Qu.: whether the plea stated the demise with the requisite particularity.—*DREW v. AVERY* (1844), 13 M. & W. 399; 2 Dow. & L. 371; 14 L. J. Ex. 65; 4 L. T. O. S. 139 A; 153 E. R. 166.

45. ———.]—*WILLIAMS v. STIVEN*, No. 471, *post*.

46. ——— Determination by forfeiture—*Distress between issue of writ & judgment*.]—A lease of premises contained a covenant by the lessee not to assign, underlet, or part with possession of the premises, or any part thereof, without the consent of the lessor, such consent not to be unreasonably withheld if the proposed assignee or underlessee should be a respectable & responsible person; & there was a proviso for re-entry on breach of any of the covenants. The lessee let the premises to pltf. from year to year, &, without having obtained the consent of the lessor, mort-

gaged them by way of sub-demise to another person. A receiver was subsequently appointed on behalf of the mtgee., who gave pltf. notice to pay the rent to the receiver. The original lessor brought an action, & recovered judgment for possession of the premises upon the ground of the breach of covenant against assigning or underletting. After the writ in that action had been served, & before judgment was obtained, the receiver, on behalf of the mtgee., distrained upon the underlessee to recover a quarter's rent that had accrued after the issue of the writ in the lessor's action:—*Held*: (1) there had been a breach of the covenant, entitling the lessor to re-enter; (2) the service of the writ by the lessor to recover possession of the premises on the ground of forfeiture determined the lease, the lessor having thereby unequivocally declared his election to determine the lease; (3) the subsequent distress was illegal.—*SERJEANT v. NASH, FIELD & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510, C. A.

Annotation:—*As to* (2) *Appld. Works Comrs. v. Hull*, [1922] 1 K. B. 205.

—— Demise by attornment clause in mortgage.]—*See* Part II., Sect. 4, sub-sect. 7, B. (a) i., *post*.

47. ——— Possession under agreement for sale insufficient.]—*WHITELY v. WOODHOUSE* (1849), 14 L. T. O. S. 177.

48. Demise collected from more than one document—*Agreement & lease*.]—Deft. by a lease which was not stamped, demised to A. He afterwards, by an agreement stamped, with a lease stamp, but which did not contain words of demise, though it referred to the lease, let the same premises to pltf.:—*Held*: (1) the terms of the lease were incorporated in, & formed part of the agreement; & the former was admissible in

PART II. SECT. 3, SUB-SECT. 2.—A.

44 i. *Necessity for existing tenancy*—*At time of distress*.]—Pltf. was the registered proprietor of certain land & premises. By an agreement in writing for a lease dated Jan. 15, 1914, pltf. agreed to let the land & premises to M. for a term of five years from Jan. 21, 1914, at a certain rental & M. entered into possession of the premises & from time to time paid the rent reserved. On Aug. 25, 1915, M. with the consent in writing of pltf. transferred the lease to O. & at the same time gave up the possession of the premises to O. Pltf. on Oct. 1, 1915, distrained for rent due by M.:—*Held*: pltf. had no right to distrain as the relation of landlord & tenant had ceased to exist.—*MARSHALL v. COUPON FURNITURE CO., LTD.*, [1916] St. R. Qd. 120.—AUS.

44 ii. ———.]—A landlord cannot distrain after his interest in the estate has expired.—*HARTLEY v. JARVIS* (1850), 7 U. C. R. 545.—CAN.

44 iii. ———.]—Deft. avowed for rent under a demise to G., to which the pltf. pleaded *non tenuit*. During the term G. had left the country & assigned to M., who sold to C., & G. afterwards returned, & entered under C., & was living there when the distress was made:—*Held*: not to deprive deft. of his right to distrain.—*ELSWORTH v. BRICE* (1859), 18 U. C. R. 441.—CAN.

44 iv. ———.]—Deft. had leased to pltf. for a term of years certain premises, portions of which were at the time in the possession of other parties, & these parties retained possession against pltf., & refused to give them up to him. In consequence of this, deft., after the expiration of the first year, agreed with pltf. to an abatement in the rent for that year, & gave him a receipt for the balance,

which pltf. paid as the amount of rent due upon the premises; deft. subsequently distrained for the sum agreed to be remitted:—*Held*: the agreement between pltf. & deft. as to the abatement of the rent did not create a new tenancy between them at a new rent, entitling deft. to distrain therefor, because the agreement was not made until after the expiration of the year, to which it alone had reference, so that the relation of landlord & tenant could not have been created for that year, & the sum agreed to be paid could not have been rent, but a mere sum in gross, & could not consequently have been distrained for.—*KELLY v. IRWIN* (1867), 17 C. P. 351.—CAN.

44 v. ———.]—In 1881 pltf. made a mtge. to defts. maturing in 1886, in which was contained a proviso that the mtgees. might distrain for arrears of interest, & a special provision by which pltf. leased the lands until the maturity of the mtge., at a rental of the same amount as the interest. In Aug. 1888, while pltf. was in possession, defts. distrained on his goods for rent or interest due at the maturity of the mtge. in 1886 & also for the amounts due in 1887 & 1888:—*Held*: there was no definite tenancy after the maturity of the mtge., & the interest thereafter being recoverable not by the terms of the contract, but as damages, the rent became uncertain, & there was no right of distress.—*KLINCK v. ONTARIO INDUSTRIAL LOAN & INVESTMENT CO.* (1888), 16 O. R. 562.—CAN.

44 vi. ———.]—An agreement for the sale of land contained an attornment clause, giving the vendor the right to distrain for arrears of principal or interest:—*Held*: unless the circumstances showed that there was the intention to create a real tenancy at a real rent, the relation of landlord & tenant was not validly created so

as to enable the vendor to distrain, on the land sold, goods belonging to the husband of the purchaser.—*HALL v. WEIMAN* (1913), 25 W. L. R. 222; 5 W. W. R. 6; 13 D. L. R. 17; 6 Alta. L. R. 239.—CAN.

44 vii. ———.]—Premises were rented to G. who abandoned them. The landlord then leased the premises to another tenant who took possession. Subsequently under a chattel mtge. made by G. during his tenancy the mtgeas. caused a seizure to be made of certain chattels which had been on the premises during G.'s tenancy & remained there. The landlord then issued a distress warrant for rent owing by G. & the chattels were seized thereunder:—*Held*: the abandonment of the premises by G. & the taking of possession by the tenant under his lease effected a surrender of G.'s tenancy by operation of law; the tenancy being at an end the landlord's right to distrain was gone & his distress & the seizure thereunder were ineffective to give him any rights in respect of the chattels.—*BRUCE v. SMITH*, [1923] 3 D. L. R. 887; 2 W. W. R. 327.—CAN.

46 i. ——— *Determination by forfeiture—Distress between issue of writ & judgment*.]—After an action of ejectment was commenced for the forfeiture of a lease the landlord distrained for & received rent subsequently accruing due:—*Held*: such course did not *per se* set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year.—*McMULLEN v. VANNATTO* (1894), 24 O. R. 625.—CAN.

d. ——— *Agreement to purchase not fulfilled*.]—A. became tenant from year to year to B. at a certain rent in 1858. In 1860, A. agreed to

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Sub-sect. 2, A. & B.]*

evidence, though it was not stamped; (2) both together amounted to a lease at a specific rent, for which deft. had a right to distrain.—*PEARCE v. CHESLYN* (1835), 4 Ad. & El. 225; 1 Har. & W. 768; 5 Nev. & M. K. B. 652; 5 L. J. K. B. 113; 111 E. R. 772.

49. — *Letters.*—Pltf. offered by letter to take a farm of deft. at £110 p.a., payable quarterly, upon a lease for 21 years; a valuation to be made of the crops; a lease to be prepared at pltf.'s expense; & the whole be subject to a certificate of pltf.'s solvency to be given by A. Deft. having received the certificate, by letter accepted of pltf. as tenant, on the terms proposed; the valuation was deferred from time to time; but pltf. on paying £100 towards the amount, was let into possession:—*Held*: the letters of pltf. & deft., at all events, as explained by above circumstances, & some admissions made by pltf. after a distress, constituted an actual demise on which deft. was authorised to distrain for rent arrear, & not a mere agreement for a lease.—*CHAPMAN v. BLUCK* (1838), 4 Bing. N. C. 187; 1 Arn. 27; 5 Scott, 515; 7 L. J. C. P. 100; 2 Jur. 206; 132 E. R. 760.

Annotations:—*Mentd.* *Jones v. Reynolds* (1841), 1 Q. B. 506; *Doe d. Wood v. Clarke* (1845), 5 L. T. O. S. 91; *Watcham v. East Africa Protectorate*, [1919] A. C. 533.

50. *Tenancy deduced from conduct of parties.*—*CHAPMAN v. BLUCK*, No. 49, *ante*.

Description in notice as tenant—Submission to distress.—If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy.—*PANTON v. JONES* (1813), 3 Camp. 372, N. P.

Annotation:—*Apld.* *Cooper v. Blandy* (1834), 1 Bing. N. C. 45.

52. — *Or predecessors in title.*—Pltf. came into occupation under one who had paid rent upon distress by the deft.:—*Held*: after proof of this fact pltf. was estopped to dispute deft.'s title to rent, notwithstanding deft. inadvertently put in evidence a document which showed that pltf.'s predecessor occupied under a lease to which deft. was in law a stranger.—*COOPER v. BLANDY* (1834), 1 Bing. N. C. 45; 4 Moo. & S. 562; 3 L. J. C. P. 274; 131 E. R. 1034.

Annotations:—*Consd.* *Carlton v. Bowcock* (1884), 51 L. T. 659. *Refd.* *Accidental Death Insce. v. Mackenzie* (1861), 5 L. T. 20.

53. — *Or their nominees—Aliter as to conduct of strangers.*—*WALTERS v. NORTHERN COAL MINING CO.*, No. 99, *post*.

54. *Occupier treated as trespasser—Served with notice of ejectment.*—A landlord having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person, who comes in & defends in lieu of the

occupier, & the occupier is aware of that circumstance, & is never turned out of possession.—*BRIDGES v. SMYTH* (1829), 5 Bing. 410; 2 Moo. & P. 740; 7 L. J. O. S. C. P. 143; 130 E. R. 1119.

55. *Agreement operating as new demise.*—A., by a contract in writing, demised to B., at a yearly rent of £145 from May 14, 1851, certain premises, including a cottage occupied by C. at the rental of £5 per year. B. took possession of all the premises included in the demise except the cottage, as C. refused either to go out or to attorn to B. Before the day fixed for the first half-yearly payment of rent, A. & B. verbally agreed that A. should receive from C. some arrears of rent, & that A. should pay B. £70 on Nov. 14, 1851, & £70 on May 14, 1852:—*Held*: this was a new demise, & A. was entitled to distrain for the £70 due on Nov. 14, 1851.—*WATSON v. WAUD* (1853), 8 Exch. 335; 22 L. J. Ex. 161; 20 L. T. O. S. 261; 1 W. R. 133; 155 E. R. 1375.

56. *Distress by holder of equitable interest—Subsequent ratification by legal owner.*—(1) A distress for rent upon a warrant signed by one who has only an equitable interest in the land, cannot be rendered valid by a ratification subsequently given by the legal owner.

By a subsequent ratification, the distrainer has an authority in him at the time; but only where the authority is put forward at the time, & the act is manifestly done under it, for the ratification can only operate on the act as it is; it adopts the act as actually done by or for the benefit of him for whom it is alleged at the time it is so done; but if it does more, it changes the nature of the act, which he alleges to be done in his own right & for his own benefit, & turns it into an act alleged to be done in the right of another, since adopted (*DENMAN, C.J.*).

(2) A party cannot fix on a right different from that which he proposes to distrain upon, unless he had the same right, or can be considered to have had it, at the time, by virtue of any subsequent consent, unless he set it up (*DENMAN, C.J.*).—*COLLIER v. CLARKE* (1845), 5 L. T. O. S. 475.

57. *Tenants in common—Joint property—Separate attornments.*—(1) Two tenants in common mortgaged an estate to secure a debt which they jointly & severally covenanted to pay, & each of them separately attorned tenant to the mtgees. of a part of the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mtge. debt. The mtgors. were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:—*Held*: the mtgees. could not distrain for the rent upon the partnership property which was on the estate.

(2) The landlord's right of distress is to seize upon the chattels that are on the land belonging to the tenant, & to carry them away; but in exercising that right he cannot seize chattels, which belong to other persons, or in which the tenant has only a partial interest.—*Re POTTER*,

purchase the land, & gave his note for the price, taking a bond for a deed from B. on payment of the note. The agreement to purchase was never carried out, no payment having been made by A., & by consent of the parties the agreement was destroyed, & A. remained in possession without any new agreement:—*Held*: the tenancy was not determined by the agreement to purchase, & B. could distrain for the subsequent rent.—*CROSKILL v. WORTMAN* (1863), 5 All. 648.—*CAN.*

e. *Relation created by contract of sale—Reservation of rent equivalent to*

instalments of principal & interest.—By an agreement between H. & D., H. agreed to sell & D. to buy a half section of land, for \$6,553, payable in instalments with interest. It was further agreed that until the completion of the purchase D. should hold the land as tenant to H. from the day of the execution of the agreement at a yearly rental equivalent to, applicable in satisfaction of, & payable at the same time as, the instalments of principal & interest, "the legal relation of landlord & tenant being hereby constituted between the vendor &

the purchaser:—*Held*: the rent reserved was not so excessive as to warrant the conclusion that the parties never really intended it to be paid as rent: the parties, when they executed the document, had a real, honest intention of creating the relation of landlord & tenant, & it was not their intention, under the guise of that relation, to effect some other purpose; H. was entitled to distrain for the rent in arrear.—*INDEPENDENT LUMBER CO. v. DAVID* (1912), 22 W. L. R. 465; 7 D. L. R. 876; 3 W. W. R. 224; 5 Sask. L. R. 316.—*CAN.*

Exp. PARKE (1874), L. R. 18 Eq. 381; 43 L. J. Bcy. 139; 30 L. T. 618; 38 J. P. 760; 22 W. R. 768; *De Colyar's County Court Cases*, 235.

Tenant holding over.—See Sect. 6, sub-sect. 6, C. (b), *post*.

B. Sufficiency of Agreement for Lease.

Agreement for lease.—See, generally, LANDLORD & TENANT.

Whether document construed as lease or agreement for lease.—See, generally, LANDLORD & TENANT.

58. Before Judicature Act—During first year.—If, under an agreement for a lease, at a certain rent, the tenant is let into possession before lease executed, the lessor cannot, during the first year, distrain for rent. For there is no demise express or implied.—*HEGAN v. JOHNSON* (1809), 2 Taunt. 148; 127 E. R. 1033.

Annotations:—**Consd.** *Knight v. Benett* (1826), 3 Bing. 361. **Distd.** *Anderson v. Mid. Ry.* (1861), 3 E. & E. 614. **Refd.** *Mann v. Lovejoy* (1826), Ry. & M. 355; *Riseley v. Ryle* (1843), 11 M. & W. 16.

59. ——— Payment of rent.—A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; &, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of £63, the tenant to enter any time on or before a particular day:—*Held*: this only amounted to an agreement for a future lease, & no lease having been executed, & no rent subsequently paid, the landlord was not entitled to distrain.—*DUNK v. HUNTER* (1822), 5 B. & Ald. 322; 106 E. R. 1209.

Annotations:—**Expld.** *Hamerton v. Stead* (1824), 5 Dow. & Ry. K. B. 206. **Distd.** *Warman v. Faithfull* (1834), 5 B. & Ad. 1042. **Expld. & Apld.** *Vincent v. Godson* (1853), 1 Sm. & G. 384. **Distd.** *Anderson v. Mid. Ry.* (1861), 3 E. & E. 614. **Refd.** *Mann v. Lovejoy* (1826), Ry. & M. 355; *Stanforth v. Fox* (1831), 7 Bing. 590.

60. ————Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, & the landlord may distrain.

Where the pltf. in replevin does not appear, deft. cannot take a verdict, though the record be brought down by his writ of *Nisi Prius*, but a nonsuit must be entered.—*MANN v. LOVEJOY* (1826), Ry. & M. 355; 4 L. J. O. S. K. B. 172, N. P.

Annotations:—**Refd.** *Doe d. Tilt v. Stratton* (1828), 1 Moo. & P. 183. **Mentd.** *Doe d. Thompson v. Amey* (1840), 12 Ad. & El. 476.

61. ——— Admission in account.—Pltf., who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him & his landlord:—*Held*: this constituted him a tenant from year to year, & liable to distress.—*COX v. BENT* (1828), 5 Bing. 185; 2 Moo. & P. 281; 7 L. J. O. S. C. P. 68; 130 E. R. 1031.

Annotations:—**Distd.** *Regnart v. Porter* (1831), 7 Bing. 451. **Refd.** *Braythwayte v. Hitchcock* (1842), 10 M. & W. 494; *Watson v. Waud* (1853), 8 Exch. 335. **Mentd.** *Vincent v. Godson* (1854), 4 De G. M. & G. 546.

62. ——— Agreement for future tenancy.—A., occupying premises of B., tenant to C. entered into an agreement with B. & C. to become C.'s tenant at the expiration of B.'s term. Before that time arrived, C. makes an unconditional contract to sell the property to A.; the title is objected to by A., & A. continues to occupy, paying no rent until C. distrains for twelve months' rent under the agreement for tenancy:—*Held*: the agreement for a future tenancy operated as a lease, & the relation of landlord & tenant

existed between the parties at the time of the distress, notwithstanding the contract to purchase.—*TART v. DARBY* (1846), 15 M. & W. 601; 15 L. J. Ex. 326; 7 L. T. O. S. 262; 153 E. R. 989.

Annotation:—**Refd.** *Ellis v. Wright* (1897), 76 L. T. 522.

63. Since Judicature Acts—Agreement entitling to specific performance—Payment of rent.—Deft. on May 29, 1879, agreed to grant & pltf. to accept a lease of a mill for seven years at the rent of 30s. a year for each loom run, pltf. not to run less than 540 looms, lease to contain such stipulations as were inserted in a certain lease of May 1, which was a lease at a fixed rent made payable in advance & contained a stipulation that there should be at all times payable in advance on demand one whole year's rent in addition to the proportion if any, of the yearly rent due & unpaid for the period previous to such demand. Pltf. was let into possession & paid rent quarterly not in advance, up to Jan. 1, 1882, inclusive, having run in 1881 560 looms. In March, 1882, deft. demanded payment of £1,005 14s., £840 as one whole year's rent for 560 looms at 30s. & £165 14s. as the proportionate part of the rent from Jan. 1, last, & put in a distress. Pltf. thereupon commenced his action for damages for illegal distress, & for specific performance, & moved for an injunction. The judge granted the injunction on the terms of pltf. paying the £1,005 14s. into ct. Pltf. appealed:—*Held*: (1) since the Judicature Acts the rule no longer held that a person occupying under an executory agreement for a lease was only made tenant from year to year at law by the payment of rent, but that he was to be treated in every ct. as holding on the terms of the agreement; (2) pltf. holding under the agreement, was subject to the same right of distress as if a lease had been granted, & if under the terms of the lease a year's rent would have been payable in advance on demand a distress for that was lawful.

Semble: such lease ought to receive a minimum rent of £810 30s. apiece on 540 looms, & the stipulation in the lease of May 1, as to payment in advance would be applicable to such minimum rent though not to the whole rent, & deft. being willing to submit to the injunction on having £810 paid into ct., order varied accordingly, the ct. being inclined to the view that there was a right to distress for that amount though the time had not arrived for finally determining the question.

There is an agreement for a lease under which possession has been given. Now, since the Judicature Acts, possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of rent from year to year, & an estate in equity under the agreement. There is only one ct. and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance (*JESSEL, M.R.*).—*WALSH v. LONSDALE* (1882), 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, C. A.

Annotations:—**As to** (1) **Consd.** *Re Northumberland Avenue Hotel Co., Sully's Case* (1885), 54 L. T. 76. **Expld.** *Foster v. Reeves*, [1892] 2 Q. B. 255. **Distd.** *Murgatroyd v. Silkstone & Dodsworth Coal & Iron Co., Ex p. Charlesworth* (1895), 65 L. J. Ch. 111. **Expld. & Distd.** *Friary Holroyd & Healey's Breweries v. Singleton*, [1899] 1 Ch. 86. **Expld.** *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. **Consd.** *Gilbey v. Cossey* (1912), 106 L. T. 607. **Distd.** *I. R. Comrs. v. Derby*, [1914] 3 K. B. 1186. **Consd.** *Hurst v. Picture Theatres*, [1915] 1 K. B. 1; *Purchase v. Lichfield Brewery Co.*,

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[1915] 1 K. B. 184. *Reid*. Allhusen v. Brooking (1884), 26 Ch. D. 559; Coatsworth v. Johnson (1886), 54 L. T. 520; Furness v. Bond (1888), 4 T. L. R. 457; Swain v. Ayres (1888), 21 Q. B. D. 289; Lowther v. Heaver (1889), 41 Ch. D. 248; Strong v. Stringer (1889), 61 L. T. 470; Lowe v. Adams, [1901] 2 Ch. 598; Lewis v. Baker, [1905] 1 Ch. 46; Jones v. Tankerville, [1909] 2 Ch. 440; Allen v. I. R. Comrs., [1914] 2 K. B. 327; Slough Picture Hall Co. v. Wade, Wilson v. Neville, *Reid* (1916), 32 T. L. R. 542; Pole-Carew v. Western Counties & General Manure Co., [1920] 2 Ch. 97; Gray v. Spyer, [1922] 2 Ch. 22. *As to* (2) *Distd.* Murgatroyd v. Silkstone & Dodsworth Coal & Iron Co., Ltd., *Ex p.* Charlesworth (1895), 65 L. J. Ch. 111. *Consd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Gilbey v. Cossey (1912), 106 L. T. 607. *Reid*. Gray v. Spyer, [1922] 2 Ch. 22. *Generally, Mentd.* Beighton v. Beighton (1895), 64 L. J. Ch. 796; List v. Tharp (1897), 45 W. R. 243; White v. Grand Hotel Eastbourne (1912), 106 L. T. 785.

64. ———.]—A tenant holding under an agreement for a lease of which the ct. will decree specific performance is subject to the same right of distress as if a lease had been granted.—*CRUMP v. TEMPLE* (1890), 7 T. L. R. 120.

C. Nature of Tenancy.

65. *Life or years.*]—*LAMB v. WEST* (1632), Hut. 114; 123 E. R. 1139.

66. *Tenant at will.*]—A landlord has a right to distrain upon his tenant at will. After the tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made & signed between the parties; rent had been paid, & a receipt given for a quarter's rent, & a distress also had been put in by the landlord upon the tenant:—*Held*: not sufficient to alter the original tenancy at will into a tenancy from year to year.—*DOE d. BENSON v. FROST* (1851), 17 L. T. O. S. 145; 15 J. P. Jo. 387.

Annotation:—*Reid*. Doe d. Davies v. Thomas (1851), 6 Exch. 854.

67. ———.]—*ANDERSON v. MIDLAND RY. CO.*, No. 1006, *post*.

68. ———.]—B., being mtgor. in possession, executed a mtge. on Sept. 12, 1866, of the premises to defts. to secure repayment with interest of certain advances to be made by defts. The mtge. was by indenture between B. & defts., but was never executed by defts.; the deed recited the previous mtge. (which was in fee), & by it B. conveyed all the premises comprised in the recited mtge. to defts., in fee, upon trust that defts., should, either immediately or at any time, sell

them &, as a further security for the principal & interest for the time being due from B. to defts., B. did thereby attorn & become tenant to defts. for the term of ten years, at the yearly rent of £800, the first yearly rent to be payable on Oct. 1, 1886. Defts. made the stipulated advances, & B. continued in occupation of the premises, & on Oct. 15, 1866, defts. distrained for the first year's rent:—*Held*: (1) the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, & not a term of ten years; a deed being therefore unnecessary, the tenancy was created by the assent of the parties & the occupation under it, & the fact that defts. had not executed the deed was immaterial; (2) the parties having agreed that the relation of landlord & tenant should be established between them, the mtgor. was estopped from setting up that defts. had no legal reversion, & it made no difference that the fact of the mtgor. having only the equity of redemption appeared on the face of the deed; & the distress was therefore lawful.—*MORTON v. WOODS* (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. Q. B. 81; 17 W. R. 414, Ex. Ch.

Annotations:—*As to* (1) *Expld.* *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. *Reid*. Burchell v. Clark (1876), 25 W. R. 334; *Re Knight, Ex p. Voisey* (1882), 52 L. J. Ch. 121; *Kearsley v. Philips* (1883), 11 Q. B. D. 621; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. *As to* (2) *Expld. & Distd.* *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725. *Expld. & Follid.* *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. *Consd.* *Kearsley v. Philips* (1883), 11 Q. B. D. 621. *Reid.* *Re Potter, Ex p. Park* (1874), De Colyar's County Court Cases 235; *Hartcup v. Bell* (1883), Cab. & El. 19. *Generally, Mentd.* *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373.

69. *Weekly tenancy.*]—An agreement for the sale of a public-house contained the following stipulation: " &, inasmuch as it is intended that E. shall be let into immediate possession of the hereditaments hereby agreed to be sold, & for the purpose of securing the due performance of the several agreements herein contained, he, the said E. hereby admits himself to be a tenant from week to week to S. of the hereditaments hereby agreed to be sold, at the weekly rent of £80, payable in advance ":—*Held*: this created the relation of landlord & tenant between S. & E. & gave a right to distrain.—*YEOMAN v. ELLISON* (1867), L. R. 2 C. P. 681; 36 L. J. C. P. 326; 17 L. T. 65.

70. *Licence—Use of stall at exhibition.*]—

PART II. SECT. 3, SUB-SECT. 2.—C.

66 i. *Tenant at will.*]—There being a tenancy at will at a fixed rent, there is, as incident to it, the right to distrain.—*PEGG v. INDEPENDENT ORDER OF FORESTERS* (1901), 21 C. L. T. 158; 1 O. L. R. 97.—*CAN.*

i. *Tainted tenancy.*]—In an action for the conversion of goods of pltf. in the possession of a third person if deft. justify for the conversion as under a distress by him for rent due from such third person, pltf. may show that the letting to such third person was for an immoral purpose & may take advantage of such taint though a stranger to the contract of letting.—*NICHOLSON v. WEST* (1879), 5 V. L. R. 80.—*AUS.*

g. *Tenant of person in possession without title.*]—A. demised to B. for a term; B. during the term absconded & abandoned the property; C., finding the place vacant, put a person in possession, & made a demise to G.:—*Held*: distress legal.—*RUDOLPH v. BERNARD* (1848), 4 U. C. R. 238.—*CAN.*

h. *Lease cancelled—Tenancy continuing.*]—K. leased premises for a term to B., who sublet a portion of them to pltf. Afterwards, by indorsement on the lease from K. to B., after reciting that they had mutually agreed to release each the other from the covenants & agreements contained therein, it was declared that said lease was therefore wholly cancelled at & from that date, & B. authorised K. to collect the rent under the lease from him to pltf. Subsequently K. distrained upon pltf. for two quarters' rent under B.'s lease to him. At the time of the distress pltf. had paid all rent due for one quarter, being the first distrained for, to one C., under an agreement with B. so to do, with the exception of a small amount still unpaid. There was a second distress for the other quarter, the time of payment of both quarters having elapsed; & there was also in arrear at this time six months' rent under the lease from K. to B.:—*Held*: as the term created by the lease from K. to B. continued to exist notwithstanding the cancellation of the lease, the rent which was

incident to that term could be distrained for.—*LAUR v. WHITE* (1868), 18 C. P. 99.—*CAN.*

k. *No real tenancy—Mere device to protect one party.*]—C., having paid rent due by R. to H., in order to secure the sum so paid & other advances, took an assignment of the residue of the term from R., who forthwith took a lease from C. for a term of three months, the rental being the amount of C.'s advances to R.:—*Held*: such lease, however binding between the parties, could not create the relation of landlord & tenant so as to enable C. to distrain the goods of third parties, unpaid vendors, on the premises, the intention being manifestly not to create such relation except as a scheme to enable C. to seize such goods.—*THOMAS v. CAMERON* (1885), 9 O. R. 441.—*CAN.*

l. ———.]—Where the rent fixed by the document creating a tenancy is so excessive that a ct. might come to the conclusion that it was never intended to create a real tenancy, but that the provision reserving rent

Defts. let to W. a stall at an exhibition at a weekly rent, but W. was not to use it before 10 a.m. nor after 11 p.m.:—*Held*: this was a mere licence, which gave no right of distraint to debtors.—*RENDELL v. ROMAN* (1893), 9 T. L. R. 192, D. C.

Advertisement hoardings.]—*PROVINCIAL BILL POSTING CO. v. LOW MOOR IRON CO.*, No. 312, *post*.

—*See, also*, Nos. 75, 76, *post*.

SUB-SECT. 3.—RENT MUST ISSUE OUT OF CORPOREAL HEREDITAMENT.

72. General rule.]—A distress at common law must be made in a place which is part of the premises actually demised, & out of which the rent issues; & not in a place wherein the tenant has a privilege, or an easement, but which is not actually demised. Accordingly, where a wharf was demised, with the exclusive use of a barge-way or space between high & low water mark in a navigable river:—*Held*: the landlord was not entitled to distrain a barge moored to the wharf by a rope, the barge itself being over the space between high & low water mark.—*BUSZARD v. CAPEL* (1828), 8 B. & C. 141; 2 Man. & Ry. K. B. 197; 6 L. J. O. S. K. B. 267; 108 E. R. 996; *affd. sub nom. CAPEL v. BUSZARD* (1829), 6 Bing. 150, Ex. Ch.

Annotations:—*Refd. Hancock v. Austin* (1863), 14 C. B. N. S. 634; *Perring v. Emerson* (1905), 75 L. J. K. B. 12. *Mentd. Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238.

73. —.]—*BRITISH MUTOSCOPE & BIOGRAPH CO., LTD. v. HOMER*, No. 255, *post*.

74. Furnished lodgings.]—A landlord may distrain for the rent of ready furnished lodgings.—*NEWMAN v. ANDERTON* (1806), 2 Bos. & P. N. R. 224; 127 E. R. 611.

Annotations:—*Consd. Cook v. Humber* (1862), K. & G. 413. *Refd. Wilson v. Roberts* (1862), K. & G. 430.

75. Rooms let with power.]—A., being the owner of a factory, permitted B. to place his lace-making machines in one of the rooms, & to use the steam power, on the consideration of his paying the sum of 12s. weekly; A. reserving to himself the right of entry into the room for the purpose of oiling the machinery. B. went out, & fastened the doors & windows; & A., during his absence, some payments being in arrear, placed a ladder against the window & unfastening the hasp, entered the room & distrained the machines:—*Held*: (1) even if there had been a demise of the room, A. had no right to enter as he did; (2) the letting the floor alone, upon which the machines stood, would not give him the power of distraining.—*HANCOCK v. AUSTIN* (1863), 14 C. B. N. S. 634; 2 New Rep. 243; 32 L. J. C. P. 252; 8 L. T. 429; 10 Jur. N. S. 77; 11 W. R. 833; 143 E. R. 593.

Annotations:—*As to* (1) *Consd. Nash v. Lucas* (1867), L. R. 2 Q. B. 590. *As to* (2) *Distd. Marshall v. Schofield* (1882), 52 L. J. Q. B. 58. *Refd. Selby v. Greaves* (1868), L. R. 3 C. P. 594.

76. —.]—(1) A. let to B. a defined portion of a room in a factory, with steam power for working lace machines belonging to B., at a certain sum *per annum*, payable quarterly: a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter:—*Held*: a sufficient demise to entitle A. to distrain.*

(2) By a deed, duly registered, in the form given in sched. D. to Bkpcy. Act, 1861 (c. 134), to which the required majority of the creditors assented,

was a mere device to enable the landlord to obtain an additional security on chattels which would otherwise

be available to creditors, such provision, & the distress levied under it, are invalid.—*WATEROUS ENGINE*

B. assigned all his effects to a trustee, to be applied & administered for the benefit of the creditors in like manner as if B. had been at the date thereof duly adjudged a bkpt.:—*Held*: the title of the trustee, under sect. 197 of above Act, dated from the execution of the deed; & a distress for rent levied between that time & the day of registration could not, by reason of sect. 129 of Bkpcy. Act, 1849 (c. 106), be made available for more than one year's rent.—*SELBY v. GREAVES* (1868), L. R. 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. 186; 16 W. R. 1127.

Annotations:—*As to* (1) *Folld. Marshall v. Schofield* (1882), 52 L. J. Q. B. 58. *Consd. British Electric Traction Co. v. I. R. Comrs.*, [1902] 1 K. B. 441. *Refd. Re Wilson, Ex p. Watkins* (1887), 57 L. T. 201; *Reudell v. Roman* (1893), 9 T. L. R. 192. *As to* (2) *Refd. Re Douglas, Ex p. Ryder* (1871), 8 Ch. App. 413.

77. Not for acquittance.]—*ROBERTS v. MYDLETON* (1741), Bunb. 348; 145 E. R. 695.

Annotation:—*Mentd. R. v. Loveden* (1800), 8 Term Rep. 615.

78. Compensation for goodwill—Added to rent.]—Where a lease came into the hands of the original lessor by an agreement entered into between him & the assignee of the original lessee, that the lessor should have the premises as mentioned in the lease, & should pay a particular sum over & above the rent annually towards the good will already paid by such assignee, such agreement operates as a surrender of the whole term. The sum in the agreement is considered as a sum to be paid annually in gross, not as rent, & the assignee cannot distrain either for that or for the original rent; but he has a remedy by *assumpsit* for the sum reserved for the goodwill.—*SMITH v. MAPLEBACK* (1786), 1 Term Rep. 441; 99 E. R. 1186.

Annotations:—*Folld. Preece v. Corrie* (1828), 5 Bing. 24. *Consd. Pollock v. Stacy* (1847), 9 Q. B. 1033. *Mentd. R. v. Fauntleroy* (1824), 2 Bing. 413; *Doe d. Courtail v. Thomas* (1829), 9 B. & C. 288; *Ford v. Beech* (1848), 11 Q. B. 852; *Charles v. Alton* (1854), 2 C. L. R. 1764.

79. Payment on outlay by landlord.]—The lessee of a house, & his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, 10 per cent. on the cost of new buildings, if the lessor would erect them:—*Held*: the original lease still existed: the new contract was, therefore, no demise of the premises; only the original rent could be distrained for; & this was merely a collateral agreement to pay so much more money during the residue of the term.—*HOBV v. ROEBUCK* (1816), 7 Taunt. 157; 2 Marsh. 433; 129 E. R. 63.

Annotations:—*Apld. Donellan v. Read* (1832), 3 B. & Ad. 899. *Refd. Maples v. Pepper* (1856), 20 J. P. 279.

80. Demise of corporeal & incorporeal hereditaments—Entire rent reserved.]—A demise, not under seal, of tithes, & also of a corporeal hereditament, at an entire rent, will not justify a distress for the rent reserved.

A distress can only be, by law, in respect of a fixed ascertained rent reserved out of land; & here, no fixed certain rent was reserved in respect of the land (*PATTESON, J.*).—*GARDINER v. WILLIAMSON* (1831), 2 B. & Ad. 336; 9 L. J. O. S. K. B. 233; 109 E. R. 1168.

Annotations:—*Apld. Neale v. Mackenzie* (1836), 1 M. & W. 747. *Refd. R. v. Hookworthy* (1837), 7 Ad. & El. 492; *Harris v. Morrice* (1842), 10 M. & W. 260; *Evans v. Robins* (1862), 6 L. T. 897.

SUB-SECT. 4.—REVERSION.

81. Reversionary interest necessary.]—To avowry for rent arrear, plea, that by the demise

WORKS v. WELLS (1911), 16 W. L. R. 274; 4 Sask. L. R. 48.—*CAN.*

Sect. 3.—Conditions precedent to right to distress:
Sub-sect. 4.]

in the avowry mentioned, avowant demised & transferred the premises to pltf. for the residue of avowant's term & interest in the same, & that avowant had not, at the time when, etc., any reversionary interest in the premises, after the expiration of the term granted to pltf. by the demise:—*Held*: sufficient.—*PASCOE v. PASCOE* (1837), 3 Bing. N. C. 898; 3 Hodg. 188; 5 Scott, 117; 6 L. J. C. P. 322; 132 E. R. 656.

Annotation:—*Consd. Jolly v. Arbuthnot* (1859), 4 De G. & J. 224.

82. Lessee granting sub-tenancy.]—If a lessee for twenty years make a lease for ten years, then he who makes the lease for ten years has a reversion upon these ten years, so that if rent be reserved upon it, he may distress for it & have fealty of the termor (*POPHAM, C.J.*).—*HUGHES v. ROBOTHAM* (1593), Poph. 30; Cro. Eliz. 302; 79 E. R. 1150.

Annotations:—*Refd. Burton v. Barclay* (1831), 7 Bing. 745. *Meatd. Dighton v. Greenvil* (1690), 2 Vent. 321.

83. — Distress by executor.]—An exor. who has the reversion on a lease can bring a joint avowry for arrears accrued during his own time & in the time of testator.—*WADE v. MARSH* (1625), Benl. 159; Lat. 211; 73 E. R. 1024.

Annotations:—*Refd. Renvin v. Watkin* (1731), cited 3 B. & Ad. 861; *Prescott v. Boucher* (1832), 3 B. & Ad. 849.

84. Yearly tenant granting sub-tenancy.]—A tenant from year to year, underletting from year to year, has a reversion which entitles him to distress.—*CURTIS v. WHEELER* (1830), Mood. & M. 493, N. P.

Annotations:—*Refd. Oxley v. James* (1844), 13 M. & W. 209. *Meatd. Mercer v. Whall* (1845), 5 Q. B. 447.

85. —.]—A tenant from year to year who has sublet to a tenant from year to year, has a sufficient reversion to support a distress.

It is a good sub-demise. Provided his original tenancy from year to year continues so long, he has always a reversion for the indefinite term, which may continue for years (*PARKE, B.*).—*COLLINS v. OZANNE* (1847), 10 L. T. O. S. 207.

86. Reversion of part of land.]—Deft. avowed for rent & found that his father was seised, & let for years rendering rent, & died, & that the reversion descended to deft., & so he avowed for the whole of the rent in arrear & pltf. replied that the father devised the reversion to another. The jury found that the devise was only of two parts & not of the third, the lands being held by knight's service:—*Held*: avowant should have return for the third part, as there appeared to be a sufficient certainty to the ct. to make an apportionment, & judgment was given for him accordingly.—*CLAWORTHY v. MITCHEL* (1622), Win. 49; 124 E. R. 42.

Annotation:—*Distd. Philpott v. Dobbinson* (1829), 3 Moo. & P. 320.

87. —.]—Although a landlord may avow generally for rent in arrear, under Distress for Rent Act, 1737 (c. 19), s. 22, yet the terms of the contract under which the tenant holds must be truly stated in the avowry. Where, therefore, deft. made cognisance as bailiff of J., whose tenant he alleged pltf. to be, under a demise before then

made to pltf. at a certain yearly rent; & pltf. pleaded, *non tenuit, modo et formâ*:—*Held*: the cognisance was not supported by proof of a conveyance under which J. claimed, & which purported to have been made by three trustees, but was executed by two only; as J. thereby only took two-thirds of the premises, as tenant in common with the trustee who had omitted to execute the deed.—*PHILPOTT v. DOBBINSON* (1829), 6 Bing. 104; 3 Moo. & P. 320; 7 L. J. O. S. C. P. 248; 130 E. R. 1219.

Annotation:—*Refd. Roberts v. Snell* (1840), 1 Man. & G. 577.

88. Assignment of reversion—Incomplete.]—A reversion of a tenancy from year to year cannot pass without deed. Therefore, where A. & B. had occupied apartments for some years in the same house as yearly tenants, & A. secretly made a parol agreement with the common landlord, in May, 1822, to take the whole house as a yearly tenant from the then ensuing Midsummer, at which season B.'s tenancy had commenced; but B. never attorned, nor acknowledged A. as his landlord, but paid his ensuing Midsummer, & tendered his ensuing Michaelmas quarter's rent, acceptance of which was refused, to his landlord's agent, who directed him on both occasions to pay his rent from the former period to A.; & A., on B.'s refusal to do so, distrained for the Michaelmas quarter's rent, & at the following Christmas gave B. six months' notice to quit; in an action of trespass for the illegal distress:—*Held*: B.'s interest in the part of the premises occupied by him was undetermined, no regular notice to quit having been given him by his proper landlord; the reversion of it had not passed directly to A. by parol, nor indirectly, as appendant to A.'s apartments, considered as surrendered to the landlord by virtue of the agreement, & re-demised; B. was still the tenant of his original landlord, & not of A., & consequently, the action was maintainable.—*BRAWLEY v. WADE* (1824), M'Cle. 664; 148 E. R. 278.

89. —.](1) A mtgee., after default in payment by the mtgor., has, if he think proper to exercise them, the same rights against a tenant by lease granted before the mtge., as the mtgor. had, & may take his remedy on such lease, as assignee of the reversion.

(2) If the lease was made by the mtgor. subsequently to the mtge., the mtgee. may treat the tenant as a trespasser, but cannot distress, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, & the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of £800 advanced by H. to R. tenant in tail in remainder, declared the uses as follows: To H. & L., their exors., etc., for 1,000 years, to commence from the day before the date, etc., in trust (subject to the powers, etc., after mentioned), upon nonpayment of the £800 & interest, to sell or mortgage, & pay that sum to H.: & from & after the determination of that term, & subject meantime thereto, & to the trusts thereof,

PART II. SECT. 3, SUB-SECT. 4.

82 i. Lessee granting sub-tenancy.]—The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, which must be vested in him at the time of the distress. A tenant who makes a sub-lease of the property for the whole of his term, without reserving to him-

self any right of distress, cannot distress for rent in arrear due under the sub-lease, as he has parted with the reversion.—*O'CONNOR v. FELTIER* (1908), 8 W. L. R. 576; 18 Man. L. R. 91.—CAN.

86 i. Reversion of part of land.]—Deft. leased to pltf. by deed for three years, there being another tenant in

possession of part as a monthly tenant, who was succeeded by two others, holding under deft.:—*Held*: the lease to pltf., being under seal, operated as a grant of the reversion, with the rent incident thereto, as to the part thus held, & deft. was entitled to distress for the whole rent in arrear.—*HOLLAND v. VANSTONE* (1867), 27 U. C. R. 15.—CAN.

to E., mother of R., for life: remainder to L., his exors., etc., for 2,000 years, to commence from the day of the decease of E., in trust to levy & repay such sums as E. should during her life pay to H. for interest on the £800, & to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, & in the meantime subject thereto, to such uses as R. should appoint, & in default of appointment, to him for life: remainders to his sons & to his daughters in tail: remainders over. A power was then reserved to E. to demise the premises for ten years from the date of the deed, of seven years from the day of her decease, reserving the best rent, etc. E. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to R., or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of E. She died & the lessee entered. R. died shortly afterwards, & left a daughter. Afterwards, the trustees of the terms of 1,000 & 2,000 years assigned them to H., default having been made in the payment of his £800:—*Held*: the seven years lease granted by E., being made under a power created by the deed of uses, must be deemed contemporaneous with the term of 1,000 years created by the same deed, & binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession; the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, & consequently, their assignee might distrain for it; & this, although an ejectment had been brought against the lessee, on the demises, among others, of the last-mentioned trustees, laid previously to their assignment to H., there having been no judgment, nor any actual eviction of the lessee.—*ROGERS v. HUMPHREYS* (1835), 4 Ad. & El. 299; 1 Har. & W. 625; 5 Nev. & M. K. B. 511; 5 L. J. K. B. 65; 111 E. R. 799.

Annotations:—*As to* (2) *Consd. Re Ind*, *Coope, Fisher v. The Co., Knox v. The Co., Arnold v. The Co.*, [1911] 2 Ch. 223. *Generally*, *Mentd. Yellowly v. Gower* (1855), 24 L. J. Ex. 289.

90. —.]—B., a lessee of certain property for a term of 79 years, granted an underlease of the demised property for 70½ years, leaving in himself a reversion of 3½ years. After the death of B., his exors. assigned to D. the property comprised in the underlease, & the rent reserved, & all powers & remedies for recovering the same, & all the estate, etc., whatsoever of the exors. & of B. in the premises during the term of 70½ years, granted by the underlease, to hold to D. for all the residue of such term subject to the underlease. The persons claiming under D. having put up for sale the ground rent issuing out of the property:—*Held*: the assignment to D. passed all the interest of B. in the term of 79 years for a term commensurate with the term of 70½ years granted by the underlease; & a purchaser under D. was entitled to all his remedies for recovering the rent by distress.—*LECOY v. MOGFORD* (1856), 2 Jur. N. S. 1084; 4 W. R. 805.

91. *Ownership during part of time.*]—In replevin, deft. avowed for six months rent, due on Nov. 11, 1833, alleging that pltf. held the premises as tenant to the avowant, for six months immediately preceding that day. Pltf. pleaded in

bar, that deft. was not for all the time during which the rent was accruing landlord to pltf. of the premises; upon which plea issue was joined:—*Held*: this was an immaterial issue, & deft., who had been landlord for the last four months only, having succeeded his father, who died in the July preceding, was entitled to judgment *non obstante veredicto*.

It was not necessary that avowant should be landlord for all the time: it was sufficient that he should be so at the end of it, as according to the doctrine of land, the rent goes with the reversion (*TINDAL, C.J.*).—*THOMPSON v. SHAW* (1836), 5 L. J. C. P. 234.

92. *Demise by three persons—Distress by one only.*]—Where it was proved that the contract, by which the party who underlet to pltf., was made by the party with deft. on behalf of deft. & his two brothers as landlords:—*Held*: (1) this was no evidence in support of an avowry for rent in arrear upon a demise by deft. alone; (2) the judge was right in refusing to amend the avowry by stating the demise to be on behalf of the three, pltf. having offered to pay deft. one-third of the rent, supposing the demise to be by the three tenants in common, which deft. had refused, contending the demise was solely by him.—*BECKESON v. GREAVES* (1849), 14 L. T. O. S. 178.

93. *Severance of reversion.*]—Pltf. was tenant to defts., six in number, who were joint tenants of the reversion. Four of defts. executed a conveyance of the reversion to F.; the other two did not execute it. Afterwards defts. distrained pltf.'s goods for rent due to the six before the conveyance:—*Held*: by the severance of the reversion the right to distrain for this rent was gone.—*STAVELY v. ALLCOCK* (1851), 16 Q. B. 636; 20 L. J. Q. B. 320; 15 Jur. 628; 117 E. R. 1024.

94. *Pleading interest in reversion.*]—A plea justifying a trespass as a distress for rent, stated that pltf. held & enjoyed as tenant under deft. at the rent of, etc., without showing any reversion in him:—*Held*: good.—*HOOKE v. NYE* (1834), 1 Cr. M. & R. 258; 4 Tyr. 777; 3 L. J. Ex. 340; 149 E. R. 1077.

Annotations:—*Apld. Angell v. Harrison* (1847), 17 L. J. Q. B. 25. *Mentd. Curtis v. Headfort* (1837), Will. Woll. & Dav. 567; *Parker v. Riley* (1838), 3 M. & W. 230; *Purchell v. Salter* (1841), 1 Q. B. 197.

95. *Estoppel of tenant—Payment of rent.*]—When A. took a lease in writing in his own name of certain premises, & subsequently occupied part only, & paid rent for so much as he occupied to B., as whose agent he in fact took the lease:—*Held*: B. might distrain for the part so occupied, & A. was precluded in replevin from disputing his title.—*CLARKE v. WATERTON* (1838), 2 Mood. & R. 87; *sub nom. CLARK v. WATERLOW*, 8 C. & P. 365, N. P.

96. — *Attornment by tenant.*]—*JOLLY v. ARBUTHNOT*, No. 163, *post*.

97. — —.]—*MORTON v. WOODS*, No. 68, *ante*.

98. — *Third party not estopped.*]—Though a tenant, who has been let into possession of land by a lessor, is estopped from disputing his lessor's title, third persons not claiming possession of the land under the tenant are not so estopped. A person who lets land to which he has no title cannot distrain for arrears of rent due from his tenant the goods of a third person brought on the premises by the tenant's licence.—*TADMAN v.*

95 i. *Estoppel of tenant—Payment of rent.*]—The payment of rent under a sub-lease does not operate as an

estoppel so as to confer a right of distress for subsequent arrears of rent which otherwise does not exist.—

O'CONNOR v. PELTIER (1908), 18 Man. L. R. 91.—*CAN.*

Sect. 3.—Conditions precedent to right to distress: Sub-sects. 4, 5, 6 & 7.]

HENMAN, [1893] 2 Q. B. 168; 57 J. P. 664; 9 T. L. R. 509; 37 Sol. Jo. 478; 5 R. 479.

—.]—*See, generally, ESTOPPEL.*

Lessor disposing of entire interest.]—*See Sect. 9, sub-sect. 2, post.*

SUB-SECT. 5.—RENT CERTAIN.

99. General rule—Landlord may distress.]—

(1) A bill filed against the official manager of a co., to obtain payment of large arrears of rent under an agreement for a lease of mines, the term of which had expired before the hearing of the cause, & compensation for breaches of covenant, dismissed, notwithstanding the co. had taken possession of, & had worked the mines for a year.

(2) The rights of a landlord are, against those who occupy as tenants, legal rights. Where a tenant is holding under a demise at a stipulated rent, the landlord has his remedy by distress or by action of debt; & if the demise should contain a covenant by the tenant for the payment of rent, he may be sued if the rent is not paid. Such a covenant is broken if the lessee assigns to another.

(3) The landlord has against the assignee of a tenant, so long as he remains in possession, the same rights which he had against the original tenant.

(4) If, instead of assigning his interest, a lessee creates a tenancy under himself, then the original landlord may either distress on the undertenant, or may bring his action of debt or covenant, as the case may be, against the original lessee.

(5) The circumstance that there is a relation of an equitable character subsisting between a lessee & the actual occupier cannot give any equitable rights to any person who claims by a title paramount both to the trustee & the *cestui que trust*. If a *cestui que trust* calls on a lessee to assign the legal interest to him, the landlord will have a legal remedy, by action, against him as assignee; but in such a case the landlord cannot sue in equity as well as at law.

If before the assignment the landlord has an equitable right against the occupier, the occupier cannot destroy that equitable right by an act to which the landlord is no party.

(6) If the persons to whom a demise is made accept the lease either by occupying the demised property themselves, or by permitting others to do so as their nominees, the non-execution of the instrument of demise will not prevent the lessor from recovering his rent, either by distress or by action of debt against the lessee.

(7) When a demise is made to persons who have never executed the lease, nor adopted it by entry or otherwise, they are of course mere strangers, & against them the landlord can have no right. If, on such a demise, other persons enter claiming to be *cestuis que trust* of the nominal lessee, the landlord's remedy must be by distress; & if the parties in possession have so conducted themselves as to be precluded from disputing against

the landlord the validity of the lease as a good demise to the persons named as lessees, or if they have not so bound themselves, or the lessees disclaim the lease, then the landlord has a remedy by action for use & occupation.—*WALTERS v. NORTHERN COAL MINING CO.* (1855), 5 De G. M. & G. 629; 25 L. J. Ch. 633; 26 L. T. O. S. 167; 2 Jur. N. S. 1; 4 W. R. 140; 43 E. R. 1015, L. C.

Annotations:—As to (1) Reidd. De Brassac v. Martyn (1863), 2 New Rep. 512; *Gilbert v. Cossey* (1912), 56 Sol. Jo. 363. *As to (5) Apld. Cox v. Bishop* (1857), 8 De G. M. & G. 815. *Consd. Wright v. Pitt* (1870), L. R. 12 Eq. 408. *Apld. Ramage v. Womack*, [1900] 1 Q. B. 116. *Generally, Mentd. Re Royal British Bank, Ex p. Walton, Ex p. Hue* (1857), 26 L. J. Ch. 545.

100. Necessity for—Breach of covenant to repair by landlord.]—A tenant entered under an agreement, containing stipulations for a lease at £25 a year, & an agreement by the landlord to complete certain erections. The erections were never completed, & the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, & an allowance made him for the expense of some repairs:—*Held*: a demise at a rent certain could not be implied so as to entitle the landlord to distress.

Unless there be a demise at a rent certain a landlord cannot distress (ALDERSON, J.).—*REGNART v. PORTER* (1831), 7 Bing. 451; 5 Moo. & P. 370; 9 L. J. O. S. C. P. 168; 131 E. R. 174.

Annotations:—Consd. Watson v. Waud (1853), 8 Exch. 335. *Reidd. Marshall v. Schofield* (1882), 52 L. J. Q. B. 58.

101. — Inclusive rent for land & tithes.]—*GARDINER v. WILLIAMSON*, No. 80, *ante*.

102. Amount of rent not stated in agreement—Rent paid by tenant—Accepted by landlord.]—Pltf. entered a farm under an oral agreement for a lease for ten years; though the time of paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed; but pltf. occupied according to the terms of the proposed lease, & paid a certain rent for two years:—*Held*: the lessor might distress.—*KNIGHT v. BENETT* (1826), 3 Bing. 361; 11 Moore, C. P. 222; 4 L. J. O. S. C. P. 94; 130 E. R. 552.

Annotations:—Apld. Cox v. Bent (1828), 5 Bing. 185. *Reidd. Watson v. Waud* (1853), 8 Exch. 335.

103. Fluctuating rent—Made certain by calculation.]—The proprietor of a house & of a marl pit & brick mine demised the house, by unwritten agreement, to A. from a day named; & it was at the same time agreed between them, without writing, that A. should take the marl pit & brick mine, & should pay quarterly, 8d. per solid yard for all the marl that he got, & 1s. 8d. per thousand for all the bricks that he made. A. took the marl & made bricks accordingly, & paid the stipulated sums for a time; but they afterwards fell into arrear:—*Held*: the agreement for the marl pit & brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, & for which, therefore, the lessor might distress.—*DANIEL v. GRACIE* (1844), 6 Q. B. 145; 13 L. J. Q. B. 309; 8 Jur. 708; 115 E. R. 56.

Annotations:—Consd. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373. *Reidd. Pollett v. Forest* (1847), 8 L. T. O. S. 534; *Turnor v. Cameron*

PART II. SECT. 3, SUB-SECT. 5.

99 i. General rule—Landlord may distress.]—A rent of a sum certain reserved payable in leather, may be distrained for.—*CUMMING v. HILL* (1842), 6 O. S. 303.—CAN.

103 i. Fluctuating rent—Made certain by calculation.]—Deft. leased a farm to

pltf. for five years. He was to find the team & seed for the first year, to receive as rent for the first year two-thirds of all the grain, when cleaned, threshed & ready for market, also one-third of the straw, turnips, & root crops, & half the hay; for the remainder of the term to receive one-third of all the crops, with the excep-

tion of the hay, of which one-half:—*Held*: the rent was sufficiently certain to warrant a distress.—*NOWERY v. CONNOLLY* (1869), 29 U. C. R. 39.—CAN.

m. — *Tenant to make improvements—Rent to be fixed by arbitration.]—*Deft. leased certain land to pltf. for

(1870), 22 L. T. 525. *Mentd. R. v. Westbrook, R. v. Everist* (1847), 10 Q. B. 178; *Edmonds v. Eastwood* (1858), 2 H. & N. 811; *Holwell Iron Co. v. Mid. Ry.*, [1910] 1 K. B. 296.

104. — Rent varied by price of corn.]—*ROSKRUGE v. CADDY* (1852), 19 L. T. O. S. 68; *subsequent proceedings*, 7 Exch. 840.

105. — Rent subject to deductions.]—*SELBY v. GREAVES*, No. 76, *ante*.

106. — According to number of looms.]—*WALSH v. LONSDALE*, No. 63, *ante*.

107. — Rent equal to subscriptions, etc.—*Mortgage to building society.*]—A member of a building society borrowed £7,500 from the society, which was to be repaid in a series of monthly instalments of £71 17s. 6d. each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, & if the member neglected to pay them when due he became liable to a fine, at the rate of 5 per cent. per month on the total amount in arrear & unpaid at each meeting. To secure the loan he executed to the trustees of the society a mtge. of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscriptions, or in the event of his becoming bkpt., the mtgees. might enter into possession or receipt of the rents of the mtged. property. And for the better securing the payments which by the rules of the society ought to be made by the mtgor. it was agreed that, if the mtgees. should at any time become entitled to enter into possession or receipt of the rents, & the mtgor. should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mtgees. at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mtgor. from time to time for subscriptions, & other moneys under the rules, & that the tenancy should commence on the day up to which he should have fully paid all & every part of such subscriptions, & other moneys, & the rent for the period intervening between the commencement of the tenancy & the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable & paid on that day, & the monthly rent due upon & subsequently to that day should become due monthly in advance, & be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mtgees. should first become entitled to enter into possession. Power was given to the mtgees. to determine the tenancy by fourteen days' notice.

The deed was not executed by the mtgees., nor was it registered under Bills of Sale Act, 1878 (c. 31). The mtgor. committed default in his payments, & was afterwards adjudicated a bkpt. :—*Held*: (1) the attornment clause, & distresses levied under it for rent which accrued due both before & after the commencement of the bkpcy., were valid as against the trustee in the bkpcy.; (2) it was no objection to the attornment clause that the monthly rent was fluctuating in amount. A rent the amount of which may fluctuate according to the happening of certain events is not an uncertain rent; (3) the tenancy under the attornment clause was not made by sect. 1 of Stat. Frauds a tenancy at will.—*Re KNIGHT, Ex p. VOISEY* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19, C. A.; *affg. S. C.*

a term, during which the latter was to make improvements, & at the expiration of the term the value of such improvements, as well as the amount

of the rent, was to be fixed by arbitration. Deft. having distrained for rent claimed to be due :—*Held*: there being no fixed rent agreed upon, there

sub nom. Re KNIGHT, Ex p. ISHERWOOD, 46 L. T. 539.

Annotations:—*Generally, Mentd. Re Knight, Ex p. Isherwood* (1882), 22 Ch. D. 384; *Re Middlesborough Bldg. Soc.* (1884), 54 L. J. Ch. 592.

SUB-SECT. 6.—RENT IN ARREAR.

See Sect. 6, sub-sect. 1, post.

SUB-SECT. 7.—NECESSITY FOR DEMAND.

108. *General rule.*]—A rentcharge granted to one & his assigns, *pro consilio impendendo*, may be assigned over. The assignee need not demand the rent at the day to enable him to distrain. A man who has a rent seck payable yearly at Easter, & has once seisin of the rent, & the feast passes, & no tender or demand made of the rent, may after the day come to the land & demand it; & although the tenant be not there, if none be ready to pay the rent, he shall have an assise. Otherwise if the tenant were on the land at the last instant of the feast ready to pay the rent; for in such case he ought to demand the rent of the person of the tenant on the land; & if he cannot be found, then he should make the demand on the land at the next Easter.—*MAUND'S CASE* (1601), 7 Co. Rep. 28 b; 77 E. R. 454.

Annotations:—*Distd. Cranley v. Kingswell* (1618), Hob. 207. *Reid. Kind v. Ammery* (1619), Hut. 23; *Sands v. Lea* (1622), Palm. 320; *Smith v. Smith* (1638), Cro. Car. 507; *Crouche v. Fastolfe* (1680), T. Raym. 418.

109. — Distress is a demand.]—*CRANLEY v. KINGSWELL* (1617), Hob. 207; 80 E. R. 354; *sub nom. CRAWLEY v. KINGSWELL*, Hut. 13; *Noy* 24; *sub nom. KINGSWELL v. CRAWLEY*, Moore, K. B. 883.

Annotations:—*Consd. Mallam v. Arden* (1833), 3 Moo. & S. 793. *Reid. Blucke v. Mole* (1661), 1 Lev. 40; *Crouche v. Fastolfe* (1680), T. Raym. 418; *Horn v. Luines* (1700), 12 Mod. Rep. 352.

110. — —.] — *BROWNE v. DUNNERY* (1618), Hob. 208; 1 Brownl. 171; 80 E. R. 355. *Annotation*:—*Reid. Blucke v. Mole* (1661), 1 Lev. 40.

111. — —.] — Where a rentcharge is granted with a power of distress if in arrear for a month, it being lawfully demanded, it is unnecessary for an actual demand to precede the distress, the distress being a demand. But it would be otherwise if the power to distrain arose in a month after demand.—*KIND v. AMMERY* (1619), Hut. 23; 123 E. R. 1073.

Annotations:—*Consd. Mallam v. Arden* (1833), 3 L. J. C. P. 48. *Reid. Bird v. Lodge* (1848), 11 L. T. O. S. 102.

112. *Whether demand essential—Demise by Crown.*]—If the King makes a lease for a term of years reserving rent, & the rent falls into arrear, the King may re-enter without any demand made for the rent; this is not so in the case of a common person (*BRIAN, O.J.*).—*ANON.* (1486), Y. B. 2 Hen. 7 fo. 8, pl. 25.

Annotations:—*Mentd. Page's Case* (1587), 5 Co. Rep. 52 a; *Hornbee's Petition* (1691), Freem. K. B. 331.

113. — Possession in the Crown.]—*WICKS & DENNIS' CASE* (1589), 1 Leon. 190; 74 E. R. 175.

Annotation:—*Mentd. R. v. Hornby* (1695), 5 Mod. Rep. 29.

After tender of rent.]—*CRANLEY v. KINGSWELL* (1617), Hob. 207; 80 E. R. 354; *sub nom. CRAWLEY v. KINGSWELL*, Hut. 13;

was no right of distress.—*MITCHELL v. McDUFFY* (1880), 31 C. P. 266.-CAN.

*Sect. 3.—Conditions precedent to right to distrain :
Sub-sects. 7 & 8. Sect. 4 : Sub-sect. 1.]*

Noy 24; *sub nom.* **KINGSWELL v. CRAWLEY**, Moore K. B. 883.

Annotations:—Expld. **Mallam v. Arden** (1833), 3 Moo. & S. 793. *Refd.* **Blucke v. Mole** (1661), 1 Lev. 40; **Horn v. Luines** (1700), 12 Mod. Rep. 352. *Mentd.* **Crouche v. Fastolfe** (1680), T. Raym. 418.

115. ——— *Penalty reserved.]* — **CRANLEY v. KINGSWELL** (1617), Hob. 207; 80 E. R. 354; *sub nom.* **CRAWLEY v. KINGSWELL**, Hut. 13; Noy 24; *sub nom.* **KINGSWELL v. CRAWLEY**, Moore K. B. 883.

Annotations:—Mentd. **Blucke v. Mole** (1661), 1 Lev. 40; **Crouche v. Fastolfe** (1680), T. Raym. 418; **Horn v. Luines** (1700), 12 Mod. Rep. 352; **Mallam v. Arden** (1833), 3 Moo. & S. 793.

116. ——— *—.]* — **BROWNE v. DUNNERY** (1618), Hob. 208; 1 Brownl. 171; 80 E. R. 355.

Annotation:—Refd. **Blucke v. Mole** (1661), 1 Lev. 40.

117. ——— *—.]* — **HOWELL v. SAMBACK** (1615), Hob. 133; 80 E. R. 283.

Annotations:—Mentd. **Ward v. Everard** (1695), Comb. 329; **Grips v. Ingledew** (1702), 7 Mod. Rep. 87.

118. ——— *Agreement for previous demand.]* — **KIND v. AMMERY**, No. 111, *ante*.

119. ——— *—.]* — **THORP v. HURT**, [1886] W. N. 96.

120. ——— *Time of payment at election of landlord.]* — A. demises a house to B. for a year certain, with six months notice to quit; the rent to be paid quarterly or half-quarterly if required. The landlord received the rent for a certain period quarterly, & upon the tenants quitting before the expiration of a quarter, he distrains for the rent of that half quarter:—*Held*: such distress was illegal, inasmuch as the landlord, by receiving the rent quarterly, had made his election, & could not distrain for the half-quarter without giving reasonable notice. Under such circumstances, the distress was not equivalent to a demand.—**MALLAM v. ARDEN** (1833), 10 Bing. 299; 3 Moo. & S. 793; 3 L. J. C. P. 48; 131 E. R. 919.

121. ——— *Rent payable quarterly if required.]* — In an action of trover for goods distrained, brought by assignees of a bkpt., it appeared that bkpt. held the premises in question, from Nov. 12, as yearly tenant to deft. but "if required, to pay the rent quarterly." On the following May 12 deft. demanded half a year's rent, which was paid & in Aug. distrained for a quarter's rent, due on the 12th of that month:—*Held*: deft. had not, either by the demand in May or the distress in Aug., exercised his option to make the rent payable quarterly; & therefore, the distress was wrongful, & pltfs. were entitled to recover.

The rent was payable quarterly at the option of the landlord; & on one occasion he demanded half a year's rent, & it was paid; but that was by no means a decision that the rent was to be payable quarterly (**DENMAN, C.J.**).—**BIRD v. LODGE** (1848), 11 L. T. O. S. 102.

122. ——— *Rent payable in advance if required.]* — Deft. let to pltf. certain premises, under an agreement that the yearly rent should be £110 from Oct. 15, 1847, & that the rent should be payable in advance, if the landlord required the same. At the expiration of the first quarter, deft. (the landlord) demanded £27 10s. for a quarter's rent then due; & as it was not paid, he distrained for the £110:—*Held*: (1) after such demand, he had a right to distrain for the £27 10s. but not for the £110; (2) if the jury were of opinion that the goods distrained were no more than sufficient, if fairly sold, to realise the £27 10s. pltf. would be entitled, under a count for taking an excessive distress, to recover only nominal damages; (3) in assessing the damages under that count, the jury were at liberty to inquire whether the best means had been used to ascertain the

value of the goods seized & sold, although it appeared that they had been duly appraised, & that they were sold at the appraised value; (4) under a count in trover, to recover damages for wrongfully removing fixtures under a distress, pltf. was entitled to recover the value of the fixtures as chattels merely.—**CLARKE v. HOLFORD** (1848), 2 Car. & Kir. 540.

Annotation:—As to (4) Refd. **Barff v. Probyn** (1895), 64 L. J. Q. B. 557.

123. ——— *—.]* — Defts. let a house to a tenant upon a yearly tenancy under an agreement whereby the rent was reserved payable quarterly on the usual quarter days, & always if required in advance. The tenant granted a bill of sale of his goods in the house to pltfs., who, upon default in payment of the amount secured by the bill of sale, took possession of the goods & fixed a day for their sale. On the morning of the sale, which occurred in the middle of a quarter, defts. demanded of the tenant, under threat of immediate distress, the rent for the current quarter in advance. Pltfs., to prevent the sale from being interrupted, paid the rent under protest, & then brought an action to recover it back:—*Held*: under the above agreement defts. were entitled to demand the quarter's rent in advance at any time during the currency of the quarter, in the event of non-payment upon such demand they would under the circumstances of the case have been entitled to distrain immediately, & consequently the money paid by pltfs. could not be recovered back.—**LONDON & WESTMINSTER LOAN & DISCOUNT CO. v. LONDON & NORTH WESTERN RY. CO.**, [1893] 2 Q. B. 49; 62 L. J. Q. B. 370; 69 L. T. 320; 41 W. R. 670; 37 Sol. Jo. 497; 5 R. 425, D. C.

124. ——— *Last half year's rent payable in advance.]* — It was a condition in a lease of a farm that the tenant should pay the last half year's rent in advance, which last half year's rent should be considered as reserved & due on Sept. 29 preceding, if the landlord should see cause for such demand:—*Held*: the landlord was entitled to demand the last half year's rent & to distrain for it at any time between Sept. 29, & the expiration of the tenancy, without demand previous to Sept. 29.—**WITTY v. WILLIAMS** (1864), 4 New Rep. 138; 10 L. T. 457; 28 J. P. 726; 12 W. R. 755.

125. ——— *Agreement to demand rent at place other than on the land.]* — **BROWNE v. DUNNERY** (1618), Hob. 208; 1 Brownl. 171; 80 E. R. 355.

Annotation:—Mentd. **Blucke v. Mole** (1661), 1 Lev. 40.

126. ——— *—.]* — **SELDEN v. KING** (1641), March, 147; 82 E. R. 451.

127. ——— *—.]* — **PERRYMAN v. BOWDEN** (1627), Het. 59; 124 E. R. 341; *sub nom.* **BERRIMAN v. BOWDEN**, cited March at pp. 147, 148.

SUB-SECT 8.—LEAVE TO DISTRAIN.

See Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 6.

128. *Application of statute.]* — A dwelling-house to which the Increase of Rent & Mortgage Interest (Restrictions) Act, 1915 (c. 17), applied was on Aug. 3, 1914, let at the standard rent of 10s. per week. At the end of Nov. 1917, it was let to a fresh tenant at the weekly rent of 20s. The landlord applied under the Ots. (Emergency Powers) Act, 1914 (c. 19), for leave to distrain for arrears of rent & obtained such leave:—*Held*: the 1915 Act, applied to every change of tenancy of premises under the Act, & operated *in rem* & not *in personam*, & leave to distrain ought not to have been granted.—**KING v. YORK** (1919), 88 L. J. K. B. 839; 35 T. L. R. 256, D. C.

Annotations:—Refd. **Roberts v. Poplar Assmt. Com.**, [1922] 1 K. B. 25; **Schmit v. Christy**, [1922] 2 K. B. 60.

129. Discretion of court—Extent of.]—(1) Where an application is made to the ct. under Courts (Emergency Powers) Act, 1914 (c. 78), & Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), by the landlord of premises to which the latter Act applies, for leave to levy a distress for rent, the discretion of the ct. to grant or refuse the application is not limited to the question that arises under 1914 Act, s. 1 (2), namely, whether the tenant is unable immediately to make the payment by reason of circumstances attributable to the war, but extends to, & may & should be exercised only after due inquiry into, any other question that may have been raised under 1920 Act, s. 6, such for example as the question whether the rent sought to be distrained for is due & payable by the tenant.

(2) Amount of rents for which distress may be levied, apart from statutory restrictions, see No. 510, *post*.—TOWNSEND v. CHARLTON, [1922] 1 K. B. 700; 91 L. J. K. B. 714; 127 L. T. 96; 38 T. L. R. 397; 66 Sol. Jo. 389; 20 L. G. R. 382, D. C.

SECT. WHO MAY DISTRAIN.

SUB-SECT. 1.—IN GENERAL.

The Crown & its grantees.]—See Part I., *ante*.

130. Terre-tenant—On property of commoner.]—In replevin, pltf. in bar of the avowry intitled himself by custom to have common of pasture, etc. which custom was traversed & found for him, but that every commoner used to pay for the same one hen & five eggs annually:—*Held*: pltf. on this verdict, shall have judgment.

The terre-tenant may distrain the cattle of the commoner on his own land for the hen & eggs. But if the jury had found that pltf. should have common, paying so many hens & eggs, the issue had been found against him.—GRAY'S CASE (1595), 5 Co. Rep. 78 b; 77 E. R. 174; *sub nom.* GRAY v. FLETCHER, Cro. Eliz. 405.

Annotations:—*Consd.* Paddock v. Forrester (1842), 3 Man. & G. 903. *Mentd.* James v. Tutney (1638), Cro. Car. 532; Clayton v. Kinaston (1698), 1 Ld. Raym. 419; Griffith v. Williams (1752), Say. 56; Waring v. Griffiths (1758), 1 Burr. 440; Brook v. Willet (1793), 2 Hy. Bl. 224; Duncan v. Louch (1845), 6 Q. B. 904.

131. Premises rented by agent—Part occupation by principal.]—A. wishing to take stables desired B. to go to the landlord & take them for him, it

being agreed that when taken A. should underlet one of the stables to B. by the week; B. took the stables of the landlord in his own name under a written agreement, but A. occupied all but the one which was underlet by A. to B., & B. for several weeks paid A. the weekly rent:—*Held*: in the original taking of them B. was a mere trustee for A., & it was not necessary that B. should have assigned his interest by writing, under Stat. of Frauds, s. 3, & A. was, therefore, entitled to distrain on B. if the weekly rent was in arrear.—CLARK v. WATERLOW (1838), 8 C. & P. 365; *sub nom.* CLARKE v. WATERTON, 2 Mood. & R. 87, N. P.

132. Agent—Under power of attorney.]—In trespass for breaking the outer door, & entering pltf.'s dwelling-house, & seizing his goods, deft. may give in evidence, under a plea of not guilty by statute, that he had entered under a warrant of distress for rent, & was forcibly turned out of possession, & thereupon broke the door & entered, in order to seize the goods.—EAGLETON v. GUTTERIDGE (1843), 11 M. & W. 465; 2 Dowl. N. S. 1053; 12 L. J. Ex. 359; 8 J. P. 643; 152 E. R. 888.

Annotation:—*Refd.* Bannister v. Hyde (1860), 2 E. & E. 627.

— **Authority to distrain.]—**See AGENCY, Vol. I., p. 328, Nos. 451–453.

133. Assignee.]—Bequest to the use of A. of the lease of one house, & to B. of the lease of another, providing that the rent of both shall be charged upon A.'s house, & that if B. should at any time be called upon to pay any part of the rent, he might distrain upon A. C. became assignee of B.'s interest, & was also exor. under the will. Being called upon to pay rent, & having paid it, he distrained upon A. for the amount. In an action of replevin, to which he avowed that he had been compelled to pay as assignee:—*Held*: he was bound to give evidence that he had been called upon & compelled to pay in that character.

The only evidence is that of a receipt given to him, not at all expressing in what character the money was paid; & that certainly cannot satisfy the express & necessary averment contained in this avowry (*per cur.*).—GIRDLESTONE v. MCGOWRAN (1846), 7 L. T. O. S. 59.

134. Holder of legal estate—Receiver in possession—Rights of purchaser.]—Re POWERS, MANISTY v. ARCHDALE, No. 218, *post*.

PART II. SECT. 4, SUB-SECT. 1.

n. Agent.]—A distress made by an agent for the benefit of his principal, in his own name, & subsequently ratified by the principal:—*Held*: legal.—GRANT v. McMILLAN (1861), 10 C. P. 536.—CAN.

133 i. Assignee.]—A landlord, after leasing certain premises, by deed "assigned, transferred, & set over" to M. two instalments of the rent reserved, & appointed him his attorney to sue for, collect, or levy by landlord's warrant, if necessary, in his, the landlord's, name:—*Held*: the instrument contained a grant, & of a rent charge, as an incorporeal hereditament, accompanied with a clause of distress, & not of a rent seek, & M. could distrain for the rent in his own name; but, whether rent charge or rent seek, he had equally the power of distress under 4 Geo. II. c. 28.—HOPE v. WHITE (1869), 19 C. P. 479.—CAN.

133 ii. —.]—If rents are specifically assigned *quâ* rents the assignee may distrain therefore, but an assignment of "all the debts, accounts & money due or accruing due," etc., although such debts consist only of

rent, is not sufficient to enable the assignee to distrain.—*Re* COMPANIES WINDING UP ORDINANCE, *Re* EDMONTON LAW STATIONERS (IN LIQUIDATION), [1919] 2 W. W. R. 869; 48 D. L. R. 344.—CAN.

o. The collector of internal revenue.]—The Collector of Internal Revenue, although not specifically authorised to distrain for the recovery of quit rents, is recognised as a legal officer & is required to perform a specific duty, & a distress being one means for the recovery of the rents, he is entitled to distrain.—WINDEYER v. RIDDELL & FLOOD (1846), 1 Legge, 295.—AUS.

p. Annuitant.]—W. devised his farm to his wife during widowhood, provided that she pay to his mother \$20 a year during her life, & to his brother W. the same; & on the marriage or death of his wife, he willed that the property should be sold, & the proceeds be divided between the children of his brothers & sister:—*Held*: the will created no charge upon the land, & the annuitants had no power to distrain.—CLIFTON v. RYAN (1866), 26 U. C. R. 9.—CAN.

q. Infant.]—An infant may make a

warrant of distress.—OWEN v. TAYLOR (1876), 39 U. C. R. 358.—CAN.

r. Lessor—After possession taken by assignee.]—B., by lease dated Nov. 28, 1887, was lessee for five years from Feb. 1, 1888, of certain premises at a yearly rental of \$370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due & payable, & might be distrained for, but that in other respects the term should immediately become forfeited & at an end. B. paid \$100 on account of rent on July 7, 1888, & on July 16, 1888, made an assignment to pltf. for the benefit of his creditors, & pltf. went into possession of the premises, & remained in possession until Sept. 1, 1888. On July 24, 1888, defts. distrained for, & were paid by pltf. as assignee, \$270, the balance of the current year's rent:—*Held*: the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being an election to forfeit.—LINTON v. IMPERIAL HOTEL Co. (1889), 16 A. R. 337.—CAN.

DISTRESS.

Sect. 4.—Who may distrain : Sub-sects. 2, 3 & 4.]

SUB-SECT. 2.—CHURCHWARDENS AND OVER-

135. Authority of any one member—Poor Relief Act, 1819 (c. 12), s. 17.]—(1) The above Act enacts, that all buildings, lands, etc., purchased or taken on lease by the churchwardens & overseers of the poor of any parish by the authority & for the purposes of that Act, shall be conveyed, demised, etc., to the churchwardens & overseers of every such parish & their successors, in trust for the parish; & such churchwardens & overseers, etc., are empowered to take & hold in the nature of a body corporate all buildings, lands, etc., belonging to such parish:—*Held*: the Act made the churchwardens & overseers a corp'n. of a peculiar kind, differing from ordinary corpns., the object of it being the care & proper management of the parochial property, & it was competent for any one of the churchwardens or overseers to authorise a distress for rent in arrear.

(2) Certain land was vested in trustees upon trust to apply the rents to the repair of a parish church. Those trustees in 1818 demised to S. for ten years, & again in 1828 for ten years more, which lease expired in 1838. During the lease S. assigned to pltf. & after the expiration of it, pltf. continued in possession under the trustees, paying rent to them. The trustees afterwards, & after the above Act came into operation, viz. in 1842, assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time that a distress for rent was made:—*Held*: the payment of rent to the old trustees was evidence of a new taking under them as tenant from year to year, which precluded pltf. from contesting the title of the old trustees, & the new trustees, who claimed under them by deed of assignment, had a good title by estoppel.—*GOULDSWORTH v. KNIGHTS* (1843), 11 M. & W. 337; 12 L. J. Ex. 282; 8 J. P. 8; 152 E. R. 833.

Annotations:—*As to* (1) *Reid*. *Doe d. Edney v. Benham*, *Doe d. Edney v. Billett* (1845), 7 Q. B. 976; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *R. v. White* (1883), 11 Q. B. D. 309. *As to* (2) *Consd. Webb v. Austin* (1844), 7 Man. & G. 701; *A.-G. v. Stephens* (1855), 1 K. & J. 724. *Reid*. *Cuthbertson v. Irving* (1860), 6 H. & N. 135. *Generally*, *Mentd. Pargeter v. Harris* (1845), 7 Q. B. 708; *Hickman v. Machin* (1859), 4 H. & N. 716.

SUB-SECT. 3.—CORPORATIONS AND COMPANIES.

136. By whom distress must be made—Bailliff.]—*EMANUEL COLLEGE, CAMBRIDGE* (MASTER, ETC.) *CASE* (1614), 1 Brownl. 175; 123 E. R. 738.

137. Distress by officers to whom rent paid—Whether authority of whole corporation necessary.]—By indenture between A. B., & C., bailiffs, & D., E., & F., aldermen, with the assent of the burgesses of the borough of M. of the one part, & S. of the other part; the bailiffs, aldermen, & burgesses demised lands to S. for years, to be held of the bailiffs, aldermen, & burgesses; & the deed was executed by A., B., & C., D., E., & F.; but not sealed with the corp'n. seal; S. having paid rent to the bailiffs as chief officers of the borough:—*Held*: their servant might make cognisance for taking a distress under a demise by the corp'n., notwithstanding a notice had been given by the aldermen, one of whom was a party to the indenture, to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corp'n.—*WOOD v. TATE* (1806), 2 Bos. & P. N. R. 247; 127 E. R. 621.

Annotations:—*Consd. Eccl. Comrs. v. Merral* (1869), L. R.

4 Exch. 162. *Reid*. *R. v. North Duffield* (1814), 3 M. & S. 247; *Kidderminster Corp'n. v. Hardwick* (1873), L. R. 9 Exch. 13. *Mentd. Stafford Corp'n. v. Till* (1827), 4 Bing. 75; *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593.

138. Liability for act of agent—Appointment not under seal.]—(1) A corp'n. is liable in tort for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service, such as a distress professedly made under a statute for a debt due to the corp'n.; & a jury may infer the agency from an adoption of the act by the corp'n., as from their having received the proceeds of the seizure.

(2) A corp'n. need not appoint a bailiff, by deed, where the bailiff is only to distrain for rent (*TAUNTON, J.*).—*SMITH v. BIRMINGHAM GAS CO.* (1834), 1 Ad. & El. 526; 3 Nev. & M. K. B. 771; 3 L. J. K. B. 165; 110 E. R. 1309.

Annotations:—*As to* (1) *Reid*. *Hall v. Swansea Corp'n.* (1844), Dav. & Mor. 475; *Mill v. Hawker* (1874), L. R. 9 Exch. 309.

Appointment of bailiff.]—*See* Part II., Sect. 10, sub-sect. 2, C., *post*.

139. Dissolution of corporation—Loss of right to distrain.]—By an order of the Poor Law Comrs. made on Sept. 16, 1835, which purported to be founded on the consent of two-thirds of the guardians of C. Union, such Union was ordered to be dissolved; & on Sept. 17 another order of the Comrs. was made under the provisions of Poor Law Amendment Act, 1835 (c. 76), that the parishes comprised in the Union of C. should, together with others, be formed into the Union of W. From the date of the latter order the guardians of the W. Union used the Union house formerly belonging to the C. Union for the poor of their Union, & payments expressed to be for rent had been made by the guardians of the W. Union to the treasurer of the C. Union until Sept. 1838, when the payments were made generally, but receipts were given by the treasurer as for rent. On that day a sum of money was paid by the W. Union to the C. Union as a balance for the furniture, etc., in the workhouse. In Jan. 1841, the Poor Law Comrs. made an order, which recited that the premises in question had, under the order of Sept. 17, 1835, become convertible to the use of the W. Union, & had since been used & occupied by the poor of such union, & directed the guardians of the W. Union to pay to the treasurer of the C. Union a yearly rent as compensation for the use of the premises. This order appeared to have been acted on by both parties:—*Held*: (1) pltf's. were not estopped, by having sued defts. as a corp'n. from giving in evidence the order of Sept. 16, 1835; (2) the effect of that order was not *ipso facto* to dissolve the corp'n. for all purposes; (3) this order was admissible in evidence, without proof of the consent of two-thirds of the guardians of the C. Union, as that corp'n. had since ceased to perform the duty of providing for & taking care of the poor, & that a jury might rightly presume that it operated as a valid dissolution; (4) supposing upon the dissolution of the C. Union that the property in the workhouse was diverted from it (of which *quære*), yet if the guardians of W. had contracted with them as owners expressly or impliedly, the mere want of legal ownership would not take away their right to distrain; (5) under the circumstances the occupation of the workhouse by the W. Union must be referred to the order of the Comrs. which must be presumed to have been communicated to the C. Union, & not to any contract creating the relation of landlord & tenant between the parties.—

WOODBRIDGE UNION GUARDIANS *v.* COLNEIS GUARDIANS (1849), 13 Q. B. 269; 18 L. J. Q. B. 126; 12 L. T. O. S. 421; 13 J. P. 409; 13 Jur. 803; 116 E. R. 1266.

140. Limited liability company—Power of managing director to distrain—Law of Distress Amendment Act, 1888 (c. 21), s. 7.]—The above Act provides by sect. 7 that no person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of a county court judge:—*Held*: the managing director of an incorporated co., in levying a distress for rent due to the co., was acting as a bailiff within the meaning of sect. 7.—HOGARTH *v.* JENNINGS, [1892] 1 Q. B. 907; 61 L. J. Q. B. 601; 66 L. T. 821; 56 J. P. 485; 40 W. R. 517; 8 T. L. R. 551; 36 Sol. Jo. 485, C. A.

Officer of corporation—Certified as bailiff by county court judge.]—See Sect. 10, sub-sect. 2, B., *post*.

SUB-SECT. 4.—LANDLORD—WHEN RECEIVER IN POSSESSION.

141. With leave of court—If title of landlord paramount.]—Property, in possession of a receiver appointed by the ct. in a suit, was in two instances seized by the sheriff under writs of *fi. fa.* issued by judgment creditors of deft.:—*Held*: the sheriff was not warranted in making the seizures.

I find in one case where a party wished to distrain for rent on property in the possession of a receiver that the ct. being satisfied that the legal right of distress was paramount to the title of the party for whose benefit the receiver was appointed allowed the distress to be made. In another case where property liable to distress had been sold & the receiver had received the proceeds & paid them into ct. the landlord having claimed a right to distrain while the receiver was in possession, this ct. ordered the receiver to pay out of those proceeds to the landlord the rents that were due to him, the receiver being in possession for the benefit of the tenant for life, who was liable for the payment of that rent which was so sought to be distrained for on the property in the possession of the receiver (LORD TRURO, C.).—RUSSELL *v.* EAST ANGLIAN RY. CO. (1850), 3 Mac. & G. 104; 6 Ry. & Can. Cas. 501; 20 L. J. Ch. 257; 16 L. T. O. S. 317; 14 Jur. 1033; 42 E. R. 201, L. C.

Annotations:—*Consd.* *Re* London Dry Docks Corp'n. (1888), 39 Ch. D. 306. *Reid.* *Ames v. Birkenhead Docks Trustees* (1855), 20 Beav. 332; *De Winton v. Brecon Corp'n.* (No. 2) (1860), 28 Beav. 200; *Re Mayhew, Ex p. Till* (1873), L. R. 16 Eq. 97. *Mentd.* *Fripp v. Chard Ry., Fripp v. Bridgewater & Taunton Canal, etc., Co.* (1853), 11 Hare, 241; *Potts v. Warwick & Birmingham Canal Navigation Co.* (1853), Kay, 142; *Bowen v. Brecon Ry., Ex p. Howell* (1867), L. R. 3 Eq. 541; *G. S. & W. Ry. v. Corry, Turquand, etc.* (1867), 15 W. R. 650; *Edwards v. Edwards* (1875), 1 Ch. D. 454; *Re Mead, Ex p. Cochrane* (1875), L. R. 20 Eq. 282; *Jarman v. Chatterton* (1882), 20 Ch. D. 493; *Re Burry Port & Gwendreath Valley Ry.* (1885), 54 L. J. Ch. 710; *Re Hull, Barnsley, & West Riding Junction Ry.* (1888), 40 Ch. D. 119.

142. ———.]—Where a receiver is appointed of leaseholds, & the landlord gives him notice of a claim for rent, but takes no other step, & the receiver sells the furniture, etc., the landlord has no lien on the proceeds of the sale in priority to other creditors.

Where a receiver has been appointed of leaseholds, & the landlord has a claim for rent, the ct. will give him authority to distrain, notwithstanding the presence of the receiver; but where the

receiver sells chattels, & the landlord makes no previous application to the ct. he has no lien on the proceeds of the sale.

Where there is no receiver, & the exor. sells, the landlord will equally lose his right to priority, by not exercising his right of distress.

The appointment of a receiver does not affect the rights of the landlord, but the ct. will not allow him to exercise those rights without leave first obtained (KINDERSLEY, V.-C.).—*Re SUTTON'S ESTATE, SUTTON v. REES* (1863), 1 New Rep. 464; 32 L. J. Ch. 437; 8 L. T. 343; 27 J. P. 388; 9 Jur. N. S. 456; 11 W. R. 413.

Annotation:—*Reid.* *Re Mayhew, Ex p. Till* (1873), L. R. 16 Eq. 97.

143. ———.]—Lands were conveyed to a railway co. by various persons in consideration of rentcharges. The co. became unable to pay the rents, & a suit was instituted by the owner of one of the rentcharges on behalf of himself & all the other owners of rentcharges who should come in & contribute to the expenses of the suit for the payment of the rentcharges, & a decree was made, & a receiver of the tolls, profits, & income of the undertaking appointed. The co. by deed, conveyed & assigned their superfluous lands & chattels to trustees upon trust for the benefit of the creditors of the co. & a suit was instituted by a creditor on behalf of himself & all other creditors entitled to the benefit of the trust deed for the administration of the trusts thereof; a decree was made, & a receiver appointed in this suit also. Upon the application of the owner of a rentcharge for leave in both suits to distrain for arrears of rent on land conveyed by him to the co.:—*Held*: he was entitled to such leave in the first suit, but not in the second.—EYTON *v.* DENBIGH, RUTHIN & CORWEN RY. CO., RICKMAN *v.* JOHNS (1868), L. R. 6 Eq. 488; 38 L. J. Ch. 74; 16 W. R. 928.

Annotation:—*Reid.* *Re Crosbie, Johnson & Hughes v. Crosbie* (1909), 74 J. P. 25.

144. Leave refused.]—On Dec. 29, 1883, defts. mortgaged to pl'ts. a colliery which defts. held under a lease for fifty years, dated Dec. 31, 1879, together with all the plant & machinery, etc. (except such as came within the definition of personal chattels in the Bills of Sale Act, 1878 (c. 31), which was assigned absolutely), "then standing or being, or thereafter to stand or be," upon the premises of the colliery. Under an agreement with defts. dated July 1, 1889, the Luhrig co. erected a coal-washing plant on the premises of the colliery. The agreement, which provided that the plant was to be paid for by instalments, contained (*inter alia*) the following stipulation: "It is hereby expressly understood that, immediately on the Luhrig co. receiving payment of the balance, the plant becomes the full & undisputed property of defts., without any further claim for royalty or otherwise; but that, until fully paid for, the plant remains the property of the Luhrig co." In Feb. 1891, mtgees. of this colliery brought the present action for sale or foreclosure, & a receiver was appointed. On March 14, 1891, defts. resolved on a voluntary liquidation. On May 1, 1891, an order was made to continue the winding up under the supervision of the ct. Two sums of £113 15s. each were paid by defts. to the Luhrig co. under the agreement of July 1, 1889, but a large sum remained due to the Luhrig co. under the agreement. Motion by the Luhrig co. to remove from the colliery the plant which had been erected by them. The plant claimed was admitted not to be within the above Act. Summons by the lessor of the colliery

Sect. 4.—Who may distrain: Sub-sects. 4, 5, 6

for leave to distrain on the stocks, plant, & other chattels in & about the colliery for arrears of rent. Summons by plffs. that the receiver might vacate the premises & remove from them all fixtures, chattels, & plant belonging to defts.:—*Held*: (1) on the motion, the Luhrig co. might remove the plant erected by them.

(2) The landlord must be refused leave to distrain for arrears of rent previous to March 14, 1891, with liberty to prove for the same on the plffs. submitting to pay rent from March 14, 1891, to Dec. 31, 1891; & the receiver might give up possession of the colliery, & as between the receiver & the landlord, remove all chattels from the premises.—*CUMBERLAND UNION BANKING CO. v. MARYPORT HEMATITE IRON & STEEL CO., Re MARYPORT HEMATITE IRON & STEEL CO.*, [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280.

Annotations:—*As to* (1) *Apprvd.* Gough v. Wood, [1894] 1 Q. B. 713. *Expld.* Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273. *Consd.* Hobson v. Gorrings, [1897] 1 Ch. 182. *Reid.* Lyon v. London City & Midland Bank, [1903] 2 K. B. 135; *Re Glasdir Copper Works, English Electro Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819; *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. *Generally*, *Mentd.* Prichett Co. v. Currie, [1916] 2 Ch. 515.

145. — *Restraint on distress gives no equity on money in receiver's hands.*—Where in an action by mtgees. or debenture-holders to enforce their security, including leasehold property mtged. by sub-demise, a receiver has been appointed who enters into possession of the mortgaged property, the ct. will not order the receiver to pay out of the assets in his hands rent or moneys payable in respect of breaches of covenant which neither the mtgees. nor the receiver are liable at law or in equity to pay to the head landlord. The mere fact that the head landlord, owing to the appointment of a receiver, cannot re-enter or distrain without first obtaining leave from the ct., is not sufficient to raise such an equity in his favour.—*HAND v. BLOW*, [1901] 2 Ch. 721; 70 L. J. Ch. 687; 85 L. T. 156; 50 W. R. 5; 17 T. L. R. 635; 45 Sol. Jo. 639; 9 Mans. 156, O. A.

Annotations:—*Reid.* *Re British Fullers' Earth Co.*, *Gibbs v. Same Co.* (1901), 17 T. L. R. 232; *Re Abbott, Abbott v. Abbott* (1913), 30 T. L. R. 13. *Mentd.* *Re Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. v. Griffiths Cycle Corpn.* (1901), 85 L. T. 675; *Re Westminster Motor Garage Co., Boyers v. The Co.* (1914), 84 L. J. Ch. 753; *Re Levi*, [1919] 1 Ch. 416.

146. *Without leave of court—Order appointing receiver ambiguous.*—In a suit relating to two annuities secured on real estate, & to which the grantor was not a party, a receiver was appointed "of the incomes of the outstanding trust property in the pleadings mentioned." The receiver entered & continued in possession of the real estate for six years. The ct. refused to restrain the grantor by injunction from distraining on the tenants. An order for a receiver ought to state distinctly, on the face of it, over what property the receiver is appointed.—*Crow v. Wood* (1850), 13 Beav. 271; 51 E. R. 104.

147. — *Contempt of court.*—*BILSBOROUGH v. HARVEY* (1893), 37 Sol. Jo. 784.

148. *Attornment of tenant to receiver—Not an attornment to owner.*—An attornment by a tenant of land to a receiver appointed by the Ct. of Ch. to collect the rents, & payment of rent to such receiver, create a tenancy by estoppel between the tenant & the receiver, but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, & to distrain for rent.—*EVANS v. MATHIAS*

(1857), 7 E. & B. 590; 26 L. J. Q. B. 309; 29 L. T. O. S. 209; 3 Jur. N. S. 793; 119 E. R. 1364.

Effect of bankruptcy on landlord's power to distrain.—*See* BANKRUPTCY, Vol. V., pp. 956–964, Nos. 7837–7893.

Effect of winding up of company on landlord's power to distrain.—*See* COMPANIES, Vol. X., pp. 968, 969, Nos. 6650–6667.

Receiver appointed by mortgagee.—*See* Nos. 158, 159, *post*.

See, generally, RECEIVERS.

SUB-SECT. 5.—LORD OF THE MANOR.

149. *On copyholders.*—The lord of a manor may avow for a rent issuing out of a copyhold.—*LAUGHTER v. HUMPHREY* (1596), Cro. Eliz. 524; 78 E. R. 772.

Annotation:—*Mentd.* *Hughes v. Clubb* (1722), 1 Com. 369.

See, also, COPYHOLDS, Vol. XIII., p. 102, 1305; p. 157, No. 2027.

150. *Remainder-man in tail—Surrender of estate for life.*—If a man, seised in fee of a manor holden in moieties by socage & knight's service, & of a parsonage appropriate, leases them for an entire rent, & on his death devises the manor for life, remainder in tail; the remainder-man, on a surrender to him of the estate for life, may distrain on the lessee for an apportionment of the rent; & a bar to his avowry must show the value of all the premises, & answer the rate of the apportionment.—*EWER v. MOYLE* (1600), Cro. Eliz. 771; 78 E. R. 1002.

Annotations:—*Mentd.* *Smith v. Malings* (1607), Cro. Jac. 160; *Salts v. Battersby*, [1910] 2 K. B. 155.

Heriot service.—*See* COPYHOLDS, Vol. XIII., p. 95, Nos. 1186–1194.

Heriot custom.—*See* COPYHOLDS, Vol. XIII., p. 96, Nos. 1219, 1223–1225.

Relief.—*See* COPYHOLDS, Vol. XIII., p. 99, Nos. 1256, 1262.

Quit rents, etc.—*See* COPYHOLDS, Vol. XIII., p. 99, Nos. 1269, 1270, 1274.

Amercement.—*See* COPYHOLDS, Vol. XIII., p. 101, Nos. 1290–1294.

Fealty.—*See* COPYHOLDS, Vol. XIII., p. 101, No. 1298.

Certum laetæ.—*See* COPYHOLDS, Vol. XIII., p. 102, Nos. 1304, 1305.

SUB-SECT. 6.—MARRIED WOMEN.

Legal proceedings by & against married women.—*See, generally*, HUSBAND & WIFE.

Rights of married women.—*See* Married Women's Property Act, 1882 (c. 75), s. 12.

151. *Rights of husband—After death of wife—Rent Arrears (Recovery) Act, 1540, c. 37.*—By above Act, (1) exors. may distrain upon the possession of a lessee at will for the whole arrears; & (2) a husband after the death of the wife may distrain for arrears incurred before the coverture, of a rentcharge granted to her when sole for life.—*OGNEL'S CASE* (1587), 4 Co. Rep. 48 b; 76 E. R. 1000.

Annotations:—*As to* (1) *Reid.* *Dixon v. Harrison* (1669), Vaugh. 36; *Shuttleworth v. Garnett* (1688), Carth. 90; *Prescott v. Boucher* (1832), 3 B. & Ad. 849; *Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368; *Apsden v. Seddon*, *Preston v. Seddon* (1876), 46 L. J. Q. B. 353. *As to* (2) *Reid.* *Anon.* (1584), Owen, 4; *Manby v. Scott* (1662), 1 Keb. 337; *Harding v. Howell* (1889), 14 App. Cas. 307. *Generally*, *Mentd.* *Lillingston's Case* (1608), 7 Co. Rep. 38 a; *Clay & Barnett's Case* (1613), Godb. 236; *Stukeley v. Butler* (1614), Hob. 168; *Chamberlaine v. Turner* (1628), Cro. Car. 129; *Robins (or Cox) v. Warwick* (1661), 1 Keb. 1, 72; *Witherhead v. Harrison* (1670), T. Jo. 2; *Hool v. Bell* (1696), 1 Ld. Raym. 172; *St. David's Bp. v. Lucy* (1699), 1 Salk. 134; *Re Herbage Rents, Greenwich Charity Comrs. v. Green*, [1896] 2 Ch. 811.

152. ———.]—The wife of deft. in replevin had, at time of her marriage, the equity of redemption in the *locus in quo*, which was then settled to her separate use. She was allowed to enjoy the property; & she & deft., or he in her name, let it to pltf., she receiving the rents until she died. Deft. then distrained for rent subsequently accruing:—*Held*: it was not lawful for him to do so.—*HOWE v. SCARROTT, SHARP v. SCARROTT* (1859), 4 H. & N. 723; 28 L. J. Ex. 325; 157 E. R. 1026.

153. ———.]—The husband having himself an interest in his wife's real estate during their joint lives, was capable of creating a term out of that interest, & did so; & during that term the reversion of it, that is, the right to the possession at the end, or sooner determination, of the term, was in the husband only. He was the person to whom by the contract contained in the lease with pltf., the tenant for the term was bound to deliver up the land on its determination; he alone could distrain, the right of distress being incident to the reversion (*PARKE, B.*).—*HARCOURT v. WYMAN* (1849), 3 Exch. 817; 18 L. J. Ex. 453; 13 L. T. O. S. 213; 154 E. R. 1075.

SUB-SECT. 7.—MORTGAGORS AND MORTGAGEES.

A. Mortgagors.

See Judicature Act, 1873 (c. 66), s. 25 (5).

154. In possession—Distrains as bailiff of mortgagee.]—(1) The right of a person to do an act with regard to the property of another, depends upon the authority or right which he really has to do the act, & not upon that which he says he has. Therefore, if a person, having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other.

(2) A want of notice does not render a distress invalid.

(3) If a lessor having mtged. his reversion, is permitted by the mtgee. to continue in the receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorised, if it should become necessary, to realise the rent by distress, & to distrain for it in the mtgee.'s name, as his bailiff.

Semble: (4) a pltf. in replevin will not be allowed to reply to a cognisance by traversing the facts of the tenancy & the rent being in arrear, & also the authority to distrain as bailiff.

(5) A notice is not essential to the validity of the distress at all, although it is necessary by Distress Act, 1689 (c. 5), s. 1, in order to authorise a regular sale (*ALDERSON, B.*).—*TRENT v. HUNT* (1853), 9 Exch. 14; 1 C. L. R. 752; 22 L. J. Ex. 318; 22 L. T. O. S. 23; 17 Jur. 899; 1 W. R. 481; 156 E. R. 7.

Annotations:—As to (1) *Reid. Woolston v. Ross*, [1900] 1 Ch. 788. As to (2) *Reid. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1897), 66 L. J. Ch. 186. As to (3) *Folld. Snell v. Finch* (1863), 13 C. B. N. S. 651; *Reece v. Strousberg* (1885), 54 L. T. 133. *Reid. Jolly v. Arbuthnot* (1859), 4 De G. & J. 224; *Christchurch, Oxford v. Buckingham & Chandos* (1864), 17 C. B. N. S. 391; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621. *Generally, Mentd. Cadle v. Moody* (1861), 30 L. J. Ex. 385.

155. ———.]—A., the lessee of premises, granted an underlease to B., & then mtged. the premises to C., & afterwards sold the equity of redemption to D. D. paid off the mtge., obtaining from the mtgee. an authority to receive the rent & an undertaking to execute a conveyance when required, & before the execution of the conveyance to him, D. distrained for rent accruing in his time:

—*Held*: the distress was lawful.—*SNELL v. FINCH* (1863), 13 C. B. N. S. 651; 1 New Rep. 328; 32 L. J. C. P. 117; 7 L. T. 747; 9 Jur. N. S. 333; 11 W. R. 341; 143 E. R. 258.

Annotations:—*Reid. Christchurch, Oxford v. Buckingham & Chandos* (1864), 17 C. B. N. S. 391; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621; *Reece v. Strousberg* (1885), 54 L. T. 133.

156. ———.]—A mtgor. in possession has, in the absence of interference by the mtgee., an implied authority from the mtgee. to distrain upon the tenant of the mortgaged property for the rent due in respect thereof; &, although it may be necessary for the mtgor. to justify the distress as bailiff of the mtgee., it is not necessary that the distress should be made in the mtgee.'s name.—*REECE v. STROUSBERG* (1885), 54 L. T. 133; 50 J. P. 292, D. C.

157. ——— Authority to mortgagee to collect rents subsequently revoked.]—Deft. was mtgor. in possession, having mortgaged to H. in 1834. Deft., in 1838, demised the premises to pltf. at an annual rent, payable quarterly; & in 1840 he gave H. an authority to receive the rent of the premises, described as occupied by pltf. & belonging to deft. H. communicated this authority to pltf. & gave him notice not to pay rent to deft. but to H. Pltf. accordingly paid several quarters' rent to H.: but, shortly before Michaelmas 1841, when the quarter's rent mentioned in the avowry became due, deft. gave notice to pltf. not to pay it to H. but to deft. Pltf. paid to neither; & deft. distrained. At that time, a small arrear of interest was due from deft. to H. under the mtge.:—*Held*: (1) the authority & payments of rent effected no change in the tenancy, & the issue on the plea of *non tenuit* must be found for deft.; (2) the issue on the plea of *reins in arriere* must also be found for deft. since, if the facts proved amounted to a defence, they ought to have been made the subject of a special plea. But *semble*: the facts did not amount to a defence.—*WHEELER v. BRANSCOMBE* (1843), 5 Q. B. 373; 1 Dav. & Mer. 406; 13 L. J. Q. B. 83; 2 L. T. O. S. 187; 7 Jur. 1131; 114 E. R. 1290.

Annotation:—As to (1) *Reid. Underhay v. Read* (1887), 58 L. T. 457.

158. After appointment of receiver by mortgagee—No power to distrain—Conveyancing Act, 1881 (c. 41), ss. 19, 24.]—A mtgee. appointed a receiver of the income of the mtged. property under the above Act, & gave notice of the appointment to the mtgor. The mtgor. nevertheless distrained for rent becoming due after the appointment of the receiver. The mtgor. claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent:—*Held*: an injunction must be granted to restrain the mtgor. from interfering with the receiver, or receiving the rent. *Semble*: even if the mtgor. had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests.—*BAYLY v. WENT* (1884), 51 L. T. 764.

159. ———.]—Where a mtgee. of a leasehold house has appointed a receiver of the rents & profits under sect. 19 of the above Act, a distress for arrears of rent levied by the mtgor., without any authority from the receiver, is illegal. So long as the receivership is in force, & the notice to the tenant of the appointment has not been withdrawn, no valid distress can be levied except by the receiver or some person authorised by him.—*WOOLSTON v. ROSS*, [1900] 1 Ch. 788; 69 L. J. Ch. 363; 82 L. T. 21; 64 J. P. 264; 48 W. R. 556.

Sect.

: Sub-sect. 7, B. (a) i.]

B. Mortgagees.**(a) Against Mortgagor.****i. Under Attornment Clause.**

160. Mortgagor as tenant by attornment.]—A mtge. deed, reciting a loan of £850 at 5 per cent. interest, contained an agreement that the mtgor., during his occupation of the mortgaged premises, should yield & pay for the same to the mtgee. the yearly rent or sum of £50 payable half-yearly, & that it should be lawful for the mtgee. to use such remedies by distress & sale for the recovery of the said rent as landlords have on common demises; provided that the reservation of such rent should not prejudice the mtgee.'s right to enter & evict the mtgor. at any time after default made in payment of the monies secured, or any part thereof:—**Held:** after default made in payment of the principal & of one half-year's rent, the mtgee. might eject the mtgor. without any notice to quit, though he had treated the mtgor. as tenant by distraining on him for a previous year's rent.—**DOE d. GARROD v. OLLEY** (1840), 12 Ad. & El. 481; 4 Per. & Dav. 275; 9 L. J. Q. B. 379; 4 Jur. 1084; 113 E. R. 894.

Annotations:—**Apld.** Doe d. Snell v. Tom (1843), 4 Q. B. 615; Metropolitan Counties Assce. v. Brown (1859), 4 H. & N. 428. **Consd.** Jolly v. Arbuthnot (1859), 4 De G. & J. 224.

161. —.]—Proviso in a deed of mtge.: A. agrees "to become tenant" to C. & D. of the premises, etc., "at their will & pleasure, at & after the rate of £25 4s. per annum, payable quarterly." A. remained in possession under this agreement for two years, & paid a year's rent; after which the lessors distrained for four quarters' rent:—**Held:** A. was tenant at will, & not from year to year.—**DOE d. BASTOW v. COX** (1847), 11 Q. B. 122; 17 L. J. Q. B. 3; 10 L. T. O. S. 132; 11 Jur. 991; 116 E. R. 421.

PART II. SECT. 4, SUB-SECT. 7.—
B. (a) i.

160 i. Mortgagor as tenant by attornment.]—A mtge. contained the usual clauses as to entry, etc., on default, with power to distrain for arrears of interest, & that until default, the mtgors. should have quiet possession & in addition, the following provision & variation: "the mtgor. doth release to the co. all his claims upon the said lands, & doth attorn to & become tenant at will to the co., subject to the said proviso":—**Held:** there was no reservation of rent entitling the mtgee. to claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mtge. before removal of goods on mortgaged premises by the sheriff.—**TRUST & LOAN CO. v. LAWRASON** (1885), 10 S. C. R. 679.—**CAN.**

160 ii. —.]—A mtge. of lands contained a special attornment clause whereby the mtgor. became tenant of the lands to defts. at a yearly rental equal to the interest on the amount of the loan to be paid at the times appointed for the payments of interest. This mtge. was not executed by the mtgee.:—**Held:** the relation of landlord & tenant was validly created between the parties, & on default of any payment of interest the mtgee. might distrain for a year's rent under the attornment clause, & take any goods upon the premises, whether belonging to the mtgor. or not, & make a valid sale of same.—**LINSTEAD v. HAMILTON PROVIDENT & SOCIETY** (1896), 11 Man. L. R. —.—**CAN.**

160 iii. —.]—Pltf. sued defts. in

trespass & trover for seizing & selling her crops under a warrant of distress issued by them directing their bailiff to levy the amount of arrears of interest due on a mtge. given them by R., the lessor of pltf., on the land on which the crops had been grown. The mtge. contained the usual provision that defts. might distrain for arrears of interest. It also contained an attornment clause by which the mtgor. became a tenant to defts. of the land at a yearly rental equal to the amount of interest payable on the mtge.:—**Held:** under R. S. M., c. 46, s. 2, the distress was wholly illegal as deft. could only take the goods of the mtgor. for arrears of interest due by him.—**MILLER v. IMPERIAL LOAN & INVESTMENT CO.** (1896), 11 Man. L. R. 247.—**CAN.**

160 iv. —.]—An attornment clause in a mtge. is valid if it constitutes a real relation of landlord & tenant between mtgee. & mtgor., & a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mtge., viz. ten years, to repay the principal money & interest thereon at 7 per cent.—**MASSEY-HARRIS CO. v. YOUNG** (1905), 37 N. B. R. 107.—**CAN.**

160 v. —.]—A mtge. on land contained the following two clauses: "(1) for the purpose of better securing the punctual payment of the interest I, the mtgor., do hereby attorn tenant to the mtgee. at a yearly rental equivalent to the annual interest secured hereby, to be paid yearly the legal relation of landlord & tenant being hereby constituted; (2) if I shall make default in payment of any part of the

162. & contract.]—A mtge. deed, executed by the mtgor. only, contained a clause, whereby "for the more effectual recovery of the interest, the mtgor. did attorn & become tenant to the mtgee. of the premises, at the yearly rent of £40, to be paid half-yearly, so long as the principal sum remained secured." The mtgor. continued in possession, & made several of these half-yearly payments:—**Held:** the subsequent occupation, connected with the covenant, created the relation of landlord & tenant, & the mtgee. might distrain for a half-yearly payment in arrear.—**WEST v. FRITCHE** (1848), 3 Exch. 216; 18 L. J. Ex. 50; 12 L. T. O. S. 223; 13 J. P. 170; 154 E. R. 822.

Annotations:—**Consd.** Jolly v. Arbuthnot (1859), 4 De G. & J. 224. **Apld.** Morton v. Woods (1868), L. R. 3 Q. B. 658. **Distd.** Gibbs v. Cruikshank (1873), 28 L. T. 104; Scobie v. Collins, [1895] 1 Q. B. 375.

163. — Receiver.]—A receiver of an estate was appointed by a mtgor. & mtgee. ooth joined in the appointment, & gave him power of distress & entry, & the mtgor. attorned as tenant to the receiver at a rent of £3,500. The deed recited all the facts relating to the mtge. & provided that nothing in the deed should abridge the rights of the mtgee. The mtgor. afterwards became bkpt. & the receiver distrained for £3,500. Upon this being claimed by the mtgee., by a party under a bill of sale & by the assignees of the mtgor.:—**Held:** the validity of the distress depended upon the existence of a tenancy to the receiver; such a tenancy was created, pursuant to the intention of all parties, by the attornment of the mtgor. to him, with the consent of the mtgee., & the express power of distress was not a power in gross, but annexed to the tenancy, & the distress was valid, entitling the mtgee. to the produce of it.—**JOLLY v. ARBUTHNOT** (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532; 45 E. R. 87, L. C.

Annotations:—**Distd.** Hampson v. Fellows (1868), 37

said principal or interest at any day or time hereinbefore limited for the payment thereof it shall & may be lawful for them & I do hereby grant full power & license to the mtgee. to enter, seize & distrain upon the said lands & by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal & interest as shall from time to time be or remain in arrear & unpaid as in like case of distress for rent":—**Held:** while the agreement under the first clause was valid, the legal relation of landlord & tenant being actually created thereunder at a rent reserved the same as the interest, which was fair & reasonable, & payable at stated times, the second clause was inconsistent with the actual attornment clause & merely aimed at conferring for further security a license to distrain for a debt; it was, therefore, impeachable by third parties, including a liquidator of the mortgagor co. appointed under Dominion Winding-up Act; even as against the mtgor. the clause, which should be construed strictly, did not give a right of distraint for principal made payable under the acceleration clause.—**RE CROSSEN METAL WORKS, LTD.**, [1920] 3 W. W. R. 197; 53 D. L. R. 341; 30 Man. L. R. 503.—**CAN.**

160 vi. —.]—The fact that a distress by a mtgee. is made under an attornment clause does not remove the limitation of Distress Ordinance, c. 34, C. O. s. 5, that a distress by a mtgee. must be confined to the goods of the mtgor. or his assigns.—**CONFEDERATION LIFE ASSOCN. v. WOOD**, [1922] 1 W. W. R. 766.—**CAN.**

L. J. Ch. 694. *Apld. Morton v. Woods* (1889), L. R. 4 Q. B. 293. *Consd. Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. *Apld. Kearsley v. Phillips* (1883), 11 Q. B. D. 621. *Refd. Re Roberts, Ex p. Hill* (1877), 6 Ch. D. 63.

164. —.]—A mtge. deed contained the usual attornment clause by the mtgor., & the rent reserved thereunder coincided with the interest payable on the principal debt. The mtgor. having gone into liquidation, the mtgees. distrained under the attornment clause for arrears of rent, & the distress realised more than the arrears of interest then due:—*Held*: the mtgees., in the absence of any provision to the contrary in the mortgage deed, were entitled, as against the trustee in liquidation, to retain the surplus proceeds of the distress in payment *pro tanto* of the principal due to them under the mtge.—*Re BETTS, Ex p. HARRISON* (1881), 18 Ch. D. 127; 50 L. J. Ch. 832; 45 L. T. 290; 30 W. R. 38, C. A.

165. —.]—*Re KNIGHT, Ex p. VOISEY*, No. 107, *ante*.

166. —.]—(1) The relationship of landlord & tenant may be created by a mtge. deed, & therefore, in an action for recovery of land by mtgees. from a mtgor. in possession under a mtge. deed creating a tenancy between them, the writ may be specially indorsed under R. S. C., Ord. 3, r. 6 (F), so that Ord. 14, will apply, & final judgment may be ordered.

(2) The partner have agreed that to the relationship of mtgor. & mtgee. shall be superadded the relationship of landlord & tenant. It has been done for long series of years for the purpose of giving the mtgee. a better remedy than he would otherwise have, & it has been recognised . . . that the fact of giving him power to distrain puts the mtgee. in the position of landlord (CAVE, J.).—*DAUBUZ v. LAVINGTON* (1884), 13 Q. B. D. 347; 53 L. J. Q. B. 283; 51 L. T. 206; 32 W. R. 772, D. C.

Annotation:—*As to* (1) *Folld. Hall v. Comfort* (1886), 18 Q. B. D. 11.

167. —.]—If a mtge. is created by way of demise for a term of years, & the mtgor. attorns & becomes tenant to the mtgee. at a certain rent, the relation of landlord & tenant is created, & upon failure to pay the rent the mtgee. is entitled to distrain the goods even of a stranger. J. being lessee for a term of years, demised to P., by way of mtge., all his interest in the term save one day, & J. attorned & became tenant to P. at a certain rent. J., being mtgor., let the mortgaged premises to K. who assigned his goods thereon to R. The rent due from J. to P. being unpaid P. distrained the goods assigned by K. to R. No rent was then due from K. R. having brought an action against P. for the seizure of the goods:—*Held*: by the attornment J. had become tenant to P., & the distress was lawful.—*KEARSLEY v. PHILIPS* (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581; 49 L. T. 435; 31 W. R. 909, C. A.

168. — Second mortgage—*Estoppel as to legal estate in mortgagee.*—*MORTON v. WOODS*, No. 68, *ante*.

169. — Omitting attornment clause.]—*Re JOHNSON, Ex p. HYDE v. CASH* (1897), 41 Sol. Jo. 368.

170. — Notice required.]—By a mtge. deed it was provided that the mtgor. in the event of his making default in payment of the sums advanced to him, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mtgees. from the date of the deed at a specified rent, & that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease. The mtgor.

having made default, the mtgees. without having given him any notice of their intention thenceforward to treat him as a tenant, distrained, after the lapse of more than a year from default as for a year's rent in arrear:—*Held*: not having given him notice of their intention to treat him as a tenant they were not entitled to distrain.—*CLOWES v. HUGHES* (1870), L. R. 5 Exch. 160; 39 L. J. Ex. 62; 22 L. T. 103; 34 J. P. 344; 18 W. R. 459.

171. Effect of assignment of mortgage—*Without notice—Tenancy not determined.*—A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord.

J. W. H., being tenant of copyhold premises, granted a lease for 21 years, from Christmas, 1823, renewable for another term of 21 years. In 1823 he died, & H. H., L. H., & R. H. were admitted tenants by the lord as devisees. Previous to 1847, L. H. married A. Y. B., & in January of that year H. H., R. H., A. Y. B., & L., his wife, granted a lease of the premises to M. for 21 years, from Christmas, 1844, with covenant for further renewal, M. having previously purchased the interest of the preceding lessee. In May, 1847, M. leased to Q., who, in July of the same year, executed a mtge. of the premises to deft. By this deed Q. granted & demised the residue of his term except one day to deft., with a proviso for redemption on payment of principal & interest at certain periods, & covenants for payment of the principal & interest. The deed also provided that Q. should hold the premises as tenant at will of deft. at a yearly rent, for which rent deft. might distrain, & that the rent thereby reserved should go in satisfaction of the principal & interest, & the residue (if any) to Q. Q. subsequently assigned to F. without notice to deft., & the rent above reserved being in arrear, deft. distrained on the premises in pursuance of the above power. The warrant was to distrain the goods of Q. Pltf.'s goods, being on the premises, were taken:—*Held*: the above deed created a tenancy at will, which was not put an end to by the assignment to F. without notice to deft., & the distress was regular.—*PINHORN v. SOUSTER* (1853), 8 Exch. 763; 1 C. L. R. 99; 22 L. J. Ex. 266; 21 L. T. O. S. 92; 1 W. R. 336; 155 E. R. 1560.

Annotations:—*Apld. Brown v. Metropolitan Counties, etc. Soc.* (1859), 1 E. & E. 832. *Distd. Hampson v. Fellows* (1868), 37 L. J. Ch. 694. *Apld. Kearsley v. Phillips* (1883), 11 Q. B. D. 621. *Refd. Jolly v. Arbuthnot* (1859), 4 De G. & J. 224; *Turner v. Barnes* (1862), 2 B. & S. 435; *Re Potter & Ferrige, Ex p. Parke* (1874), 43 L. J. Bcy. 139; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127. *Mentd. Re Lord & Copper Miners Co.* (1854), 3 Eq. Rep. 197; *Melling v. Leak* (1855), 16 C. B. 652.

172. — Arrears due before assignment—*Whether assignee may distrain for.*—(1) Pltf. mortgaged his interest in leasehold premises & his goods thereon to V. & others; V. & others by deed assigned the mtge., the debt & arrears of interest then due, & all their rights under the mtge., to defts. The mtge. deed contained a clause, "to the intent that the said V. & others, their exors. & assigns, may have for the recovery of the interest accruing on the principal money secured, the same powers of entry & distress as are by law given to landlords for the recovery of rent in arrears, the said B., pltf., doth hereby attorn & become tenant from year to year to the said V. & others, their exors. & assigns, of the said premises, at the yearly rent of £125." Pltf. remaining in possession of the premises & goods, defts., after the assignment to them, entered & seized goods for arrears of interest due before the assignment:—*Held*: defts.

Sect. 4.—Who may distrain: Sub-sect. 7, B. (a) i. & ii. & (b) i.

could not justify such seizure under that clause; such clause operated as a creation of a tenancy, for the purpose of giving such rights of distress as would arise under such tenancy; V. & others, having conveyed away their estate before the seizure, could not have distrained either at common law or under 4 & 5 Ann, c. 3, ss. 9 & 10.

(2) Supposing such clause could be construed as a mere personal licence to V. & others to seize chattels; *Seem*: as such it could not be transferred to them; neither could they act under it at a different time & for a longer period than they would have had the right of distress as landlords, & defts. could not justify the seizure as their servants.—*BROWN v. METROPOLITAN COUNTIES, ETC. SOCIETY* (1859), 1 E. & E. 832; 28 L. J. Q. B. 236; 33 L. T. O. S. 162; 5 Jur. N. S. 1028; 7 W. R. 477; 120 E. R. 1123; *subsequent proceedings, sub nom. METROPOLITAN COUNTIES ASSURANCE CO. v. BROWN*, 4 H. & N. 428.

Annotations:—As to (1) Refd. Turner v. Barnes (1862), 2 B. & S. 435; *Re Potter, Ex p. Park* (1874), De Colyar's County Court Cases, 235. *As to (2) Refd. Re Davis & Co., Ex p. Rawlings* (1888), 22 Q. B. D. 193.

173. Death of mortgagor—Determination of tenancy—Effect of payment of interest by heir.—A mtge. contained the usual attornment clause; the mtgor. attorned tenant to the mtgees., & during his life paid the interest on the mtge.; he died intestate, & his heir-at-law entered into possession & for a time continued to pay the interest. The mtgees. subsequently distrained for arrears of interest:—*Held*: the original tenancy was determined by the death of the mtgor., & no new tenancy was created between the mtgees. & the heir by the mere payment of interest.—*SCOBIE v. COLLINS*, [1895] 1 Q. B. 375; 64 L. J. Q. B. 10; 71 L. T. 775; 1 Mans. 491; 15 R. 6.

Effect of bankruptcy—Right of mortgagee to distrain under attornment clause.—*See BANKRUPTCY*, Vol. V., p. 958, Nos. 7855–7857.

Agreements as to distress.—*See BANKRUPTCY*, Vol. V., p. 962, Nos. 7878–7885.

Whether a bill of sale.—*See BILLS OF SALE*, Vol. VII., p. 24, Nos. 113–116.

ii. Under Agreement Other than Attornment Clause.

174. Power to distrain in “like manner as for rent.”—Mtgee., under a special power in the mtge. deed, enabling him to distrain for arrears of interest “in like manner as for rent,” distrained after the date of the demise in the declaration, but for arrears due before such demise, the mtgor. having, without any express provision in the deed enabling him so to do, continued in possession:—

Held: such distress did not amount to a recognition of the mtgor. as tenant, so as to disable the mtgee. from bringing ejectment.—*DOE d. WILKINSON v. GOODIER* (1847), 10 Q. B. 957; 16 L. J. Q. B. 435; 11 Jur. 892; 116 E. R. 363.

Annotation.—Re Metrop. Counties Asse. Soc. v.

175.—(1) Certain premises were let to pltf. by P., who had previously mortgaged them to defts., the trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mtge. deed gave power to defts. to distrain the goods of P., on the premises, for arrears of subscriptions due to the society, as for rent due on a demise. Defts. distrained on the premises for subscriptions due from P., & seized pltf.'s goods. Pltf. replevied the goods, & recovered in the action of replevin, in the county ct., as damages, the amount of the expenses of the replevin bor. Having sustained further consequential damage by reason of the seizure of his goods, he subsequently brought an action of trespass in the superior ct., to recover these damages, & also in respect of the trespass to the land:—*Held*: the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin. With respect to the trespass to the land, the judgment in replevin was no bar to the action; but defts. were entitled to the verdict on a plea of not possessed, inasmuch as they had done no act to recognise pltf. as a tenant.

(2) The party whose goods have been wrongfully seized has a choice of remedies open to him. He may bring trespass to recover damages for the taking of the goods, but it may be that this remedy is inadequate, & the immediate recovery of the goods themselves may be of greater consequence to him than the recovery of damages (*BOVILL, C.J.*).

(3) No damages for injury by entry on the land or the taking of the fixtures can be recovered in replevin (*per CUR.*).—*GIBBS v. CRUIKSHANK* (1873), L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 37 J. P. 744; 21 W. R. 734.

Annotations:—As to (1) Refd. Smith v. Enright (1893), 63 L. J. Q. B. 220. *Generally, Mentd. Dover v. Child* (1876), 34 L. T. 737.

176. Clause purporting to be attornment clause.—By an indenture between A. & B., holders of shares in a benefit building society, & C. & D., trustees of the society, reciting that A. & B. were entitled to a certain sum out of the funds thereof in respect of their shares therein, & that, for the security of all the payments to become due in respect of the said shares, A. & B. had agreed to execute the assurance thereby made, A. & B. conveyed certain premises to C. & D. as such

PART II. SECT. 4, SUB-SECT. B. (a) ii.

s. Licence.—A mtge. of land contained no attornment clause, & no provision expressly creating the relation of landlord & tenant between the mtgors. & mtgees., but it provided for possession by the mtgors., until default; that no default in payment of any one instalment for two months all should become due; & that on default in payment of any instalment the mtgees. might distrain therefor, & by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The first instalment fell due on Nov. 1, 1879, & the mtgors. held in

possession on Oct. 8, 1879. This right to distrain was a mere licence, & did not warrant the taking of a stranger's goods upon

the premises.—*LAING v. ONTARIO LOAN & SAVINGS CO.* (1881), 46 U. C. R. 114.—CAN.

t.—The right to distrain for interest given by the statutory distress clause under Short Forms Act is a mere personal licence, not justifying a mtgee. in distraining goods other than those of the mtgor.—*MCDERMOTT v. FRASER* (1915), 8 W. W. R. 196; 23 D. L. R. 430; 25 Man. L. R. 298.—CAN.

a. Express power.—One of several trustees of a building society, to which pltf. had mortgaged his property, issued a distress for rent reserved by the mtge.:—*Held*: pltf., although a mtgor., might under the express provisions of the mtge., be treated as tenant of the mtgees.—*MOORE v. LEE* (1871), 2 V. R. (Law) 4.—AUS.

b.—A clause in a mtge. that the mtgor. shall continue in pos-

session, coupled with his occupation in pursuance of it, & with a covenant for distress, in accordance with 27 & 28 Vict. c. 31, Sched. 2, cl. 5, creates the relation of landlord & tenant at a fixed rent:—*Held*: by the indenture of mtge. set out, the tenancy created was until the day of repayment of the principal, for a determinate term, & thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises.—*ROYAL CANADIAN BANK v. KELLY* (1869), 19 C. P. 196.—CAN.

c.—M., in May, 1873, mortgaged land to defts. to secure payment of money by instalments, & it was provided that in case of default defts. might distrain. M. made an assignment & pltf., as his assignee, entered on the land, which was in M.'s possession, & took possession of

trustees, upon trust to permit A. & B. to receive the rents until default in payment of their contributions; with a power to C. & D., & the trustees for the time being of the society, to appoint a person to receive the rents, in case of default, & a power of sale in the like event, etc. The deed also contained a clause whereby A. & B. agreed "to become tenants of the parties hereto of the second part, & to the trustees for the time being of the society, of the premises hereby demised, henceforth during their will, at the net yearly rent of £200, payable on the usual quarter days":—*Held*: this indenture did not operate as a demise, so as to sustain an avowry alleging a tenancy under the trustees at the yearly rent of £200, the general scope of the deed being altogether inconsistent with such a construction.—*WALKER v. GILES* (1849), 6 C. B. 662; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 14 L. T. O. S. 41; 13 Jur. 588, 753; 136 E. R. 1407.

Annotations:—*Consd. Brown v. Metropolitan Counties, etc. Soc.* (1859), 1 E. & E. 832; *Turner v. Barnes* (1862), 2 B. & S. 435. *Reid. Doe d. Dixie v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1852), 8 Exch. 138; *Pinhorn v. Souster* (1853), 8 Exch. 763; *Re Potter, Ex p. Park* (1874), *De Colyar's County Court Cases*, 235; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127. *Mentd. Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Royal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78.

177. —.]—T. being tenant at will at a yearly rent, died leaving rent in arrear, the next day the lessor distrained on the premises, which were then occupied by T.'s servants; his widow came into occupation the day after, & subsequently took out administration to her husband:—*Held*: the distress was not justified under 8 Ann c. 14, ss. 6 & 7, as it was not made "during the possession of the tenant from whom the rent became due."—*TURNER v. BARNES* (1862), 2 B. & S. 435; 31 L. J. Q. B. 170; 6 L. T. 418; 26 J. P. 628; 9 Jur. N. S. 199; 10 W. R. 561; 121 E. R. 1135.

Annotation:—*Reid. Scoble v. Collins*, [1895] 1 Q. B. 375.

178. Licence—Not assignable by mortgagee.]—*BROWN v. METROPOLITAN COUNTIES, ETC. SOCIETY*, No. 172, *ante*.

179. —.]—An agreement for the hire, & ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer, & take possession of, & remove & sell the goods. During the currency of this agreement the lender assigned all interest under the agreement to a person who had lent him money, as

certain goods there belonging to him. Afterwards, an instalment on the mtge. being overdue, debts distrained therefor on these goods, which were still upon the mortgaged premises:—*Held*: debts' only remedy was by application under Insolvent Act, s. 50, & they had no right to distrain.—*MUNRO v. COMMERCIAL BUILDING & INVESTMENT SOCIETY* (1875), 36 U. C. R. 464.—CAN.

d. *Re-demise clause*.]—Pltf.'s father executed a mtge. of land, dated Nov. 17, 1881, to debts, but which was not executed by them, for the term of seven years, the principal & interest being repayable by instalments on Nov. 1 in each year. The mtge. contained a demise clause for the term of the mtge., at a rental

equal to the instalment of principal & interest & due at the same time, & also a distress clause. The mtgor. was to remain in possession until default. He remained in possession & paid the instalments due on Nov. 1, 1882 & 1883. He died intestate in Dec. 1884, when pltf., a son, by arrangement with the other heirs-at-law & the widow, occupied the land. At the father's death there was due for principal \$100 & for interest \$147. The interest was subsequently paid by pltf. In Oct. 1885, after the interest had been so paid, debts. executed a distress warrant to their bailiff, directing him to levy \$112.55, "the amount of interest due on Nov. 1, 1884," under which the bailiff distrained pltf.'s goods:—*Held*: by reason of the provisions of the mtge., the mtgor.

security for the advance, authorising him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid:—*Held*: (1) this assignment was not a bill of sale within the meaning of Bills of Sale Act, 1878 (c. 31), s. 4; (2) the license to enter & take possession of the goods was not capable of being assigned; (3) the assignment of the instalments which accrued due under the hiring agreement after the commencement of the bkpcy. of the assignor was valid as against the trustee in bkpcy.—*Re DAVIS & Co., Ex p. RAWLINGS* (1888), 22 Q. B. D. 193; 37 W. R. 203; 5 T. L. R. 119, C. A.

Annotations:—*As to* (1) *Reid. Re Davis, Ex p. Rawlings v. Pipe* (1888), 60 L. T. 157. *As to* (3) *Reid. Wilmot v. Alton*, [1897] 1 Q. B. 17.

180. Express power—Not so beneficial as attornment clause—Carrying implied right to distrain.]—Sometimes a mtge. deed is made without any attornment clause, but it contains an express power for the mtgee. to enter & distrain. Such a power is not so beneficial to the mtgee. as a power of distress which is by law incident to the attornment clause (LINDLEY, L.J.).—*Re WILLIS, Ex p. KENNEDY* (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 793; *sub nom. Re WILLIS, Ex p. TRUSTEE*, 4 T. L. R. 637; *sub nom. Re WILLIS, Ex p. WILLOUGHBY DE ERESBY (LADY)*, 5 Mort. 189, C. A.

Annotations:—*Reid. Mumford v. Collier* (1890), 25 Q. B. D. 279; *Stevens v. Marston* (1890), 60 L. J. Q. B. 192; *Green v. Marsh*, [1892] 2 Q. B. 330; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373.

Effect of bankruptcy.]—See BANKRUPTCY, Vol. V., p. 963, Nos. 7886, 7887.

(b) Against Tenant of Mortgagor.

i. Tenancy Prior to Mortgage.

181. Right of mortgagee to distrain.]—*ROGERS v. HUMPHREYS*, No. 89, *ante*.

182. — Effect of notice of mortgage to tenant.]—A mtgee. after giving notice of the mtge. to the tenant in possession under a lease prior to the mtge. is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, & he may distrain for it after such notice. In a notice for the sale of a distress under 2 Will. & Mar. c. 5, it is not necessary to mention when the rent became due for which the distress was made.—*MOSS v. GALLIMORE* (1779), 1 Doug. K. B. 279; 99 E. R. 182.

Annotations:—*Consd. Birch v. Wright* (1786), 1 Term Rep. 378. *Apld. Burrowes v. Gradin* (1843), 1 Dow. & L. 213. *Reid. Ex p. Wilson* (1813), 2 Ves. & B. 252; *Alchorne v. Gomme* (1824), 2 Bing. 54; *Johnson v. Howson* (1828), 6 L. J. O. S. K. B. 236; *Pope v. Biggs* (1829), 9 B. & C. 245; *Partington v. Woodcock* (1835), 5 Nev. & M. K. B. 672; *Salmon v. Dean* (1851), 15 Jur. 641; *Wilton v. Dunn* (1851), 17 Q. B. 294; *Trent v. Hunt* (1853), 9 Exch.

remaining in possession, & the payments made by him, the relation of landlord & tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mtgor.—*MCDONELL v. BUILDING & LOAN ASSOCN.* (1886), 10 O. R. 580.—CAN.

PART II. SECT. 4, SUB-SECT. 7. B. (b) i.

181 i. *Right of mortgagee to distrain*.]—A mtgee. with power to distrain for principal & interest has no right to distrain upon the goods of any one whose interest in the lands was created prior to the mtge.—*BOWERS v. BOWLEN* (1915), 32 W. L. R. 955; 9 W. W. R. 604; 8 Sask. L. R. 436.—CAN.

Sect. 4.—Who may distrain: Sub-sect. 7, B. (b) i. (c); sub-sect. 8.]

14; *Hickman v. Machin* (1859), 4 H. & N. 716; *Re Ind, Coope, Fisher v. The Co., Knox v. The Co., Arnold v. The Co.*, [1911] 2 Ch. 223. *Mentd. Christophers v. Sparke* (1820), 2 Jac. & W. 223; *Doe d. Fisher v. Giles* (1829), 5 Bing. 421; *Galliers v. Moss* (1829), 4 Man. & Ry. K. B. 268; *Delaney v. Fox* (1857), 2 C. B. N. S. 768; *Heath v. Pugh* (1881), 6 Q. B. D. 345; *Underhay v. Read* (1887), 58 L. T. 457; *Towerson v. Jackson*, [1891] 2 Q. B. 484.

183. — *Effect of payment before notice of mortgage to tenant.*—B., having leased his land to pltf. at a rent payable quarterly, subsequently mortgaged the land to defts., who allowed B. to remain in receipt of the rent. Subsequently to the mtge. B. applied to pltf., who was not aware of the mtge., to pay him a year's rent in advance, & pltf. did so. After the payment, & before the rent had become due, defts. gave notice to pltf. to pay the rent to them, & pltf. refusing to pay it, defts. distrained for it:—*Held*: payment of the rent before it became due was not a good payment as against defts., the mtgees., & pltf. was still liable to pay them the rent.—*DE NICHOLLS v. SAUNDERS* (1870), L. R. 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.

Annotations:—*Consd. Cook v. Guerra* (1872), L. R. 7 C. P. 132. *Refd. Green v. Rheinbery* (1911), 104 L. T. 149; *Ashburton v. Nocton*, [1915] 1 Ch. 274. *Mentd. Glyn, Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591.

See, further, MORTGAGE.

ii. Tenancy Subsequent to Mortgage.

184. *Right of mortgagee to distrain—Payment of rent to mortgagee.*—*ROGERS v. HUMPHREYS*, No. 89, *ante*.

185. — *Effect of notice by mortgagee to tenant.*—Where a mtgor. in possession makes a lease, after the mtge. reserving rent, the mtgee. cannot, by merely giving the lessee notice of the mtge. & that principal & interest are in arrear, & requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease.—*EVANS v. ELIJOT* (1838), 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Woll. & H. 744; 8 L. J. Q. B. 51; 112 E. R. 1242.

Annotations:—*Distd. Burrowes v. Gradin* (1843), 1 Dow. & L. 213. *Apprvd. & Apld. Towerson v. Jackson*, [1891] 2 Q. B. 484. *Refd. Doe d. Parry v. Hughes* (1847), 11 Jur. 698; *Evans v. Matthias* (1857), 29 L. T. O. S. 209; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621; *Underhay v. Read* (1887), 20 Q. B. D. 209. *Mentd. Poole Corp'n. v. Whitt* (1846), 16 L. J. Ex. 229.

PART II. SECT. 4, SUB-SECT. 7.—B. (b) ii.

184i. *Right of mortgagee to distrain—Payment of rent to mortgagee.*—Where a mtgee. received rent from a tenant of the mtgor. by lease subsequent to the mtge., but afterwards directed the tenant to pay the rent to the mtgor., which he did:—*Held*: the mtgee. could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent.—*LAMBERT v. MARSH* (1845), 2 U. C. L. 39.—*CAN.*

e. — *Attornment to mortgagee—Of mortgagor.*—The father of pltf. mortgaged land to deft. to secure \$476 & interest, to be repaid one-half, with interest, on Nov. 1, 1908, & the other half, with interest, on Nov. 1, 1909. The first payment was not made & was still due & unpaid when deft. on Sept. 28, 1909, seized the 1909 crop. The memorandum of mtge. contained a provision whereby the mtgor. became tenant from year to year to deft., at a rental equivalent to & applicable in satisfaction of & payable at the same time as the

interest; the legal relation of landlord & tenant being thereby constituted in express terms between mtgee. & mtgor.; & also a provision that, if default should be made in the payment of any portion of the principal, it should be lawful for the mtgee. to enter, seize, & distrain upon any goods on the lands, & by distress to recover as much of the principal & interest as remained due; & also a provision that, should default be made in the payment of any part of the principal or interest, the whole mortgage money should at once become due. Pltf., after the execution of the mtge., became sub-tenant to his father of the mortgaged lands for one year, & as tenant took off the 1909 crop, which was seized by deft. In the distress warrant it was said that the distress was to be made by virtue of power for that purpose contained in the mtge.; & the distress was for \$572.25, the whole amount due for principal & interest by virtue of the acceleration clause:—*Held*: while the attornment clause in the mtge. limited the right of distress at most to arrears of interest, deft. distrained for all principal secured

188. — *Attornment to mortgagee—Of lessee.*—Deft., a mtgee., avowed for rent due to him from pltf. by virtue of a certain demise to him for two years, ending on Sept. 29, 1842. It appeared that pltf. was tenant of mtgor. & that he with other tenants subsequently to the mtge. on Oct. 14, 1842, attorned to deft. Opposite pltf.'s name in the instrument of attornment was entered "Rent £55 from Michaelmas, 1840":—*Held*: the avowry was well supported.—*GLADMAN v. PLUMER* (1845), 15 L. J. Q. B. 79; 6 L. T. O. S. 171; 10 Jur. 109.

Of mortgagor.—*KEARSLEY v. PHILIPS*, No. 167, *ante*.

188. — *Tenancy not recognised by mortgagee.*—*GIBBS v. CRUICKSHANK*, No. 175, *ante*.

189. *Mortgage absolute by default—Subsequent tenancy.*—Pltf. had mortgaged a house to defts. There was no redemise in the mtge. Pltf.'s mother had lived in it as his tenant. After the mtge. she continued in it, but he also went to live there. After the mtge. had become absolute by default, defts. the mtgees., went to the house, & agreed with pltf.'s mother that she should become their tenant at a certain rent. The rent being in arrear, defts. distrained, which was the trespass complained of.

Defts. were entitled to enter & take possession; they did so, & let the premises; therefore pltf. cannot maintain the action (*WILLES, J.*).—*DAWSON v. JOHNSON* (1859), 1 F. & F. 656; *subsequent proceedings*, 34 L. T. O. S. 68.

See, further, MORTGAGE.

Where lease made under Conveyancing Act, 1881 (c. 41).—*See MORTGAGE.*

(c) Liability to defend Distress made.

190. *Discontinuance of distress by first mortgagee—Liability to second mortgagee.*—A first mtgee. in possession of a livery stable-yard & premises let the same to a tenant. He afterwards distrained for rent, taking possession under such distress, of divers horses & carriages standing at livery on the premises. On being threatened with legal proceedings by the owners of the chattels at livery so seized, he restored such chattels to them:—*Held*: in taking the accounts in a suit by a second mtgee. to redeem the premises, the first mtgee. was not answerable as for wilful neglect & default in not realising the chattels which he had seized & afterwards restored to the owners.—*COCKS v. GRAY* (1857), 1 Giff. 77; 26

by the mtge., apparently under the licence clause, & now sought to justify the seizure under the attornment clause. It was not open to him to do so; he must justify under the licence clause or not at all.—*VOUSDEN v. HOPPER* (1911), 16 W. L. R. 294; 4 Sask. L. R. 1.—*CAN.*

f. — — — — —.]—

by his will directed his trustees to permit his wife, H., to receive all rents & income derived from his real estate. H. mtgd. her rents & income to deft. as security for the repayment of a loan; & a power of attorney, contained in the mortgage deed, authorised deft., his nominee or nominees, in case of non-payment of rent, to distrain in H.'s name for the benefit of deft., his exors., administrators, or assigns. H. let a cottage, part of the devised estate, to pltf., who paid her the rent for it until Oct. 1892, at which time the interest on the mortgage debt was in arrear. On Oct. 3, pltf. was served with a notice from deft. that he was to pay the rent to him, & with one from the trustees of the will to pay the rent to

L. J. Ch. 607; 3 Jur. N. S. 1115; 5 W. R. 749; 65 E. R. 831.

SUB-SECT. 8.—PERSONAL REPRESENTATIVES.

See, generally, EXECUTORS; Civil Procedure Act, 1833 (c. 42), ss. 37, 38.

191. Persons in representative capacity—Immaterial whether executors or trustees.]—Deft. made cognizance as bailiff of three persons, exors. of F. & averred that pltf. held as tenant of those three persons as exors. It was contended that those three persons, having assented to a legacy, had ceased to be exors. & became trustees, & that therefore the cognisances were wrong:—*Held*: it was immaterial whether they were exors. or trustees, it was enough to show that they were pltf.'s landlords; the words "as exors." were mere surplusage, & not part of the issue.—*NEWLANDS v. PALMER* (1849), 13 L. T. O. S. 116.

192. Executor—Whether necessary to show authority.]—*VULGAR v. HIGGINS* (1622), Palm. 173; 81 E. R. 1032.

193. — Rent reserved to husband & wife—Distress by personal representative of wife.]—*EGERTON v. SHEAFE* (1687), 2 Lut. 1151; 125 E. R. 639.

194. — Arrears of rentcharge—Power at common law.]—*TURNER v. LEE* (1637), Cro. Car. 471; 79 E. R. 1007.

Annotations:—Overd. Hool v. Bell (1697), 1 Ld. Raym. 172. *Consd. Prescott v. Boucher* (1832), 3 B. & Ad. 849.

195. — —.]—A. by will gave a leasehold estate to B. his exors., etc., subject to a rentcharge to his wife during her widowhood, with power to the widow to enter for non-payment, & to enjoy, etc., until the arrears were satisfied; & after the widow's marriage or death he willed that B. should pay the rentcharge to C. his exors., administrators, & assigns; the widow married, on which C. received the rentcharge during his life, & then C. died, without disposing of the rentcharge, appointing D. his exor.:—*Held*: (1) D. had no right of entry for non-payment of the rentcharge.

(2) If D. had a right of entry, a demand would have been necessary.

Semble: D., the exor., was entitled to the rentcharge, & might distrain for it.—*HASSELL d. HODGSON v. GOWTHWAITE* (1744), Willes, 500; 125 E. R. 1289.

Annotation:—As to (2) *Refd. Bearpark v. Hutchinson* (1830), 7 Bing. 178.

196. — Arrears due in lifetime of testator.]—Avowry, "that for all the time during which the rent was accruing due, & from thence until & at the time when, etc., & until & at the death of F., pltf. held the place in which, etc., as tenant to F. in the lifetime of F. under a demise, & because two years' rent due from pltf. to F. in his lifetime remained unpaid, & because pltf. remained in possession of the place in which from the death of F. till the time when, etc., the avowants, as exors. of F. distrained":—*Held*: sufficient on demurrer.—*STANIFORD v. SINCLAIR* (1824), 2

them. He paid the latter. On Nov. 15 deft. distrained:—*Held*: the right of deft. to distrain was not a limited one, & the words "in her name" in the power of attorney did not render the distress levied by deft. in his own name unlawful.—*REED v. COCKERTON* (1893), 11 N. Z. L. R. 814.—N.Z.

PART II. SECT. 4, SUB-SECT. 8.

g. Executor—Granted bare power of sale.]—A testator desired that his exors. should sell & dispose of his

land, & then appointed them to execute any deeds that might be necessary to the purchaser:—*Held*: the exors. took no interest but a mere power, & they could not distrain for rent accruing in their own time, before the land was sold.—*NICHOLL v. COTTER* (1849), 5 U. C. R. 564.—CAN.

h. Administrator—Not before grant.]—When a landlord is entitled to a term of years, & dies without appointing an exor., a distress for rent made after his death, & before any grant of

Bing. 193; 9 Moore, C. P. 372; 3 L. J. O. S. C. P. 247; 130 E. R. 280.

Annotation:—Consd. Prescott v. Boucher (1832), 3 B. & Ad. 849.

197. — Before probate—Subsequent ratification.]—A cognizance by deft. as bailiff of an exor., for rent due to testator, is supported by proof of a distress by him in the name of testator, & by his direction, but after his death; such distress though made before probate, having been afterwards adopted & ratified by the exor.—*WHITEHEAD v. TAYLOR* (1839), 10 Ad. & El. 210; 2 Per. & Dav. 367; 9 L. J. Q. B. 65; 4 Jur. 247; 113 E. R. 81.

Annotation:—Refd. Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131.

198. Administrator—Notwithstanding previous unauthorised payments.]—An annuity was payable under a will to a woman during her life, & a proportionable part computed from the last day of payment to the date of her death was payable to her exors. & administrators:—*Held*: a payment of this proportionate part to the husband of the annuitant, who never took out letters of administration, was not a good payment in law, & that the amount could therefore be recovered by the son of the annuitant in administering her estate after the death of the husband, whose exor. he also was.—*MITCHELL v. HOLMES* (1873), L. R. 8 Exch. 119; 42 L. J. Ex. 98; 28 L. T. 72; 21 W. R. 412.

199. Trustees—Disclaimer by one—Others may distrain.]—Where testator, seised in fee, devised to three trustees for certain trusts, & one disclaimed by deed:—*Held*: such disclaimer was, without matter of record, sufficient to vest a complete title in the two others, & enable them to support a distress for rent upon the premises devised.—*BEGBIE v. CROOK* (1835), 2 Bing. N. C. 70; 2 Scott, 128; 44 L. J. C. P. 264; 132 E. R. 28.

200. Under Rent Arrears (Recovery) Act, 1540 (c. 37)—Lessee at will.]—*OGNEL'S CASE*, No. 151, ante.

201. — Whether applicable to tenancy for life.]—*LAMBERT v. AUSTIN* (1594), Cro. Eliz. 332; Owen, 117; 78 E. R. 582.

Annotations:—Consd. Re Herbage Rents, Greenwich, Charity Comrs. v. Green, [1896] 2 Ch. 811. *Refd. Hool v. Bell* (1697), 1 Ld. Raym. 172; *Prescott v. Boucher* (1832), 3 B. & Ad. 849.

202. — —.]—Exor. of any tenant for life of a rentcharge may distrain for arrears incurred in the life of testator.—*HOOE v. BELL* (1697), 1 Ld. Raym. 172; 2 Lut. 1227; 91 E. R. 1011; *sub nom. HOWELL v. BELL*, 3 Salk. 136.

Annotations:—Consd. Prescott v. Boucher (1832), 3 B. & Ad. 849. *Mentd. Johnson v. Faulkner* (1842), 2 Q. B. 925.

203. — Whether applicable to demise for term of years.]—*MYLES v. WILLOUGHBY* (1598), Cro. Eliz. 547; 78 E. R. 793.

Annotation:—Refd. Hool v. Bell (1697), 1 Ld. Raym. 172.

204. — —.]—*TURNER v. LEE* (1637), Cro. Car. 471; 79 E. R. 1007.

Annotations:—Refd. Prescott v. Boucher (1832), 3 B. & Ad. 849. *Mentd. Hool v. Bell* (1697), 1 Ld. Raym. 172.

205. — —.]—*RENVIN v. WATKIN* (1731), Selwyn's N. P. 13th ed., 594.

Annotations:—Expld. Staniford v. Sinclair (1824), 2 Bing. 193. *Refd. Prescott v. Boucher* (1832), 3 B. & Ad. 849.

administration, cannot be justified.—*KEANE v. DEE* (1821), Alc. & N. 496, n. —IR.

k. — —.]—An administrator cannot distrain, before he obtains letters of administration for rent due to the intestate.—*DEJONCOURT v. ROGERS* (1846), 8 I. L. R. 450.—IR.

l. Committee of lunatic tenant for life—Lunatic dying before gale day.]—The committee of a lunatic tenant for life is not an assignee within 23 & 24 Geo. III, c. 46, ss. 1 & 2. If the lunatic

Sect. 4.—Who may distrain: Sub-sects. 8, 9, 10 & 11, A. & B.]

206. ———.]—MERITON *v.* GILBEE (1818), 8 Taunt. 159; 2 Moore, C. P. 48; 129 E. R. 344.

*Annotations:—*Apld. Martin *v.* Burton (1819), 3 Moore, C. P. 608. *Refd.* Staniford *v.* Sinclair (1824), 2 Bing. 193; Prescott *v.* Boucher (1832), 3 B. & Ad. 849.

207. ———.]—The exor. of a person who was seised in fee of land & demised it for a term of years, reserving a rent, cannot distrain for arrears of rent accrued in testator's lifetime; for the latter was not a tenant in fee simple of a rent, within the meaning of Rent Arrears (Recovery) Act, 1540 (c. 37).—PRESCOTT *v.* BOUCHER (1832), 3 B. & Ad. 849; 110 E. R. 312.

*Annotations:—*Fold. Jones *v.* Jones (1832), 3 B. & Ad. 967. *Refd.* Grant *v.* Ellis (1841), 9 M. & W. 113; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328; Howitt *v.* Harrington, [1893] 2 Ch. 497.

208. ———.]—JONES *v.* JONES (1832), 3 B. & Ad. 967; 110 E. R. 357.

209. ——— Length of tenant's term need not be stated.]—MERITON *v.* GILBEE (1818), 8 Taunt. 159; 2 Moore, C. P. 48; 129 E. R. 344.

*Annotations:—*Apld. Martin *v.* Burton (1819), 3 Moore, C. P. 608. *Mentd.* Staniford *v.* Sinclair (1824), 2 Bing. 193; Prescott *v.* Boucher (1832), 3 B. & Ad. 849.

210. Under Civil Procedure Act, 1833, c. 42.]—An action of replevin being brought against an extrix. who had distrained on the goods of a tenant, under sects. 37 & 38 of above Act, for rent accrued due to testator in his lifetime; the avowry set out the tenancy, & stated that the rent was due & in arrear to testator in his lifetime, & continued so in arrear till the time of his death, & from thence until the time, etc., & concluded with the averment that the distress was made within six calendar months, etc., & during the possession of pltf., not averring the possession of pltf. to be the same with that enjoyed by him under testator. The ct. directed the avowry to be amended.—COCKSHOTT *v.* TOMLINSON, BRADSHAW & TOMLINSON (1839), 3 Jur. 146; *subsequent proceedings* (1843), 1 L. T. O. S. 337.

SUB-SECT. 9.—RECEIVERS.

See, generally, RECEIVERS.

211. Appointed by High Court—Whether leave of court necessary—In name of trustees.]—SHELLY *v.* PELHAM (1747), Dick. 120; 21 E. R. 214.

212. ——— Doubt as to legal right to rent.]—A receiver appointed by this ct. has a power to distrain for rent, & need not apply for a particular order for that purpose, unless there be a doubt who had a legal right to the rent.—PITT *v.* SNOWDEN (1752), 3 Atk. 750; 26 E. R. 1230, L. C.

*Annotation:—*Mentd. Jones *v.* Collier (1773), Amb. 730.

213. ——— In name of person having legal estate.]—HUGHES *v.* HUGHES (1790), 3 Bro. C. C. 87; 1 Ves. 161; 29 E. R. 422.

*Annotation:—*Refd. Evans *v.* Matthias (1857), 29 L. T. O. S. 209.

214. ——— Rent in arrear for less than one year.]—Receiver may distrain without applying to the ct.

The register states that the practice is for a receiver to distrain upon his own discretion for rent in arrear within the year; but if in arrear

for more than a year, then an order is necessary (LEACH, V.-C.).—BRANDON *v.* BRANDON (1821), 5 Madd. 473; 56 E. R. 976.

215. ———.]—A receiver, appointed by the Ct. of Ch., has a right to distrain for rent, without any special authority from the ct. for that purpose.—BENNETT *v.* ROBINS (1832), 5 C. & P. 379.

*Annotation:—*Refd. Evans *v.* Matthias (1857), 29 L. T. O. S. 209.

216. ——— Without leave—Where tenant has attorned to receiver.]—RAINCOCK *v.* SIMPSON (1764), 1 Dick. 120, n.; 21 E. R. 214.

217. ——— Where receiver has granted lease in his own name.]—In replevin deft. made cognizance as bailiff of W. for rent in arrear from pltf. under a demise from W. On the production of the lease, under which pltf. held, W. was described as a receiver, appointed by the ct. of Ch., & the rent was made payable to him & any future receiver:—*Held*: W. was entitled to distrain for rent in arrear; & pltf. was estopped by his own deed from pleading *non tenuit*.—NANCY *v.* HASTINGS (1826), 4 Bing. 2; 12 Moore, C. P. 34; 130 E. R. 667; *sub nom.* DANSER *v.* HASTINGS, 5 L. J. O. S. C. P. 3.

*Annotations:—*Expld. Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224. *Refd.* Evans *v.* Matthias (1857), 29 L. T. O. S. 209; Morton *v.* Woods (1869), L. R. 4 Q. B. 293. *Mentd.* Pluck *v.* Digges (1831), 5 Bl. N. S. 31.

——— Receiver in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 956, 957, Nos. 7838, 7846.

218. ——— Sale under order of court—Rights of purchaser against outgoing tenant.]—A farm was sold under direction of the ct., subject to such tenant-right as the outgoing tenant should possess. The day for completion was Sept. 29, & the purchaser was on payment of his purchase-money to be let into possession as from that date, & to pay all outgoing after that date. The purchase-money was paid & the purchaser let into possession on Oct. 13, but no conveyance had been executed. The property was in the occupation of a tenant whose tenancy determined on Sept. 29. The rent which then became due not having been paid, the receiver, on Oct. 24, at the instance of the persons having the legal estate, distrained upon certain hay & straw produced during the last year of the tenancy. Under the tenancy agreement the tenant was bound to leave on the premises hay & straw remaining unconsumed, receiving an allowance therefor at the spending or consuming price; he was also bound to (*inter alia*) stack corn, grain, & hay, & for that purpose was to be allowed, so far as necessary, the use of the barns & yards until Mar. 25 following expiration of the tenancy. The purchaser moved to restrain the receiver from remaining in possession of or selling the hay & straw distrained:—*Held*: (1) the persons who had the legal estate had a right at law to distrain; (2) but in equity they must be regarded as trustees for purchaser, & could not be allowed to exercise their legal right in such a way as to prejudice the purchaser; (3) the injunction was granted.—*Re* POWERS, MANISTY *v.* ARCHDALE (1890), 63 L. T. 626; 39 W. R. 185.

219. Appointed by mortgagee — Determines mortgagors right to distrain—Conveyancing Act,

die before the gale day in the lease derived out of his life estate, & the committee enter to distrain for the arrears of the apportioned rent, the committee will be a trespasser.—PERSEE *v.* PERSEE (1831), Alc. & N.

A receiver under the Ct. of Ch. is entitled to demand a year's rent from the sheriff seizing in execution the goods of a tenant of the lands over which he is receiver, & he need not show a distraining order.—CRAWFORD & YOUNG *v.* HASSARD (1825), Sm. & Bat. 269.—IR.

was about to get into possession, the receiver on swearing that one half-year's rent was due, & that if he did not distrain, the rents would be lost, was allowed to distrain.—ANON. (1836), 1 Jo. Ex. Ir. 613.—IR.

*o. Power to authorise bailiff to distrain.]—*A receiver can authorise a bailiff to make a distress.—BIRCH *v.* OLDIS (1837), 1 Sau. & Sc. 146.—IR.

PART II. SECT. 4, SUB-SECT. 9.

m. Appointed by High Court—Whether distraining order necessary.]—

*n. By authority of court.]—*When the premises were sold & the purchaser

1881 (c. 41), ss. 19, 24.]—BAYLY *v.* WENT, No. 158, *ante*.

220. ———.]—WOOLSTON *v.* ROSS, No. 159, *ante*.

221. ——— Power in receiver or person authorised by him.]—WOOLSTON *v.* ROSS, No. 159, *ante*.

222. ——— After writ of *elegit*.]—JOHNS *v.* PINK, No. 229, *post*.

223. Effect of attornment of tenant to receiver.]—EVANS *v.* MATHIAS, No. 148, *ante*.

224. Under attornment clause.]—JOLLY *v.* ARBUTHNOT, No. 163, *ante*.

SUB-SECT. 10.—SEQUESTRATORS.

See Sequestration Act, 1849 (c. 67), s. 1.

SUB-SECT. 11.—TENANTS.

A. By *Elegit*.

225. May distrain without attornment—Or ejectment.]—(1) In replevin proof of payment of rent to the avowant is *prima facie* evidence that he is the owner of the land. But in a case where pltf. did not originally receive possession of the land from the avowant, it is competent to pltf. to rebut the title of the avowant by showing that he paid rent under circumstances which did not entitle the avowant to the rent. Such evidence may be given on the issue *non tenuit, modo et forma*.

(2) *Semble*: tenant in *elegit* may enter by virtue of the writ of *elegit* without ejectment.—ROGERS *v.* PITCHER (1815), 6 Taunt. 202; 1 Marsh. 541; 128 E. R. 1012.

Annotations:—As to (1) *Fold*. Gregory *v.* Doldge (1826), 3 Bing. 474. *Consd.* Cornish *v.* Searell (1828), 8 B. & C. 471. *Distd.* Cooper *v.* Blandy (1834), 1 Bing. N. C. 45; Allason *v.* Stark (1838), 1 Per. & Dav. 183. *Apud.* Doe d. Lord *v.* Crago (1848), 6 C. B. 90. *Refd.* Taylor *v.* Zamira (1816), 6 Taunt. 524; Doe d. Nepean *v.* Budden (1822), 1 Dow. & Ry. K. B. 243; Gravenor *v.* Woodhouse (1822), 1 Bing. 38; A.-G. *v.* Hotham (1823), Turn. & R. 209; Jew *v.* Wood (1841), Cr. & Ph. 185; Claridge *v.* M'Kenzie (1842), 4 Scott, N. R. 796; Carlton *v.* Bowcock (1884), 51 L. T. 659. As to (2) *Consd.* Harris *v.* Booker (1827), 5 L. J. O. S. C. P. 92.

226. ———.]—A tenant by *elegit* has a right to distrain without attornment.—LLOYD *v.* DAVIES (1848), 2 Exch. 103; 18 L. J. Ex. 80; 13 J. P. 182; 154 E. R. 423.

Annotation:—*Dbtd.* Geale *v.* Geale (1851), 18 L. T. O. S. 308.

227. Interest of tenant for life—Distress after death of tenant for life—For rent due during life of tenant for life—Rent Arrears (Recovery) Act, 1540 (c. 37).]—POOL *v.* NEEL (1657), 2 Sid. 62; 82 E. R. 1258.

228. Delivery by sheriff—Condition precedent to distress.]—Where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon:—*Held*: the execution creditor was not entitled to the rent.—SHARP *v.* KEY (1841), 8 M. & W. 379; 9 Dowl. 770; 10 L. J. Ex. 304; 151 E. R. 1086.

229. Nature of interest—Effect of appointment of receiver.]—C., who was lessee of land for a term of years mortgaged the same to pltfs. by way of subdemise, less the last three days of the term, & covenanted to pay the rent & perform the covenants in the lease. Deft., who was the owner of the demised property subject to C.'s term, recovered judgment against her in Q. B. Div. for two quarter's rent, & sued out a writ of *elegit* under which the sheriff, after inquisition delivered the property to him. After the inquisition pltfs. appointed a receiver under their mtge. Deft.

recovered nothing under his judgment & took no further steps under the *elegit*, but afterwards distrained on the property for a further half-year's rent. In an action to restrain the distress:—*Held*: (1) assuming deft. was by virtue of the *elegit* an assignee of C.'s term, he only took it for a limited purpose, & could not be treated as surety for her & bound to indemnify her against payment of rent; (2) the property was delivered to deft. not in respect of the mere reversion expectant on the determination of the sub-demise, but to the extent of C.'s interest as mtgor. in possession; that interest was determined by the appointment of the receiver, & consequently the title of deft. as tenant by *elegit* had either been extinguished or suspended, & deft. was entitled to distrain. It is the duty of the sheriff, after executing a writ of *elegit* to have the writ & inquisition filed in the central office. It is not sufficient, though it has been common, to deliver such documents to pltf.'s solr.—JOHNS *v.* PINK, [1900] 1 Ch. 296; 69 L. J. Ch. 98; 81 L. T. 712; 48 W. R. 247; 16 T. L. R. 70.

B. In Common.

230. Entitled to distrain separately—For his own share—Even if whole rent paid to one—After notice not to pay.]—A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; & if he do, the other tenant in common may distrain for his share.—HARRISON *v.* BARNBY (1793), 5 Term Rep. 246; 101 E. R. 138.

Annotations:—*Refd.* Powis *v.* Smith (1822), 1 Dow. & Ry. K. B. 490; Whitley *v.* Roberts (1825), M'Cle. & Yo. 107. *Mentd.* Cobb *v.* Bryan (1803), 3 Bos. & P. 348; Foley *v.* Addenbrooke (1843), 4 Q. B. 197.

231. ———.]—WHITLEY *v.* ROBERTS, No. 629, *post*.

232. ——— Rentcharge.]—(1) A rentcharge may be divided by will, or by deed operating under Statute of Uses, 1535 (c. 10), so as to make the tenant liable, without attornment, to several distresses by the devisees or *cestuis que use*: (2) *Semble*: since 4 Ann. c. 16, s. 9, a rentcharge may be so divided by a conveyance of any kind.—RIVIS *v.* WATSON (1839), 5 M. & W. 255; 9 L. J. Ex. 67; 151 E. R. 109.

Annotations:—As to (1) *Expd. & Distd.* Owens *v.* Wynne (1855), 4 E. & B. 579. *Refd.* White *v.* Greenish (1861), 11 C. B. N. S. 209. As to (2) *Refd.* White *v.* Greenish (1861), 11 C. B. N. S. 209. *Generally, Mentd.* West *v.* Robson (1857), K. & G. 141; Johnson *v.* Barnes (1872), L. R. 7 C. P. 592.

233. ———.]—An estate was settled, & by the deed an estate for life was created, with power of leasing, with a remainder in tail, which had become vested in defts. During the estate for life, with power of leasing, the power was executed by granting a lease for lives, under which pltf. entered, & became tenant, subject to the rent therein reserved; defts. having the rights of landlords in respect of such lease, by reason of the remainder in tail being vested in them. A term of 1,000 years had been created previous to the date of the settlement; & as to one moiety, the term merged in defts., the other moiety outstanding in some one unknown. Then there was an assignment of this term to C., to secure a sum of money advanced by way of mtge. Upon defts. coming into possession of the estate, pltf. paid rent. R. & D. acting as defts.' attorneys, sent to pltf. a written representation that the legal estate was in C., directing pltf., as tenant, to pay the rent to that person. On the faith of such representation pltf. suffered judgment to C. for a portion of the rent, defts. afterwards distrained for rent;

Sect. 4.—Who may distrain: Sub-sect. 11, B., C. & D. Sect. 5: Sub-sect. 1.]

—*Held*: defts. had a right so to do, as the term of 1,000 years had merged, as to one moiety, in them, & the representation made by R. & D., but unauthorised by defts., did not estop them from recovering that portion of rent which pltf. had not paid, or become liable for under the judgment, in consequence of that representation.

Qu.: Whether the representation by R. & D. was binding on defts. as an estoppel, they being married women & consequently incapable of appointing attorneys.

It is conceded that if defts. have the legal title to the reversion, though they in fact distrained for the whole rent, yet, if they are entitled to any part of it, they are entitled to judgment & a return, the rent being apportionable. Upon the statement in the case it is clear that as to a moiety defts. had the legal estate & consequently a right to distrain (ERLE, C.J.).—WHITE v. GREENISH (1861), 11 C. B. N. S. 209; 8 Jur. N. S. 563; 142 E. R. 776; *sub nom.* GREENISH v. WHITE, 31 L. J. C. P. 93.

Annotation:—*Mentd.* Bateman v. Faber, [1898] 1 Ch. 144.

234. May distrain upon another.]—One tenant in common may distrain upon another.—SNELGAR v. HENSTON (1621), Cro. Jac. 611; 79 E. R. 522.

C. Joint, etc.

235. One may distrain for the whole rent due—Without authority from others—Must plead his own right & as bailiff for others.]—A joint tenant, without any authority from his companion, may distrain for the whole rent; but he must particularly avow in his own right, & as bailiff of the other (*per CUR.*).—ANON. (1695), 12 Mod. Rep. 77; 88 E. R. 1176.

236. ———.]—One joint tenant may distrain for the whole rent; but when he avows, it must be for part in his own right, & make *conusance* as bailiff for the rest (*per CUR.*).—ANON. (1696), 12 Mod. Rep. 96; 88 E. R. 1189.

237. ———.]—One joint tenant may distrain but cannot avow alone.—PULLEN v. PALMER (1696), Carth. 328; 2 Lut. 1211, n.; 5 Mod. Rep. 71, 150; 3 Salk. 207; 90 E. R. 792. *Annotations*:—*Consd.* Leigh v. Shepherd (1821), 2 Brod. & Bing. 465. *Refd.* Gravenor v. Woodhouse (1824), 9 Moore, C. P. 148; Robinson v. Hoffman (1827), 3 C. & P.

238. Husband & wife.]—An avowry by a husband alone for rent due to him & his wife is good, if it appear upon the record that he was entitled to make the distress.—WISE v. BELLENT (1617), Cro. Jac. 442; 79 E. R. 378.

Annotations:—*Apprvd.* Osborne v. Walleeden (1670), 1 Mod. Rep. 272. *Apld.* Gravenor v. Woodhouse (1824), 2 Bing. 71. *Refd.* Holmes v. Hennegan (1856), 28 L. T. O. S. 25.

239. ——— Co-heirs in gavelkind.]—An avowry by one of several co-heirs in gavelkind in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs. One of several co-heirs in gavelkind may distrain for rent due to him & his companions without an actual authority from his companions.—LEIGH v. SHEPHERD (1821), 2 Brod. & Bing. 465; 5 Moore, C. P. 297; 129 E. R. 1046.

Annotations:—*Apprvd.* Robinson v. Hofman (1828), 4 Bing. 562. *Mentd.* Hogarth v. Jennings, [1892] 1 Q. B. 907.

PART II. SECT. 5, SUB-SECT. 1.

p. Money.—REEVES v. (1871), 2 V. R. (Law) 187. —AUS.

q. Vessel attached to wharf.—Where a wharf has been leased, "with

all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent, not being on the premises demised.—SANDERSON v. KINGSTON MARINE RY. Co. (1846), 3 U. C. R.

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r. Goods absolute property of distrainer—By agreement before distress.—Where a person distrained, as landlord, on goods which as a matter of

240. ——— Through a bailiff.]—One joint tenant may without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint tenants.—ROBINSON v. HOFMAN (1828), 4 Bing. 562; 3 C. & P. 234; 1 Moo. & P. 474; 6 L. J. O. S. C. P. 113; 130 E. R. 885.

241. One may distrain on another.]—One of two joint tenants may demise his part to the other with the usual incidents of a reversion & right to distrain. Therefore where one of three co-exors. to whom land was devised in trust agreed with the others to pay a rent for it & entered into possession & paid rent:—*Held*: the two might distrain for rent in arrear.—COWPER v. FLETCHER (1865), 6 B. & S. 464; 6 New Rep. 145; 34 L. J. Q. B. 187; 12 L. T. 420; 29 J. P. 423; 11 Jur. N. S. 780; 13 W. R. 739; 122 E. R. 1267.

Annotations:—*Refd.* *Re* Potter, *Ex p.* Park (1874), De Colyar's County Court Cases, 235; Leigh v. Dickeson (1883), 12 Q. B. D. 194.

D. Pur autre vie and for Years.

242. Tenant pur autre vie—Distress at death of cestui que vie—32 Hen. 8, c. 37.]—A. an owner in fee granted a rent to B. & his heirs for the life of C. B. by will devised to D. The rent was in arrear. C. died, D. distrained:—*Held*: by above Act one who has a rent *pur autre vie* can after the death of the *cestui que vie* distrain for rent incurred during the life of the *cestui que vie*, if the land is in possession of a person who was chargeable with the rent during the life of the *cestui que vie*.—GAWEN v. RAUTES (1600), Moore, K. B. 625; 72 E. R. 800.

243. ———.]—EDRICH'S CASE (1604), 5 Co. Rep. 118 a; 77 E. R. 238.

Annotations:—*Refd.* Bingham & Parkhurst's Case (1628), Litt. 93; Hool v. Bell (1697), 1 Ld. Raym. 172. *Mentd.* Lovies's Case (1614), 10 Co. Rep. 78 a; Lanyon v. Carne (1670), 2 Wms. Saund. 161.

244. Tenant for years—Not after own term expired.]—(1) A termor, who lets to an undertenant cannot, after his term has expired, enforce the continuance of the undertenancy by distress, if the undertenant refuses to acknowledge him as landlord, or pays him under threat of distress; although the undertenant still retains the possession.

(2) *Semble*: a tenant whose undertenant retains the possession after the term is not liable for mesne profits (MANSFIELD, C.J.).—BURNE v. RICHARDSON (1813), 4 Taunt. 720; 128 E. R. 513.

Annotations:—*As to* (2) *Refd.* Doe v. Harlow (1840), 12 Ad. & El. 40; Levi v. Lewis (1859), 6 C. B. N. S. 766.

245. ——— Subletting—Reversioner.]—CURTIS v. WHEELER, No. 84, *ante*.

246. ———.]—COLLINS v. OZANNE, No. 85, *ante*.

SECT. 5.—WHAT MAY OR MAY NOT BE DISTRAINED.

SUB-SECT. 1.—IN GENERAL.

247. General rule.]—(1) Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises; but if they be not in actual use, & if there be no other sufficient distress on the premises, then they may be distrained for rent.

(2) There are five sorts of things which at

common law were not distrainable: (a) Things annexed to the freehold; (b) things delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of his trade or employ; (c) cocks or sheaves of corn; (d) beasts of the plough & instruments of husbandry; (e) the instruments of a man's trade or profession. The three first sorts were absolutely free from distress, & could not be distrained, even though there were no other goods besides. The two last are only exempt *sub modo*, that is upon a supposition that there is sufficient distress besides.

(3) Things annexed to the freehold as furnaces, millstones, chimney-pieces & the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

(4) Things sent or delivered to a person exercising a trade, to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade & commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

(5) Cocks & sheaves of corn were not distrainable before 2 Will. & Mar., c. 5, which was made in favour of landlords, because they could not be restored again in the same plight & condition that they were before upon a replevin, but must necessarily be damaged by being removed.

(6) Beasts of the plough, etc., were not distrainable, in favour of husbandry, which is of so great advantage to the nation, & likewise because a man should not be left quite destitute of getting a living for himself & his family. The same reasons hold in the case of the instruments of a man's trade or profession. These last two are privileged in case there is distress enough besides; otherwise they may be distrained.

(7) For these reasons, the stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, is not distrainable for rent, even though there was no other distress on the premises (*per* CUR.).—SIMPSON v. HARTOPP (1744), Willes, 512; 125 E. R. 1295.

Annotations:—As to (1) Folld. Gorton v. Falkner (1792), 4 Term Rep. 565. *Apld.* Fenton v. Logan (1833), 2 L. J. C. P. 102. *As to (2) Apld.* Muspratt v. Gregory (1838), 3 M. & W. 677; Gibson v. Ireson (1842), 3 Q. B. 39; Parsons v. Gingell (1847), 4 C. B. 545; Swire v. Leach (1865), 18 C. B. N. S. 479; Edwards v. Fox (1896), 60 J. P. Jo. 404; Challoner v. Robinson, [1908] 1 Ch. 49. *Refd.* Adams v. Grane (1833), 1 Cr. & M. 380; Von Knoop v. Moss & Jameson (1891), 7 T. L. R. 500. *As to (3) Apld.* Darby v. Harris (1841), 10 L. J. Q. B. 294. *Refd.* Walmesley v. Milne (1859), 7 C. B. N. S. 115. *As to (4) Apld.* Gilman v. Elton (1821), 3 Brod. & Bing. 75. *Consd.* Wood v. Clarke (1831), 1 Cr. & J. 484. *Apld.* Brown v. Shevill (1834), 2 Ad. & El. 138; Clarke v. Millwall Dock Co. (1886), 17 Q. B. D. 494. *As to (5) Apld.* Morley v. Pincombe (1848), 2 Exch. 101. *As to (6) Apld.* Lavell v. Richings, [1906] 1 K. B. 480.

248. —.]—(1) Implements of trade may be distrained for rent, if they be not in actual use at the time, & if there be no other sufficient distress on the premises.

(2) Whether goods be the property of the tenant or a stranger is perfectly immaterial, provided they be on the premises, & be not privileged by law from a distress (BULLER, J.).—GORTON v.

FALKNER (1792), 4 Term Rep. 565; 100 E. R. 1178.

Annotations:—As to (1) Folld. Fenton v. Logan (1833), 9 Bing. 676. *Refd.* Wood v. Clarke (1831), 1 Cr. & J. 484; Gibson v. Ireson (1842), 3 Q. B. 39; Nargatt v. Nias (1859), 5 Jur. N. S. 198. *As to (2) Refd.* Gilman v. Elton (1821), 3 Brod. & Bing. 75.

249. —.]—(1) Goods of a principal, in the hands of a factor, for sale, are privileged from distress for rent due from such factor to his landlord on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain, & therefore that such goods are protected for the benefit of trade.

(2) Whatever is found upon the premises is *prima facie* taken as belonging to the tenant; the rule grows out of the relation of landlord & tenant, & out of the nature of the thing itself (DALLAS, C.J.).—GILMAN v. ELTON (1821), 3 Brod. & Bing. 75; 6 Moore, C. P. 243; 129 E. R. 1211.

Annotations:—As to (1) Apld. Thompson v. Mashiter (1823), 1 Bing. 283. *Folld.* Adams v. Grane (1833), 1 Cr. & M. 380. *Refd.* Wood v. Clarke (1831), 1 Cr. & J. 484; Brown v. Shevill (1834), 2 Ad. & El. 138; Farrant v. Robson (1834), 3 L. J. C. P. 146; Muspratt v. Gregory (1836), 1 M. & W. 633; Parsons v. Gingell, Lewis v. Gingell (1847), 16 L. J. C. P. 227.

250. —.]—As a general rule, subject to exceptions, all goods & chattels are liable for rent of the premises whereon they are, & if the owner of goods or chattels contends that his case is within one of the exceptions, he must in replevin show the special matter by his pleading. Where, to an avowry for rent in arrear, the owner pleaded that the cattle had not been *levant et couchant* on the premises:—*Held*: to be ill, because it might be that they were on the premises either through his own neglect or with his consent. Either of those circumstances would have rendered them liable, & he, therefore, should have negatived them both.—JONES v. POWELL (1826), 5 B. & C. 647; 8 Dow. & Ry. K. B. 416; 4 L. J. O. S. K. B. 281; 108 E. R. 241.

251. —.]—(1) Salt was manufactured & publicly sold at certain salt works, & carried away in boats of the purchasers, which came for the purpose of being loaded with it into a canal on the premises, communicating with a public navigation. The boat of pltf., an alkali manufacturer, was lying in this canal for the purpose of carrying away salt bought by him for the purposes of his manufacture. On error:—*Held*: the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, & granted by the manufacturer of the salt.

(2) Goods of a stranger on the land may be distrained for a rentcharge issuing out of it.

(3) The rule is admitted to be general, that all movable chattels found upon the land chargeable with a distress, are *prima facie* liable to be distrained. To this rule certain exceptions have been established, some for the benefit of trade or husbandry, & some for the preservation of the peace (DENMAN, C.J.).—MUSPRATT v. GREGORY (1838), 3 M. & W. 677; 1 Horn. & H. 184; 7 L. J. Ex. 385; 150 E. R. 1316, Ex. Ch.

Annotations:—As to (1) Folld. Joule v. Jackson (1841), 7 M. & W. 450. *Consd.* Re Russell, *Ex p.* Russell (1870), 18 W. R. 753; Clarke v. Millwall Dock Co. (1886), 17 Q. B. D. 494. *Refd.* Parsons v. Gingell (1847), 4 C. B. 545; Williams v. Holmes (1853), 8 Exch. 861; Lyons v. Elliott (1876), 45 L. J. Q. B. 159.

fact had, by subsequent agreement between himself & the tenant, but before the distress, become his absolutely:—*Held*: he might justify the taking on this latter ground.—BELL v. IRISH (1880), 45 U. C. R. 167.—CAN.

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s. *Chattel mortgage.*—A "tenant" within sect. 4 of C. O. 1898, c. 34, is the person who for the time being holds the premises & a chattel mtge. given by a person who does not become a tenant until after the execution of the

mtge. is not "from the tenant" within that sect., & the goods are exempt from seizure for rent.—ABBOTT v. DAHLE, [1917] 1 W. W. R. 1393; 33 D. L. R. 207; 10 Alta. L. R. 460.—CAN.

Sect. 5.—What may or may not be distrained: Subsects. 1, 2, 3 & 4, A. & B.]

252. ——W. occupied lodgings in deft.'s house at a weekly rent. He brought a piano with him, which he had hired of pltf's. Pltf's sent two men to fetch away the piano. Deft.'s wife met the men in the passage of the house outside the room in which the piano was, & having been informed of their object, said in the presence of W., who was at the door of the room, the piano should not leave the house unless what was owing from W. for rent & board was paid. The wife was acting by deft.'s authority, & there was rent due from W. Pltf's having brought an action for the conversion of the piano, deft. justified the detention as a distress:—*Held*: (1) there might be a distress without actual seizure; & (2) what had occurred amounted to a distress.

At common law a landlord could seize any chattels on the demised premises, but could only detain them till the rent was paid; &, although he had the right to seize the goods of a stranger, practically there was no hardship, as the landlord was bound to give up the goods on tender of the rent. But the legislature intervened, & gave the landlord a power to sell, after certain formalities; & the consequence is, whether it was intended or not, inasmuch as the landlord is empowered to sell any goods which he may seize, he may also sell the stranger's goods. This, no doubt, is a great hardship, but such is the law (*BLACKBURN, J.*).—*CRAMER v. MOTT* (1870), L. R. 5 Q. B. 357; 39 L. J. Q. B. 172; 22 L. T. 857; 35 J. P. 118; 18 W. R. 947.

Annotations:—As to (2) Refd. Werth v. London & Westminster Loan Co. (1889), 5 T. L. R. 320. Generally, Refd. Threlfall v. Borwick (1872), 26 L. T. 794; Central Printing Works v. Walker & Nicholson (1907), 24 T. L. R. 88.

253. ——(1) The privilege from distress of goods delivered to an auctioneer for sale is confined to goods on the premises of the auctioneer, & does not extend to goods sold on the premises of the owner of the goods. A sale by auction of V.'s goods on the premises of V. having been advertised, pltf. delivered some plate to the auctioneer to be sold along with V.'s goods. The auctioneer placed the plate on V.'s premises, where it was distrained during the auction by the landlord for rent in arrear:—*Held*: the plate was not privileged, & the distress was valid.

(2) No doubt the general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord & held as a distress till the rent was paid or the service performed. . . . The ground of privilege is public policy for the benefit of trade, & the privilege is given to the person carrying on the trade, that is, where goods are entrusted to a person in order that he may exercise his trade upon them, they should be privileged from distress at the suit of the landlord of the premises where the trade is exercised (*BLACKBURN, J.*).

(3) The case of goods in the hands of a carrier, or of goods going to market, is exceptional; the carrier or person taking the goods to market must rest somewhere; in such cases the goods are privileged, though in a private house, not the person's own; it is very similar to the privilege attaching to goods of a traveller at an inn. The principle is that when a person occupies certain premises & carries on a public trade there, goods which are brought to those premises for the purposes of that trade are privileged. But when the person exercises the trade not on his own premises,

are the goods on those premises privileged? I think not (*BLACKBURN, J.*).

(4) The law for the benefit of trade makes certain exceptions. Thus, implements of trade are not distrainable if there is other sufficient distress upon the premises (*LUSH, J.*).—*LYONS v. ELLIOTT* (1876), 1 Q. B. D. 210; 45 L. J. Q. B. 159; 33 L. T. 806; 40 J. P. 263; 24 W. R. 296.

Annotation:—As to (2) Refd. British Mutoscope & Biograph Co. v. Homer, [1901] 1 Ch. 671.

254. Tenants in common—Joint property—Separate attainments.]—*Re POTTER, Ex p. PARKE*, No. 57, ante.

255. Not chose in action—Patent rights.]—(1) The right which the owner of a patented chattel has under his letters patent of making & using the patented chattel & licensing others to use the same is a right of an incorporeal nature. It is a chose in action, at any rate not in possession, distinct from the right of property in the chattel itself, & incapable of seizure under a distress for rent.

(2) The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land & he distrains by taking possession, in the nature of a pledge, of goods & chattels found upon such land. . . . In distraining, therefore, the landlord looks to the land demised & to the goods & chattels found thereon. If the demise be of an incorporeal hereditament no entry can be made on it & no goods & chattels can be found on it; & in like manner, if the goods & chattels be of an incorporeal nature, they can have no local position upon the land demised & are incapable of seizure into the possession of the landlord. It is essential to a distress that the property distrained should be capable of physical possession (*FARWELL, J.*).—*BRITISH MUTOSCOPE & BIOGRAPH CO., LTD. v. HOMER*, [1901] 1 Ch. 671; 70 L. J. Ch. 279; 84 L. T. 26; 49 W. R. 277; 17 T. L. R. 213; 18 R. P. C. 177.

Annotations:—As to (1) Refd. Edwards v. Picard, [1909] 2 K. B. 903. Generally, Mentd. National Phonograph Co. of Australia v. Menck, [1911] A. C. 336; Barker v. Stickney, [1918] 2 K. B. 356.

256. Goods left on premises by assignor—Agreement to assign lease.]—Under an agreement to assign a lease, deft. agreed to pay the rent & taxes to become due in respect of the premises after a certain day, & to indemnify pltf. against the rent & covenants contained in the lease, & from all loss which he might incur by the non-payment or non-observance of such rent or covenants. No legal assignment was made, but deft. was let into possession, & certain of pltf.'s goods which had been left upon the premises were distrained for the rent & taxes. In an action upon the agreement for not indemnifying, the declaration alleged, that divers goods or chattels of pltf. were in & upon the demised premises with the leave & licence of deft., & were liable to be seized & taken, etc., & afterwards divers of the goods were lawfully seized & taken as distresses for arrears of rent due under the indenture in respect of the demised premises, & sold, etc. Deft. pleaded that no goods or chattels of pltf. were at any time in & upon the demised premises with the leave & licence of deft., nor was any part of such goods lawfully seized or taken for a distress, or sold or disposed of as therein alleged:—*Held*: the statement relating to the leave & licence was immaterial, & the substance of the plea was, that pltf.'s goods had not been seized, & as the facts involved in the issue raised thereon had been found for pltf., the verdict upon such issue should

have been entered for him.—*GROOM v. BLUCK* (1841), 2 Man. & G. 567; Drinkwater, 103; 2 Scott, N. R. 665; 10 L. J. C. P. 105; 5 Jur. 532; 133 E. R. 873.

SUB-SECT. 2.—GOODS RETURNABLE IN SAME CONDITION.

257. General rule.]—(1) Fixtures, as kitchen ranges, stoves, coppers, & grates, which a tenant may sever from the freehold & take away during his term are not distrainable for rent.

(2) Those things only can be distrained for rent which the landlord could afterwards restore in the plight in which they were before the distress.

(3) Fixtures at common law could not be replevied (*PATTESON, J.*).—*DARBY v. HARRIS* (1841), 1 Q. B. 895; 1 Gal. & Dav. 234; 10 L. J. Q. B. 294; 113 E. R. 1374; *sub nom. DANBY v. HARRIS*, 5 Jur. 988.

Annotations:—As to (1) *Folld. Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 344. *Reid. Crossley v. Lee*, [1908] 1 K. B. 86. Generally, *Mentd. Walmsley v. Milne* (1859), 7 C. B. N. S. 115.

258. Corn in sheaves.]—(1) By the common law corn in sheaves could not be distrained for rent.

(2) Nothing is to be distrained but what may be known & returned in the same condition as when taken, & therefore, a replevin will not lie of money out of a bag or chest (*per CUR.*).—*WILSON v. DUCKET* (1675), 2 Mod. Rep. 61; 1 Freem. K. B. 202; 86 E. R. 941.

259. Money.]—*WILSON v. DUCKET*, No. 258, *ante*.

260. Flesh of slaughtered animal.]—Commodities which cannot be restored upon a replevin in the same plight & condition as that in which they were taken, are not distrainable for rent at common law, & therefore, the flesh of animals lately slaughtered cannot be distrained.—*MORLEY v. PINCOMBE* (1848), 2 Exch. 101; 18 L. J. Ex. 272; 10 L. T. O. S. 396; 154 E. R. 423.

SUB-SECT. 3.—CONSTITUTIONAL PRIVILEGE.

261. No distress levied on land of Crown.]—*ANON.* (1459), Jenk. 112; 145 E. R. 78.

262. Crown property—On land demised.]—The chattels of the Crown on land occupied by a subject are privileged from distress for rent.—*SECRETARY OF STATE FOR WAR v. WYNNE*, [1905] 2 K. B. 845; 75 L. J. K. B. 25; 93 L. T. 797; 54 W. R. 235; 22 T. L. R. 8; 50 Sol. Jo. 13, D. C.

Goods in Royal Palaces.]—See CONSTITUTIONAL LAW, Vol. XI., p. 520, Nos. 245–250.

Goods of ambassadors & their servants.]—See CONSTITUTIONAL LAW, Vol. XI., p. 539, Nos. 420, 421.

Goods in custody of law.]—See Sect. 12, *post*.

SUB-SECT. 4.—TRADE PRIVILEGE.

A. In General.

263. General rule—Exemption on ground of

PART II. SECT. 5, SUB-SECT. 3.

261 i. No distress levied on land of Crown.]—Lands in the possession of the Crown are not liable to be distrained upon.—*GIBBONS v. MORAN* (1838), 6 Ir. L. Rec. N. S. 141.—*IR.*

262 i. Crown property—On land demised.]—The property of the Crown is not subject to distress for rent in arrears due to the landlord of the premises on which the property is found.—*R. v. TUCKER* (1864), 1

W. W. & A. B. 193.—*AUS.*

t. Militia horses.]—A person serving with or attached to a militia cavalry troop as quartermaster is an officer thereof, & his horse protected from distress under 18 Vict. c. 77, s. 31.—*DAVEY v. CARTWRIGHT* (1869), 20 C. P. 1.—*CAN.*

PART II. SECT. 5, SUB-SECT. 4.—A.

263 i. General rule—Exemption on ground of public policy—For benefit of

public policy—For benefit of trade.]—*SIMPSON v. HARTOPP*, No. 247, *ante*.

264. ———.]—*GILMAN v. ELTON*, No. 249, *ante*.

—————.]—*LYONS v. ELLIOTT*, No. 253, *ante*.

266. Privilege not extended.]—*MUSPRATT v. GREGORY*, No. 251, *ante*.

267. ———.]—*CHALLONER v. ROBINSON*, No. 273, *post*.

268. Necessity for delivery—Actual, formal or constructive—By person having right to immediate possession—Ships being built.]—Goods belonging to a third party which are on the premises of a person exercising a public trade for the purpose of being dealt with in the way of such trade, are not exempt from distress for rent, unless they have been sent or delivered to the trader.

A shipbuilder contracted to build a ship on premises which he held as tenant to debts; the ship was to be paid for by instalments at certain stages of the work. After the ship had been partly paid for, it was seized by debts as a distress for rent due from the builder. The person for whom the ship was being built paid the rent under protest, & sued to recover the amount:—*Held*: assuming the property in the ship to have passed to pltf. under the contract, still the ship, not having been sent or delivered to the builder, was liable to distress, & pltf. was not entitled to recover.

In order that “things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ,” may be exempt from distress at common law, it is essential that there should be a delivery of the possession of the things, by a person having a right to the immediate possession of them, to the person on whose premises they are at the time of the distress. *Semble*: delivery need not be actual or formal; a constructive delivery will be sufficient.—*CLARKE v. MILLWALL DOCK CO.* (1886), 17 Q. B. D. 494; 55 L. J. Q. B. 378; 54 L. T. 814; 51 J. P. 5; 34 W. R. 698; 2 T. L. R. 669, C. A.

Annotation:—Consd. Challoner v. Robinson, [1908] 1 Ch. 49.

269. Pleading privilege.]—In replevin, debt avowed for rent in arrears, as landlord of the granary or warehouse in which the goods on which he levied the distress were found. In his plea in bar to the avowry, pltf. alleged that the goods in question were deposited in the granary or warehouse with W., the keeper or proprietor of the premises, which were then a public granary or warehouse, to be safely kept for the purposes of trade. On special demurrer, upon the ground that goods merely deposited with the keeper or proprietor of a public warehouse or granary, unless he exercised a public trade, & received them for the purposes of that trade, were not privileged from distress for rent:—*Held*: leave to amend should be granted.—*FARRANT v. ROBSON* (1834). 3 L. J. C. P. 146.

B. Public Trades.

270. Necessity for trade to be public.]—Materials in the house of a manufacturer, for the purpose of

trade.]—The exemption from distress of goods intrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade.—*PATERSON v. THOMPSON* (1881), 46 U. C. R. 7; 9 A. R. 326.—*CAN.*

PART II. SECT. 5, SUB-SECT. 4.—B.

a. What are public trades—Mill owner.]—Logs delivered to a mill

Sect. 5.—What may or may not be distrained: Subsect. 4, B. & C.]

his trade, are not distrainable by his landlord for rent. Where, in trover for silk, deft. justified taking it on the premises of C. as a distress for rent due from C., & pltf. replied that, before & at the time, etc., he carried on the business of a silk manufacturer, & C. carried on the business of a silk weaver on the premises, & that pltf., shortly before, etc., "did, in the way of his trade & business, employ C. in the way of his business & calling as his workman, for certain wages in that behalf, to weave & manufacture into velvet" on the premises "certain silk of pltf.," which silk, the subject of the action, being on the premises for that purpose, was wrongfully distrained. On demurrer:—*Held*: (1) the silk was sufficiently shown to have been on C.'s premises for the purpose of C.'s trade, & therefore, exempt from distress; (2) the words "as his workman for certain wages," taken with the context, did not imply that C. had the silk only as pltf.'s servant, & for the purposes of pltf.'s trade; (3) *Qu.*: whether it be necessary to the exemption of goods held for the purposes of trade that the trade be "public," & if so, what constitutes a "public trade."—*GIBSON v. IRESON* (1842), 3 Q. B. 39; 114 E. R. 422.

271. What are public trades—Agent—Agency for two firms only.]—Where an agent under an agreement with a firm of carpet manufacturers, took premises & put his principal's name outside as well as his own, & was entitled to carry on other agency business, but was in fact agent for only one other firm:—*Held*: the agent was not carrying on a public trade so as to exempt his principal's goods on his premises from distress.—*TAPLING & Co. v. WESTON* (1883), 1 Cab. & El. 99.

272. ——— Sale of pictures on commission —By restaurant keeper.]—*EDWARDS v. FOX & SON* (1896), 60 J. P. Jo. 404, C. A.

273. ——— By club proprietor.]—Pltf. was the proprietor of the United Arts Club. He was tenant from year to year of the club premises as underlessee, & he undertook all the liabilities of the club & received all the profits. One of the objects of the club was to hold exhibitions of pictures sent in by members of the club, mostly for sale on commission, pltf. receiving a commission of 10 per cent as his profit. The club was managed by a committee, of which pltf. was a member, & the exhibitions were managed by a picture committee. Only members or associates of the club, could send pictures, & the exhibitions were not open to the public on payment, but to persons introduced by members or invited. Defts., as superior landlords, had put in a distress for rent due from the lessee, & had seized certain pictures then on the club premises, the property of members which had been sent in for exhibition & sale. In an action by pltf. to restrain deft. from proceeding with the distress. At the trial the judge held that the pictures were liable to distress unless "ptf. could bring his case" within the exceptions laid down in *Simpson v. Hartopp*, No. 247, *ante*, as "things delivered to a person exercising a public trade to be . . . managed in the way of his trade or employ."

On appeal:—*Held*: the pictures were liable to distress, & it was not necessary on the facts to consider the meaning of the words "public trade"

owner in the way of his trade to be sawn into deals, for remuneration, are privileged from distress for rent.—*GUY v. RANKIN* (1883), 23 N. B. R. 49.—*CAN.*

b. ———.]—Saw logs were taken

to a saw mill by pltf. to be converted into lumber in the due course of business of the mill, & were distrained there for rent by deft.:—*Held*: the business of sawing lumber for hire is a trade in which is exempted from

but the word "managed" must be taken to include, if not to be equivalent to, "disposed of"; the pictures were not delivered to pltf., but to the picture committee, & even if they were delivered to pltf., they were not delivered to him "to be managed in the way of his trade" which was that of a club proprietor, & not that of a picture dealer; pltf. could not be said to "manage" the pictures, which, according to the rules of the club, were under the management of the committee. On these grounds, therefore, pltf.'s action failed, & the appeal must be dismissed.

The words used by WILLES, C.J., in *Simpson v. Hartopp*, No. 247, *ante*, must be taken to define & limit precisely the things privileged from distress, & the ct. cannot go beyond the terms in which that privilege is defined.—*CHALLONER v. ROBINSON*, [1908] 1 Ch. 49; 77 L. J. Ch. 72; 98 L. T. 222; 71 J. P. 553; 24 T. L. R. 38; 52 Sol. Jo. 28, C. A.

274. ——— Artist—Touching up pict' —It is said that this picture was privilege, having been sent to be worked up, & that it came within the rule in the well-known case of *Simpson v. Hartopp*, No. 247, *ante*. I am, however, clear that an artist is no more a public trader within the meaning of the rule than barristers, poets, or dramatists (MATHEW, J.).—*VON KNOOP v. MOSS & JAMESON* (1891), 7 T. L. R. 500.

275. ——— Barristers.]—*VON KNOOP v. MOSS & JAMESON*, No. 274, *ante*.

276. ——— Butcher.]—All goods sent to a tradesman for the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress, as, the carcass of a beast in the custody of a butcher sent to him for the purpose of being slaughtered for the sender, although the sender be also a butcher.

It is said that the trade of a butcher is not a public one. I know none more public, or the carrying on of which is more convenient or necessary. It is as much so as a trade in corn. . . . It is also said that the article . . . was not brought to be wrought or managed in the way of the trade. But the beast was taken to a butcher to be slaughtered, & a butcher's business is to slaughter beasts as well as to cut them up & sell them to the public (TAUNTON, J.).—*BROWN v. SHEVILL* (1834), 2 Ad. & El. 138; 4 Nev. & M. K. B. 277; 4 L. J. K. B. 50; 111 E. R. 54.

Annotations:—*Apld.* *Gibson v. Ireson* (1842), 3 Q. B. 39; *Swire v. Leach* (1865), 18 C. B. N. S. 479. *Refd.* *Muspratt v. Gregory* (1836), 2 Gale, 158; *Parsons v. Gingell, Lewis v. Gingell* (1847), 16 L. J. C. P. 227.

277. ——— Common carrier.]—H., undertaking to carry goods of all persons indifferently for hire, is a common carrier, & the goods are privileged.—*GISBOURN v. HURST* (1710), 1 Salk. 249; 91 E. R. 220.

Annotations:—*Apld.* *Thompson v. Mashiter* (1823), 1 Bing. 283. *Consd.* *Brown v. Shevill* (1834), 2 Ad. & El. 138. *Refd.* *Gilman v. Elton* (1821), 3 Brod. & Bing. 75; *Matthias v. Mesnard* (1826), 2 C. & P. 353; *Wood v. Clarke* (1831), 1 Cr. & J. 484; *Adams v. Grano* (1833), 1 Cr. & M. 380; *Muspratt v. Gregory* (1836), 1 M. & W. 633; *Joule v. Jackson* (1841), 7 M. & W. 450; *Clarke v. Millwall Dock Co.* (1886), 17 Q. B. D. 494. *Mentd.* *Watkins v. Cottell* (1915), 114 L. T. 333; *Belfast Ropework Co. v. Bushell*, [1918] 1 K. B. 210.

278. ——— Dramatists.]—*VON KNOOP v. MOSS & JAMESON*, No. 274, *ante*.

279. ——— Pawnbroker.]—(1) Goods pledged

distress for rent the property of a stranger brought in to be converted into lumber.—*PATERSON v. THOMPSON* (1881), 46 U. C. R. 7; 9 A. R. 326.—*CAN.*

at a pawnbroker's are privileged from distress for rent due to the pawnbroker's landlord, & if they are distrained, the pawnbroker is entitled to recover their full value from the landlord, & not merely the amount which he has advanced on them.

(2) Goods which have been deposited with a pawnbroker for more than a year, & which he has therefore power to sell under 39 & 40 Geo. 3, c. 99, are privileged equally with those which he has no power to sell.

(3) Goods intrusted to persons carrying on public trades, to be by them dealt with, wrought, or managed in the way of their trade, are exempted from distress. . . . It seems to me that the goods now in question fall within the description of goods intrusted to one who carries on a public trade, to be managed & dealt with by him in the way of his trade, & which he had a right to hold until the sums advanced by him upon them were repaid to him (ERLE, C.J.).—*SWIRE v. LEACH* (1865), 18 C. B. N. S. 479; 5 New Rep. 314; 34 L. J. C. P. 150; 11 L. T. 680; 11 Jur. N. S. 179; 13 W. R. 385; 144 E. R. 531.

Annotations:—As to (1) *Appld.* *Miles v. Furber* (1873), L. R. 8 Q. B. 77. *Refd.* *Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499. *Generally*, *Mentd.* *The Winkfield*, [1902] P. 42.

280. — *Poet.*—*VON KNOOP v. MOSS & JAMESON*, No. 274, *ante*.

281. — *Warehousing.* — Pltf. deposited household furniture at a depository to be warehoused at the rate of 30s. a year. At the time he thought he was depositing them with a co. with whom he had had dealings before, & he received a receipt in the name of the co., which name was also over the door of the depository. The fact was that the co. had sold their business to B., & let the premises to him, but they had authorised the use of their name. B. being in arrears for rent, defts. seized & sold pltf.'s goods under a warrant of distress from two of the directors of the co., on which pltf. brought an action against defts.:—*Held*: (1) the goods were privileged from distress, as things delivered to a person exercising a public trade to be managed in the way of his trade; (2) the co. were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited; *Seemle*: if it were shown that a person exercised the trade of agisting cattle, the same principle would apply as in the case of a pawnbroker, & the cattle could not be distrained for rent.—*MILES v. FURBER* (1873), L. R. 8 Q. B. 77; 42 L. J. Q. B. 41; 27 L. T. 756; 37 J. P. 516; 21 W. R. 262.

Annotation:—As to (1) *Refd.* *Clarke v. Millwall Dock Co.* (1885), 53 L. T. 316.

Privilege of goods deposited at warehouse.—*See* Sect. 5, sub-sect. 4, D., *post*.

282. — *Weaver.*—Yarn which has been spun for a clothier, carried into a neighbour's house to be weighed, cannot be taken at the beam, by distress for rent.

The trade of a clothier is *pro bono publico*, who ought to be allowed all necessary means (*per* CUR.).—*READ v. BURLEY* (1597), Cro. Eliz. 596; 78 E. R. 795; *sub nom.* *BURLEY v. READ*, Noy, 68.

Annotations:—*Refd.* *Kimp v. Cruwes* (1695), 2 Lut. App. 1573; *Gisbourn v. Hurst* (1710), 1 Salk. 249; *Simpson v. Hartopp* (1744), Willes, 512; *Gilman v. Elton* (1821), 3 Brod. & Bing. 75; *Thompson v. Mashiter* (1823), 1

Bing. 283; *Matthias v. Mesnard* (1826), 2 C. & P. 353; *Wood v. Clarke* (1831), 1 Cr. & J. 484; *Brown v. Shevill* (1834), 2 Ad. & El. 138; *Muspratt v. Gregory* (1838), 3 M. & W. 677.

C. Possession for Purposes of Trade.

283. Necessity for.—*BROWN v. SHEVILL*, No. 276, *ante*.

284. — *Delivery for specific purpose.*—To a declaration in replevin, for taking the cattle, goods & chattels of pltf., deft. made cognisance as bailiff of W., & justified the taking for rent due to W. from the occupier J. who was W.'s tenant. Plea in bar, that the premises in which the cattle, goods & chattels were taken, were occupied by J. as tenant, at a yearly rent; that at the time of the making of the distress J. was a "common public livery stable keeper" & was used in his trade "as such" from time to time to take in, feed, keep, & clean all other persons' horses & carriages who placed the same with him; that it was necessary for the carrying on such trade that horses & carriages should be kept & taken care of on the premises & that the cattle, goods, & chattels distrained were placed & remained on the premises to be managed & dealt with by J. in his trade, as deft. well knew, etc.:—*Held*: horses & carriages standing at livery could be distrained for rent.

Seemle: if articles are sent to remain at a place, they are distrainable, but if sent for a particular purpose & the remaining at the place be an incident necessary for the completion of such purpose, they are not.—*PARSONS v. GINGELL* (1847), 4 C. B. 545; 16 L. J. C. P. 227; 9 L. T. O. S. 222; 11 Jur. 437; 136 E. R. 621.

Annotations:—*Consd.* *Miles v. Furber* (1873), L. R. 8 Q. B. 77. *Refd.* *Re Russell, Ex p. Russell* (1870), 18 W. R. 753. *Mentd.* *Johnson v. Mid. Ry.* (1849), 4 Exch. 367.

Necessity for delivery of possession.—*See* No. 268, *ante*.

285. Agent—Holding goods for sale.—*GILMAN v. ELTON*, No. 249, *ante*.

286. — *Sale of carriages—By coachmaker.*—*KERSEY v. DIXON* (1843), 1 L. T. O. S. 76.

287. — *By commission agent.*—To a plea in trover for a carriage, alleging that it was taken on the premises of B. as a distress for rent due from him, pltf. replied that B. was a coachmaker & a commission agent for the sale of carriages, & exercised that trade on the premises, & was employed by pltf., in the way of his trade & business, for certain commission, to expose for sale & sell the carriage on the premises, & pltf. had delivered the carriage to B. for the purpose that he might there expose for sale & sell the same for pltf. in the way of his trade & business for certain commission, & B. had the same on the premises for that purpose, & the same remained thereon to be managed, & dealt with, sold & exposed for sale in the way of B.'s trade & business, & not otherwise, until the time of the distress:—*Held*: (1) goods in the hands of a commission agent for sale in the way of his business are exempted from distress; (2) the exemption was here sufficiently pleaded.

The principle of exemption has been applied to different cases from time to time, according to the existing state of trade (*PARTRON, J.*).—*FINDON v. M'LAREN* (1845), 6 Q. B. 891; 1 New

PART II. SECT. 5, SUB-SECT. 4.

285 i. Agent—Holding goods for sale.—Goods were consigned to R. by pltf., with certain prices affixed in the invoice, below which he was not to sell,

& all above which he might keep for himself; & it appeared that he was in the habit of transferring them when convenient in payment of his own debts, charging himself with them as sold at the invoice prices. Under any

circumstances he was not paid by commission on the sales:—*Held*: such goods were not exempt from distress for rent due by R.—*HURD v. DAVIS* (1863), 23 U. C. R. 123.—*CAN.*

Sect. 5.—What may or may not be distrained: Sub-sect. 4, C. & D.; sub-sect. 5.]

Pract. Cas. 152; 14 L. J. Q. B. 183; 4 L. T. O. S. 355; 9 Jur. 369; 115 E. R. 336.

Annotations:—As to (1) Apld. Munster v. Johns (1850), 16 L. T. O. S. 245. Refd. Brown v. Arundell (1850), 10 C. B. 54. As to (2) Refd. Brown v. Arundell (1850), 10 C. B. 54.

288. — Goods sent to for exhibition purposes only.]—SIMMS MANUFACTURING CO. v. WHITEHEAD, [1909] W. N. 95.

— Whether exercising a public trade.]—See Nos. 271–273, ante.

Auction—Goods deposited for sale by.]—See No. 253, ante, Nos. 297–299, post.

289. Boat left on premises of trader—For convenience of owner.]—MUSPRATT v. GREGORY, No. 251, ante.

290. Livery stables—Carriage standing at.]—A carriage standing at livery is distrainable for rent by the lessor of the premises.—FRANCIS v. WYATT (1764), 3 Burr. 1498; 1 Wm. Bl. 483; 97 E. R. 947.

Annotations:—Expld. Gorton v. Falkner (1792), 4 Term Rep. 565; Adams v. Grane (1833), 3 Tyr. 326. Consd. Brown v. Shevill (1834), 2 Ad. & El. 138; Muspratt v. Gregory (1838), 3 M. & W. 677. Follid. Parsons v. Gingell (1847), 4 C. B. 545. Refd. Gilman v. Elton (1821), 3 Brod. & Bing. 75; Cocks v. Gray (1857), 1 Giff. 77. Mentd. Thompson v. Mashiter (1823), 1 Bing. 283; Judson v. Etheridge (1833), 2 L. J. Ex. 300.

291. — — —.]—PARSONS v. GINGELL, No. 284, ante.

292. Materials delivered for manufacture at worker's house.]—Materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due from the weaver to his landlord; but a frame or other machinery delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due.—WOOD v. CLARKE (1831), 1 Cr. & J. 484; 1 Tyr. 314; 9 L. J. O. S. Ex. 187; 148 E. R. 1514.

Annotations:—Follid. Fenton v. Logan (1833), 9 Bing. 676. Consd. Gibson v. Ireson (1842), 3 Q. B. 39; Clarke v. Millwall Dock Co. (1886), 17 Q. B. D. 494. Refd. Adams v. Grane (1833), 1 Cr. & M. 380; Brown v. Shevill (1834), 2 Ad. & El. 138; Muspratt v. Gregory (1836), 1 M. & W. 633.

293. Materials in house of manufacturer—For purposes of trade.]—GIBSON v. IRESON, No. 270, ante.

294. Pictures exhibited by club—Not managed by way of trade—By club proprietor.]—CHALLONER v. ROBINSON, No. 273, ante.

295. Wine deposited for bottling—As distinct from wine deposited for storage.]—The Ct. of Bkpcy. has jurisdiction, under Bkpcy. Act, 1869, c. 71, ss. 13, 65, 72, 78, 125, & r. 260, to restrain a distress for rent or other legal proceeding against the debtor or his estate in respect of any debt provable, & to decide the question of the landlord's right to distrain.

A wine warehouseman had been in the habit of receiving wine belonging to other persons, in cask & in bottle, & properly storing & warehousing same. It was also part of his business to bottle wine for other persons, & to see that it was properly stored away in bins & kept at a proper temperature, so

as to bring it to maturity, & also to receive wine for the purpose of having it bottled & forthwith returned. The landlord of the premises where the wines were deposited having levied a distress for rent, & the warehouseman having filed a petition for liquidation under above Act, & applied for an injunction restraining the landlord from proceeding to a sale:—*Held*: (1) wine in cask or in bottle could not be deemed "perishable"; & (2) inasmuch as it could not reasonably be said that the depositing wine in another person's cellar was an incident to the trade carried on by the owner of the wine, the wine was liable to distress, except as to that portion of it which had been sent in for the purpose of being bottled & returned to the owner at a day named.—*Re RUSSELL, Ex p. RUSSELL* (1870), 18 W. R. 753.

Warehouse—Goods deposited in.]—See Nos. 269, 281, ante, Nos. 303, 304, post.

296. Machinery lent for purpose of manufacture.]—WOOD v. CLARKE, No. 29, ante.

D. Particular Instances.

Agent—Goods sent to for sale.]—See Nos. 249, 286, 287, ante.

— Goods sent to for exhibition purposes only.]—See No. 288, ante.

— Whether exercising a public trade.]—See Nos. 271–273, ante.

Artist—Unfinished pictures at studio of.]—See No. 274, ante.

297. Auction—Goods deposited for sale by—On premises of auctioneer—Misrepresentation as to ownership.]—(1) Goods deposited for sale by auction on the premises of an auctioneer, are not liable to be distrained for rent in arrear, in respect of those premises.

(2) Nor will a misrepresentation as to the ownership made by the auctioneer, in advertising the sale, although it might vitiate the sale as between buyer & seller, destroy the exemption from distress. Accordingly, a manufacturer sent goods to a public auction room, to be sold by an auctioneer, who had hired the rooms for a short period, & who advertised the intended sale of these & other goods, received in the same way as "under an assignment for the benefit of creditors." The goods having been distrained for rent due for the auction room from the party of whom it was hired:—*Held*: they were privileged from distress.—*ADAMS v. GRANE* (1833), 1 Cr. & M. 380; 3 Tyr. 326; 2 L. J. Ex. 105; 149 E. R. 447.

Annotations:—As to (1) Apld. Brown v. Arundell (1850), 10 C. B. 54. Refd. Brown v. Shevill (1834), 4 Nev. & M. K. B. 277; Muspratt v. Gregory (1836), 1 M. & W. 633; Findon v. M'Laren (1845), 6 Q. B. 891; Williams v. Holmes (1853), 8 Exch. 861; Swire v. Leach (1865), 18 C. B. N. S. 479.

298. — — — Though place hired for occasion or occupied by trespassing.]—Goods sent to an auctioneer for sale on premises occupied by him, are privileged from distress for rent, although the place of sale is merely hired for the occasion or the occupation has been acquired by the auctioneer by an act of trespass.—*BROWN v. ARUNDELL* (1850), 10 C. B. 54; 20 L. J. C. P. 30; 16 L. T. O. S. 126; 138 E. R. 23.

Annotations:—Expld. & Apld. Williams v. Holmes (1853), 8 Exch. 861. Consd. Lyons v. Elliott (1876), 1 Q. B. D. 210.

299.

In open yard of premises—

PART II. SECT. 5, SUB-SECT. 4.—D.

c. Auction—Goods deposited for sale by—On premises of auctioneer.]—Goods were sent to the premises rented by an auctioneer for sale by public auction or otherwise. They were unsold & remained on the premises

for eighteen months:—*Held*: not liable to the landlord's hypothec for rent.—*MOLLER & Co. v. LEVY* (1892), 13 N. L. R. 118.—**S. AF.**

d. Hotel—Machine left by guest.]—Deft. distrained for rent a reaping machine on premises leased by him to

G., from whom pltf., an hotel keeper, had the use of the yard & stable. The machine had been left at pltf.'s hotel about six months before by R., an agent for the sale of reaping machines, when he was stopping there, & R. had never been at the hotel since, except perhaps on one occasion. Pltf.

Occupied by auctioneer.]—Goods deposited in an open yard belonging to premises in the occupation of an auctioneer, for the purpose of being sold by public auction, are privileged from distress.—*WILLIAMS v. HOLMES* (1853), 8 Exch. 861; 1 C. L. R. 463; 22 L. J. Ex. 283; 1 W. R. 391; 155 E. R. 1602.

Annotations:—*Reid*. *Lyons v. Elliott* (1876), 33 L. T. 806. *Mentd*. *Witty v. Williams* (1864), 4 New Rep. 138.

300. ——— Only if on premises actually occupied by auctioneer—Effect of removal.]—*LYONS v. ELLIOTT*, No. 253, *ante*.

Boat of customer lying in canal—On premises of trader.]—*See* No. 251, *ante*.

301. Bookseller & bookbinder—Books to be sold & bound.]—Pltf. had sent books of his to the premises of deft.'s tenant, who was a bookseller & bookbinder; some of the books were to be sold, others to be bound. *Semble*: both classes of books were privileged from distress.—*MUNSTER v. JOHNS* (1850), 16 L. T. O. S. 245.

302. Brewer's casks—Sent to public-house.]—(1) Brewer's casks, sent to a public-house with beer, & left there until the beer is consumed, are liable to be distrained for the rent of the house.

(2) A landlord has a right to distrain all goods found upon the demised premises with the exception of certain specified cases, which are not to be extended. *Primâ facie*, every deposit of goods upon the premises where the trade is carried on, would have relation to that trade & an exemption from distress would, in that view, be for the public good. But to hold such goods to be exempt would be establishing a very wide principle, & the case of *Muspratt v. Gregory*, No. 251, *ante*, having decided that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision (*PARKE, B.*).—*JOULE v. JACKSON* (1841), 7 M. & W. 450; 10 L. J. Ex. 142; 151 E. R. 842.

Butcher—Carcass of beast slaughtered by.]—*See* No. 276, *ante*.

Clothworkers—Materials for cloth left at—Spun yarn in course of being weighed.]—*See* No. 282, *ante*.

Common carrier—Goods in possession of.]—*See* No. 277, *ante*.

Livery stable—Horses & carriages standing at.]—*See* Nos. 284, 290, *ante*.

Manufacturers' materials—In own house.]—*See* No. 270, *ante*.

—— In workman's house for purpose of manufacture.]—*See* No. 292, *ante*.

Pawnbroker—Goods pledged with.]—*See* No. 279, *ante*.

Restaurant keeper—Pictures for sale in premises of.]—*See* No. 272, *ante*.

Ship being built—No delivery to shipbuilder.]—*See* No. 268, *ante*.

303. Warehouse — Goods deposited at — By factor.]—Goods landed at a wharf, & deposited by a factor, to whom they were consigned, in a warehouse on the wharf, till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf & warehouse.—*THOMPSON v. MASHITER* (1823), 1 Bing. 283; 8

Moore, C. P. 254; 1 L. J. O. S. C. P. 104; 130 E. R. 114.

Annotations:—*Expld*. *Wood v. Clarke* (1831), 1 Cr. & J. 484. *Consd*. *Parsons v. Gingell* (1847), 4 C. B. 545. *Reid*. *Matthias v. Mesnard* (1826), 2 C. & P. 353; *Adams v. Grane* (1833), 1 Cr. & M. 380; *Brown v. Shevill* (1834), 2 Ad. & El. 138; *Muspratt v. Gregory* (1836), 1 M. & W. 633; *Swire v. Leach* (1865), 18 C. B. N. S. 479; *Re Russell, Ex p. Russell* (1870), 18 W. R. 753; *Lyons v. Elliott* (1876), 1 Q. B. D. 210.

304. ——— ———.]—Corn sent to a factor for sale, & deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it were deposited in a warehouse belonging to the factor himself.

A landlord must know that he cannot take the corn of other parties; &, therefore, if his tenants are granary keepers, he can take other security for his rent (*BEST, C.J.*).—*MATTHIAS v. MESNARD* (1826), 2 C. & P. 353, N. P.

Annotations:—*Reid*. *Parsons v. Gingell* (1847), 4 C. B. 545; *Re Russell, Ex p. Russell* (1870), 18 W. R. 753.

305. ——— Pleading.]—*FARRANT v. ROBSON*, No. 269, *ante*.

306. ——— Business sold at time of deposit.]—*MILES v. FURBER*, No. 281, *ante*.

307. ——— Wine deposited for storage—As distinct from wine deposited for bottling.]—*Re RUSSELL, Ex p. RUSSELL*, No. 295, *ante*.

SUB-SECT. 5.—FIXTURES.

See, generally, LANDLORD & TENANT.

308. General rule.]—*SIMPSON v. HARTOPP*, No. 247, *ante*.

309. ———.]—(1) Fixtures . . . are not distrainable, not being severable from the freehold; &, for that reason, not being capable of being restored in the same plight in which they were before severance (*ABBOTT, C.J.*).

(2) A reasonable time after the expiration of five days from the time of distress is by law allowed to the landlord for appraising & selling the goods distrained.—*PITT v. SHEW* (1821), 4 B. & Ald. 206, 208; 106 E. R. 913, 914.

Annotations:—*As to* (1) *Reid*. *Twigg v. Potts* (1834), 1 Cr. M. & R. 89. *Generally, Mentd*. *Hallen v. Runder* (1834), 1 Cr. M. & R. 266.

310. ———.]—(1) The presence of a landlord with a broker, etc., on the premises of the tenant immediately after they have been forced open by the broker, & the fixtures torn down, & who professed to have distrained for rent, pending the tenancy, is sufficient evidence of the landlord's liability for the wrongful act of breaking open outer doors & taking fixtures as a distress for rent due.

(2) In an action for such wrongful act, the proper measure of damages, as to the tenant's fixtures, is not the amount of the proceeds of a forced sale by broker, nor is it necessarily the value paid by the tenant, but it is, or may be, the value of the fixtures to an incoming tenant, & the amount such incoming tenant would be likely to pay the outgoing tenant for them, & this can be recovered without deducting the amount of rent

was paid nothing for keeping the machine, nor did he assume any responsibility therefor. At the trial it was sought to prove that it was essential to pltf.'s business to receive & keep such machines brought by his customers, but the evidence merely showed that a refusal to do so would or might render his hotel less popular:—*Held*: the machine was not exempt from distress.—*MITCHELL v. COFFEE* (1880), 5 A. R. 525.—CAN.

PART II. SECT. 5, SUB-SECT. 5.

e. What is a fixture—Skating rink floor.]—A hardwood flooring, put down specially for skating, & capable of removal:—*Held*: to be a tenant fixture, & exempt from distress.—*HOWELL v. LISTOWEL RINK & PARK CO.* (1886), 13 O. R. 476.—CAN.

f. Fixtures of former tenant seized by chattel mortgagees—Distress by landlord—Rights as between landlord &

chattel mortgagees.]—Premises were rented to G. who abandoned them. The landlord then leased the premises to another tenant who took possession. Subsequently under a chattel mtge. made by G. during his tenancy the mtgees. caused a seizure to be made of chattels which had been on the premises during G.'s tenancy & remained there. The landlord then issued a distress warrant for rent owing by G. & the chattels were seized thereunder:

Sect. 5.—What may or may not be distrained: Subsects. 5, 6, 7 & 8.]

due, as the fixtures could not have been distrained upon for it.

(3) The landlord cannot distrain trade fixtures. . . . Fixtures *in situ* are worth far more than they are when severed (ERLE, J.).—MOORE v. DRINKWATER (1858), 1 F. & F. 134.

311. Fixtures removable by tenant.]—DARBY v. HARRIS, No. 257, ante.

312. —.]—By an agreement in writing debts. agreed to let & plffs. to take the exclusive right of putting up advertisement hoardings & posting bills thereon upon specified land of debts. for seven years plffs. paying debts. a fixed annual sum payable quarterly, rates & taxes to be paid by "the tenants." Plffs. erected hoardings which were affixed in a very substantial manner to the land & exhibited advertisements upon them. Plffs. fell into arrear in their payments under the agreement, & debts. levied a distress upon the hoardings & ultimately carried them away & sold them. Plffs. brought an action to recover damages for wrongful distress, & debts. counterclaimed for the amount of the arrears due under the agreement:—*Held*: (1) even assuming the agreement created the relation of landlord & tenant between the parties the advertisement hoardings, although removable by plffs. at the end of the tenancy, were fixtures & not mere chattels & were therefore not distrainable & plffs. were entitled to recover damages for the wrongful distress; (2) plff. co. having gone into liquidation it would be inequitable to set off the damages recovered by plffs. on the claim against the arrears recovered by debts. on the counterclaim & to give judgment for the balance, & separate judgments ought to be given on the claim & counter-claim respectively. *Seem*: the agreement did not constitute a demise creating a tenancy, but amounted only to a licence to enter on the land & do certain specified things upon it.—PROVINCIAL BILL POSTING CO. v. LOW MOOR IRON CO., [1909] 2 K. B. 344; 78 L. J. K. B. 702; 100 L. T. 726; 16 Mans. 157, C. A.

313. What is a fixture.]—SIMPSON v. HARTOPP, No. 247, ante.

314. —.]—DARBY v. HARRIS, No. 257, ante.

315. — Millstone.]—WYSTOW'S CASE (1523), Y. B. 14 Hen. 8, fo. 25, pl. 6.

Ch. App. 630. Mentd. Walmsley v. Milne (1859), 7 C. B. N. S. 115; Sumner v. Bromilow (1865), 34 L. J. Q. B. 130.

316. — Limekiln.]—Replevin for taking plff.'s goods & chattels, to wit, a lime-kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold:—*Held*: the plea in bar was bad, because it was a departure from the declaration.—NIBLET v. SMITH (1792), 4 Term Rep. 504; 100 E. R. 1144.

317. — Machinery let with factory—Subject to payment & conditions.]—(1) The action for removing goods taken in execution, without satisfying the landlord for the arrears of a year's rent due, under 8 Ann., c. 14, may be

—*Held*: G.'s tenancy being at an end the landlord's right to distrain was gone & his distress & the seizure thereunder were ineffective to give him any rights in respect of the chattels; as to those chattels which were fixtures of the class termed "tenant's fixtures," although, as between G. &

the landlord, the latter would in the circumstances be entitled to hold these, he could not do so as against the chattel mtgees.; it was not competent for G. by surrender of the term to defeat the mtgees.' title to the fixtures; the latter's right to the fixtures after the surrender of the

well brought against the sheriff. It is not necessary to bring it against the parties suing out the execution under which the seizure is made.

(2) Fraud in not expressing in an instrument the full consideration, in order to evade paying to the revenue the full stamp duties, does not render the instrument void, on the ground of not being properly stamped.

(3) Machinery, let with a manufactory, a property in such machinery being transferred to the tenant in consideration of money, with a power to distrain on it reserved by the lease, is distrainable, &, if taken in execution & sold, the sheriff must pay out of the proceeds the unsatisfied arrears of rent, due for one year or less, to the landlord.

(4) It is no objection to an action by the landlord against the sheriff, that the tenant, having been bkpt. when the execution was executed, his goods are no longer his property, but that of his assignees, & that, if so, the sheriff would be liable both to the assignees & to the landlord.—DUCK v. BRADDYLL (1824), 13 Price, 455; M'Cle. 217; 147 E. R. 1047.

Annotations:—As to (2) Apld. Doe d. Kettle v. Lewis (1830), 10 B. & C. 673. Refd. Dyer v. Green (1847), 1 Exch. 71. As to (3) Refd. Darby v. Harris (1841), 1 Q. B. 895; Re Mackenzie, Ex p. Hertfordshire Sheriff, [1899] 2 Q. B. 566.

—.]—Compare No. 292, ante.

318. — Beer machine in public house.]—A landlord, distraining for rent in arrear from a tenant of a public house, seized certain beer machines, etc., affixed to the freehold & removed them from the premises:—*Held*: trover lay for these articles & although for the purpose of that action, the tenant treated these as goods & chattels, the landlord could not justify distraining them for rent in arrear.—DALTON v. WHITTEM (1842), 3 Q. B. 961; 3 Gal. & Dav. 260; 12 L. J. Q. B. 55; 6 Jur. 1063; 114 E. R. 777.

Annotations:—Consd. Beck v. Denbigh (1860), 29 L. J. C. P. 273. Refd. Walmsley v. Milne (1859), 7 C. B. N. S. 115.

319. — Machine fixed by screws to floor—Spinning mule.]—(1) Certain cotton-spinning machines were fixed by means of screws, some in wooden fastenings, & some fixed in stones with molten lead, & thereby fastened to the building. The machines were distrained for rent, & subsequently replevied:—*Held*: they were not a part of the freehold, but were properly distrainable.

(2) At common law, things fixed to the freehold, & which become part of it, cannot be distrained.

(3) The machines never were part of the freehold, but were attached slightly to it, & were capable of being removed without the least injury to the fabric of the buildings. The object & purpose of annexation was not to improve the inheritance, but was to render the machinery steadier & for the more convenient use of the inheritance. They never were part of the freehold any more than a carpet would be, which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, or looking-glasses, pictures, & other matters of an ornamental nature, which have been slightly attached to the walls of a dwelling, as furniture, & which is probably the reason why those & similar articles

term was not subject to payment of the rent which would have accrued had there been no surrender, as the fixtures were not chattels that are liable for distress for rent.—BRUCE v. SMITH, [1923] 3 D. L. R. 887; 2 W. W. R. 327.—CAN.

have been held in different cases to be removable (PARKE, B.).—*HELLAWELL v. EASTWOOD* (1851), 6 Exch. 295; 20 L. J. Ex. 154; 15 J. P. 724; 155 E. R. 554; *sub nom.* *HALLIWELL v. EASTWOOD*, 17 L. T. O. S. 96.

Annotations:—*As to* (1) *Distd.* *Turner v. Cameron* (1870), L. R. 5 Q. B. 306. *N.F.* *Crossley v. Lee*, [1908] 1 K. B. 86. *Refd.* *Mather v. Fraser* (1856), 2 K. & J. 536; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Climie v. Wood* (1869), 38 L. J. Ex. 223; *Reynolds v. Ashby*, [1904] A. C. 466. *As to* (3) *Consd.* *Elliott v. Bishop* (1854), 10 Exch. 496; *Mather v. Fraser* (1856), 2 K. & J. 536. *Apld.* *Waterfall v. Penistone* (1850), 6 E. & B. 876. *Consd.* *Walmsley v. Milne* (1859), 7 C. B. N. S. 115. *Apld.* *Dumergue v. Ramsay* (1862), 10 W. R. 844. *Consd.* *Parsons v. Hind* (1866), 14 W. R. 800; *R. v. Lee* (1866), L. R. 1 Q. B. 241; *Longbottom v. Berry* (1869), L. R. 5 Q. B. 123. *Distd.* *Turner v. Cameron*, [1870] L. R. 5 Q. B. 306. *Consd.* *Holland v. Hodgson* (1872), L. R. 7 C. P. 328. *Apld.* *Chamberlayne v. Collins* (1894), 70 L. T. 217. *Consd.* *Reynolds v. Ashby*, [1904] A. C. 466. *Refd.* *Climie v. Wood* (1869), 38 L. J. Ex. 223; *Re Thomas, Ex p. Willoughby D'Eresby* (1881), 44 L. T. 781; *Tynan v. Muller Works Co. v. Longbenton Overseers* (1886), 18 L. J. D. 81; *Hobson v. Gorringe* (1896), 75 L. T. 610; *Lambourn v. McLellan*, [1903] 2 Ch. 268; *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74. *Generally, Mentd.* *Williams v. Jones* (1864), 11 L. T. 108.

320. Gas engine.—A gas engine was let out by pltf. on hire under an agreement in writing which provided for monthly payments, & that the engine should remain the property of pltf. until the hirer had exercised the option of purchase given by the agreement, & should be removable by pltf. on the failure of the hirer to pay any instalment. The engine was affixed to the floor of premises, of which the hirer was deft.'s tenant, by bolts & screws, & was used by the hirer for the purposes of his trade. The engine was seized by deft. under a distress for rent due from the hirer & sold:—*Held*: the engine had become a fixture, & was, therefore, not distrainable.—*CROSSLEY BROTHERS, LTD. v. LEE*, [1908] 1 K. B. 86; 77 L. J. K. B. 199; 97 L. T. 850; 24 T. L. R. 35; 52 Sol. Jo. 30, D. C.

Annotations:—*Consd.* *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 344. *Refd.* *Horwich v. Symond* (1914), 110 L. T. 1016.

321. — Railway sleepers.—Three railways were connected with a coal mine, one within the mine, one within a yard attached to the colliery, & the third extending from the yard & effecting a junction with a public railway. The lessee of the mine had mortgaged it to pltf., who had entered into possession. The rent being in arrear, the lessor distrained, among other things, the three railways. The railways were constructed in the following manner:—The surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast, & the ballast packed, & the rails were fastened to the sleepers by nails. In order to remove the rails, they were wrenched off the sleepers by means of bars & picks; & to remove the sleepers it was necessary to loosen the ballast by means of picks, & then with levers to raise them. The removal of the sleepers made holes in the ballast:—*Held*: the railways, by their mode of annexation to the soil, became fixtures & were not distrainable.—*TURNER v. CAMERON* (1870), L. R. 5 Q. B. 306; 10 B. & S. 931; 39 L. J. Q. B. 125; 22 L. T. 525; 18 W. R. 544.

Annotations:—*Refd.* *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Chamberlayne v. Collins* (1894), 70 L. T. 217.

— **Agricultural fixtures.**—*See* AGRICULTURE, Vol. II., p. 49, No. 268 *et seq.*; *Agricultural Holdings Act, 1923* (c. 9), ss. 22, 24.]—*See, further, LANDLOR & TENANT; MORTGAGES.*

SUB-SECT. 6.—THINGS IN ACTUAL USE.

Animals.—*See* Sub-sect. 9, *post.*

Implements of trade.—*See* Sub-sect. 8, *post.*

Agricultural implements.—*See* Sub-sect.

10, **wearing apparel & bedding.**—*See* Sub-sect. 7 *post.*

SUB-SECT. 7.—WEARING APPAREL AND BEDDING.

See Law of Distress Amendment Acts, 1888 (c. 21), s. 4, & 1895 (c. 24), s. 4, & County Courts Act, 1888 (c. 43), s. 147.

322. Wearing apparel — No common law privilege.—Wearing apparel may be distrained for rent.—*BISSET v. CALDWELL* (1791), Peake, 50, N. P.

323. — — — — ——Wearing apparel, while not in use, is distrainable for rent arrear.—*BAYNES v. SMITH* (1794), 1 Esp. 206.

324. — County Court Act, 1888 (c. 43), s. 147.—The wearing apparel & implements of trade of a debtor to the value of £5 are protected from seizure under an execution issued out of a county ct., by County Courts Act, 1846 (c. 45), s. 96; but if the landlord gives to the bailiff a written notice claiming arrears of rent under sect. 107, the bailiff may distrain such wearing apparel or implements of trade to satisfy the rent.—*WOODCOCK v. PRITCHARD* (1851), 17 L. T. O. S. 16.

325. Bedding — Law of Distress Amendment Act, 1888 (c. 21), s. 4—County Court Act, 1888 (c. 43), s. 147.—The "bedding" privileged from distress for rent under above Acts, includes a bedstead used by the tenant as part of his sleeping accommodation.—*DAVIS v. HARRIS*, [1900] 1 Q. B. 729; 69 L. J. Q. B. 232; 8 L. T. 780; 64 J. P. 136; 48 W. R. 445; 16 T. L. R. 140; 44 Sol. Jo. 197, D. C.

326. Protection limited to value of five pounds in all.—*BOYD, LTD. v. BILHAM*, No. 339, *post.*

327. — Onus of proof.—*GONSKY v. DURRELL*, No. 340, *post.*

SUB-SECT. 8.—IMPLEMENTS OF TRADE.

See Law of Distress Amendment Acts, 1888 (c. 21), s. 4, & 1895 (c. 24), s. 4; County Courts Act, 1888 (c. 43), s. 147.

328. Privileged at common law—If other sufficient distress on the premises—If in actual use.—*SIMPSON v. HARTOPP*, No. 247, *ante.*

329. — — — — ——*GORTON v. FALKNER*, No. 248, *ante.*

330. — — — — ——An implement of trade is only privileged from distress if it be in use, & if there be no other distress on the premises.—*FENTON v. LOGAN* (1833), 9 Bing. 676; 3 Moo. & S. 82; 2 L. J. C. P. 102; 131 E. R. 767.

Annotation:—*Apld.* *Lavell v. Richings*, [1906] 1 K. B. 480.

331. — — — — ——An action of trespass lies, as well as an action on the case, for distraining tools of trade, though not actually in use, if there be other unprivileged goods upon the premises, at the time of the distress, sufficient to satisfy the distress.—*NARGETT v. NIAS* (1859), 1 E. & E. 439; 28 L. J. Q. B. 143; 32 L. T. O. S. 313; 5 Jur. N. S. 198; 120 E. R. 974.

Annotations:—*Refd.* *Keen v. Priest* (1859), 4 H. & N. 236; *Attack v. Bramwell* (1863), 3 B. & S. 520; *Gonsky v. Durrell*, [1918] 2 K. B. 71.

Sect. 5.—What may or may not be distrained: Sub-8 & 9. A.

332. ———.] — Implements of trade may be distrained for rent.—*ROBERTS v. JACKSON* (1795), Peake, Add. Cas. 36, N. P.

333. ———.] — *LYONS v. ELLIOTT*, No. 253, *ante*.

334. Privileged by statute—County Courts Act, 1888 (c. 43), s. 147.]—WOODCOCK v. PRITCHARD No. 324, *ante*.

335. ———.] — **Law of Distress Amendment Act, 1888 (c. 21), s. 4.]—C.**, a gas stoker, hired a sewing machine, & his wife, a seamstress, used it, & applied the earnings for the maintenance of the household. The landlord of C., having distrained the machine for arrears of rent due by C.:—*Held*: (1) the machine was an implement of C.'s trade within Law of Distress Amendment Act, 1888 (c. 21), s. 4, though used solely by the wife; (2) the county ct. judge, having nonsuited pltf. wrongly, the High Ct., to prevent further litigation, may fix a nominal sum for damages which the county ct. ought to have fixed.—*CHURCHWARD v. JOHNSON* (1889), 54 J. P. 326, D. C.

Annotations:—As to (1) Foll. Masters v. Fraser (1901), 85 L. T. 611. Refd. Lavell v. Richings, [1906] 1 K. B. 480; Gonsky v. Durrell, [1918] 2 K. B. 71. Generally, Mentd. Polley v. Fordham (No. 2) (1904), 91 L. T. 525.

336. ———.] — A sewing machine hired by a tenant under a hire-purchase agreement whereby his wife is able to help to maintain the household is a "tool or implement of his trade" within above sect. & is privileged from distress for rent.—*MASTERS v. FRASER* (1901), 85 L. T. 611; 66 J. P. 100; 18 T. L. R. 31, D. C.

Annotation:—Expld. Lavell v. Richings, [1906] 1 K. B. 480.

337. Protection limited to value of five pounds in all.]—WOODCOCK v. PRITCHARD, No. 324, *ante*.

338. ———.] — **One chattel.]—A** distress having been levied on a stable, which was in the occupation of a cab-driver, for rent in arrear, the only article on the premises proved to be a cab of the value of more than £5, which was accordingly seized:—

Held: the cab was privileged from seizure under County Courts Act, 1888 (c. 43), s. 147, as an implement of the man's trade, & the fact that it was above the value of £5 did not exclude the operation of the exemption.—*LAVELL v. RICHINGS*, [1906] 1 K. B. 480; 75 L. J. K. B. 287; 94 L. T. 515; 54 W. R. 394; 22 T. L. R. 316; *sub nom.* *LOVELL v. RICHINGS*, 50 Sol. Jo. 292, D. C.

Annotation:—Distd. Addison v. Shepherd, [1908] 2 K. B. 118.

339. ———.] — A pianoforte, the property of pltf., was hired to H. on a hire-purchase agreement. The piano was used by H.'s wife for the purpose of giving music lessons to pupils on premises of which deft. was the landlord. Deft. levied a distress on the premises for arrears of rent, & under that distress seized, amongst other things, the piano. Wearing apparel & bedding of the value of £5 were left on the premises:—*Held*: (1) the pianoforte was an instrument of trade within Law of Distress Amendment Act, 1888 (c. 21), s. 4; (2) the requirements of County

Courts Act, 1888 (c. 43), s. 147, are satisfied providing wearing apparel or bedding or tools to the value of £5 are left on the premises.—*BOYD, LTD. v. BILHAM*, [1909] 1 K. B. 14; 78 L. J. K. B. 50; 99 L. T. 780; 72 J. P. 495.

Annotation:—As to (2) Consd. Gonsky v. Durrell, [1918] 2 K. B. 71.

340. ———.] — **Onus of proof.]—In** an action under Law of Distress Amendment Act, 1888 (c. 21), s. 4, for illegal distraint of a tool of pltf.'s trade, the *onus* is upon pltf. of proving that wearing apparel, bedding, & implements of trade to the value of £5 were not left upon the premises after the distress in accordance with County Courts Act, 1888 (c. 43), s. 147.

The statute does not take away the common law protection of implements of trade, & it would still be open to pltf. to sue at common law, in which action it would seem that the burden of proving the value of the goods left would be upon deft.—*GONSKY v. DURRELL*, [1918] 2 K. B. 71; 87 L. J. K. B. 836; 119 L. T. 174; *sub nom.* *GOSKY v. DURRELL*, 62 Sol. Jo. 622, C. A.

341. What are—Stocking frame.]—SIMPSON v. HARTOPP, No. 247, *ante*.

342. ———.] — **Books & papers.]—A.** authorised B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books & papers, which were assumed not to be distrainable, & omitted to insert them in the inventory:—*Held*: A. was liable, jointly with B., in trespass.—*GAUNTLETT v. KING* (1857), 3 C. B. N. S. 59; 22 J. P. 787; 140 E. R. 660.

Annotation:—Refd. Haseler v. Lemoyne (1858), 5 C. B. N. S. 530.

343. ———.] — **Sewing machine.]—CHURCHWARD v. JOHNSON**, No. 335, *ante*.

344. ———.] — *MASTERS v. FRASER*, No. 336, *ante*.

345. ———.] — **Cab.]—LAVELL v. RICHINGS**, No. 338, *ante*.

346. ———.] — **Pianoforte—Used for purpose of music lessons.]—BOYD, LTD. v. BILHAM**, No. 339, *ante*.

347. ———.] — **Not travellers' samples.]—A** commercial traveller, who was employed to sell type-writing machines on commission, was entrusted by his employers with one of their machines as sample. While in his possession the machine was distrained by his landlord for rent due by him:—*Held*: it was not an implement of his trade & was not protected as such from distress by virtue of Law of Distress Amendment Act, 1888 (c. 21), s. 4, & County Courts Act, 1888 (c. 43), s. 147.—*ADDISON v. SHEPHERD*, [1908] 2 K. B. 118; 77 L. J. K. B. 534; 99 L. T. 121; 72 J. P. 239, D. C.

Animals.]—See Sub-sect. 9, post.

Agricultural implements.]—See Sub-sect. 10, post.

SUB-SECT. 9.—ANIMALS.

A. Horses and Beasts of the Plough.

See, generally, ANIMALS, Vol. II., pp. 204 *et seq.*, & *Agricultural Holdings Act, 1923 (c. 9), s. 35.*

PART II. SECT. 5, SUB-SECT. 8.

343i. What are—Sewing machine.]—A co. brought a civil bill against C. to recover the value of a sewing machine their property which he had got into his possession & refused to deliver up. B., a labourer, had hired from the co. a sewing machine under the ordinary hiring agreement. B. having got into arrears of rent with his landlord, deft., deft. distrained upon

B.'s premises & seized the sewing machine. The co. served a demand on C. for return of machine, but he refused to deliver:—*Held*: as the instruments were implements of trade & used by the hirer for gain, pltf. could not succeed.—*SINGER MANUFACTURING CO. v. CARSON & FLETCHER* (1906), 40 I. L. T. 88.—*IR.*

g. Property of stranger—Distrainable only if of same trade as that of

tenant.]—A sewing machine hired by a wife for a separate business is not exempt from distress on goods of her husband, a stonemason, for rent due by him. In case of a distress for rent the exemption of instruments of trade applies to the chattels of a stranger only so far as such chattels are instruments of the same trade as that of the tenant.—*WERTHEIM v. CHEEL* (1886), 12 V. L. R. 46.—*AUS.*

Distress for animals damage feasant.]—See Part VII., post.

348. Horses—Traced together — Fetters upon horse.]—ANON. (1640), March, 91; 82 E. R. 425.

349. ———— Harnessed to cart.]—WEBB v. BELL (1670), 1 Sid. 440; 82 E. R. 1205; *sub nom.* **WELCH v. BELL**, 1 Sid. 422; *sub nom.* **WELSH v. BELL**, 1 Vent. 36.

Annotation:—Dtd. **Simpson v. Hartopp** (1744), Willes, 512.

350. ———— Being ridden.]—WEBB v. BELL (1670), 1 Sid. 440; 82 E. R. 1205; *sub nom.* **WELCH v. BELL**, 1 Sid. 422; *sub nom.* **WELSH v. BELL**, 1 Vent. 36.

Annotation:—Consd. **Simpson v. Hartopp** (1744), Willes, 512.

351. Beasts of plough.] — HORTHBURY v. LEVINGHAM (1667), 1 Sid. 348; 82 E. R. 1149.

Annotation:—Mentd. **R. v. Collins** (1798), 2 Leach, 827.

352. ———— Protected if sufficient other distress.]—SIMPSON v. HARTOPP, No. 247, *ante*.

353. ———— .] — (1) Landlord distraining beasts of the plough is not liable, if he has used due diligence to ascertain whether there was sufficient distress without.

(2) Landlord is not to be affected by subsequent sale at a higher price than was expected.—JENNER v. YOLLAND (1818), 2 Chit. 167; 6 Price, 3; 146 E. R. 724.

Annotations:—As to (1) Consd. **Nargett v. Nias** (1859), 1 E. & E. 439. *Refd.* **Keen v. Priest** (1858), 32 L. T. O. S. 131; **McCreagh v. Cox & Ford** (1923), 92 L. J. K. B. 855. *As to (2) Refd.* **Nargett v. Nias** (1859), 1 E. & E. 439.

354. ———— Onus of proof.] — DAWSON v. ALFORD (1572), 3 Dyer, 312 a; 73 E. R. 706.

Annotations:—Consd. **Gorsky v. Durrell**, [1918] 2 K. B. 71. *Refd.* **Hill v. Langley** (1600), Cro. Eliz. 749; **Nargett v. Nias** (1859), 1 E. & E. 439.

355. ———— Growing crops excepted.]—

(1) A landlord is liable to some damages, in an action on the case for an excessive distress where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience & expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, in replevying the crops.

(2) An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises besides growing crops.

(3) The statute law has created some new distrainable subjects, which are not to be treated in the same way as those which are distrainable at common law. . . . One of these subjects is corn loose or in the straw, or in sheaves or cocks, or hay, which by 2 Will & Mar., Sess. 1, c. 5, s. 3, may be secured, locked up, & detained in the place where found, in the nature of a distress, until replevied, & in default of replevying, must be sold in five days. . . . Another of these subjects is growing corn. . . . The question then arises, whether both or either of these new distrainable subjects be within the principle of the common law or 52 Hen. 3, c. 4, so that the

distrainor is to be liable if he takes an unreasonable quantity of such subjects, either alone or jointly with other chattels; & we think that they are (**PARKE, B.**).—**PIGGOTT v. BIRTLES** (1836), 1 M. & W. 441; 2 Gale, 18; Tyr. & Gr. 729; 5 L. J. Ex. 193; 150 E. R. 507.

Annotations:—As to (1) Consd. **Chandler v. Doulton** (1865), 3 H. & C. 553. *As to (2) Consd.* **Nargett v. Nias** (1859), 1 E. & E. 439. *As to (3) Refd.* **Chandler v. Doulton** (1865), 3 H. & C. 553.

356. ———— Young colts or steers—Not broken in or used for harness or plough.]—(1) Cart colts & young steers, not broken in or used for harness or the plough, are not privileged from distress as beasts which gain the land.

(2) In case of a distress by a landlord for rent due from his tenant, the sheep of an under-tenant are privileged if there are other goods upon the premises sufficient to satisfy the rent.

(3) The owner of sheep, seized & sold under a distress for rent, which was unlawful because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainor, not merely nominal damages, but the full value of the sheep so seized.—KEEN v. PRIEST (1859), 4 H. & N. 236; 28 L. J. Ex. 157; 32 L. T. O. S. 319; 23 J. P. 216; 7 W. R. 376; 157 E. R. 829.

Annotations:—As to (1) Refd. **McCreagh v. Cox & Ford** (1923), 92 L. J. K. B. 855. *As to (2) Refd.* **Attack v. Bramwell** (1863), 3 B. & S. 520. *As to (3) Apld.* **Attack v. Bramwell** (1863), 3 B. & S. 520. *Refd.* **Chinery v. Viall** (1860), 29 L. J. Ex. 180; **Johnson v. L. & Y. Ry.** (1878), 3 C. P. D. 499.

Cattle for heriot.]—See COPYHOLDS, Vol. XIII., p. 96.

B. Animals of Stranger.

See, generally, ANIMALS, Vol. II., pp. 204 et seq., & Agricultural Holdings Act, 1923 (c. 9), s. 35.

Distress for animals damage feasant.]—See Part VII., post.

357. Straying cattle.] — A. & B. having adjoining closes, A. is to keep up the fence; by his default B.'s cattle escape through; A.'s landlord cannot distrain them for rent.—ANON. (1572), 3 Dyer, 317 b; 73 E. R. 719.

358. ———— .] — If cattle escape into the next ground & are distrained there for rent, equity will relieve against such distress.—BRODON v. PIERCE (circa 1680), cited in 2 Vern. at p. 131; 23 E. R. 692, L. C.

359. ———— Cattle levant & couchant—Defective fence.]—ANON. (1565), 2 Leon. 7; 74 E. R. 312.

Annotation:—Refd. **Kimp v. Cruves** (1695), 2 Lut. 1573.

360. ———— .]—GILL v. GAWIN (1619), 2 Roll. Rep. 124; 81 E. R. 701.

361. ———— .] — Where cattle escape out of an adjoining close, & are levant & couchant:—Held: they might be distrained for rent, though they escaped through the defect of fences which the party distraining ought to have repaired.—POOLE v. LONGUEVILL (1671), 2 Wms. Saund. 288; 2 Keb. 660; 3 Salk. 106; 85 E. R. 1074.

Annotations:—Dtd. **Elmore v. Tucker** (1704), 6 Mod. Rep. 198. *Consd.* **Musgratt v. Gregory** (1838), 1 Horn. & H. 184. *Refd.* **Kimp v. Cruves** (1695), 2 Lut. App. 1573;

his cow to be on the leased premises permanently, & presumably for the benefit of the family, he must be taken to have tacitly consented that it should be subject to the landlord's lien for unpaid rent, & it was attachable in execution of a judgment against the lessee for rent.—**RUSSELL v. SAVORY** (1906), E. D. C. 100.—S. AF.

1. Cattle left with third party—Removed to tenant's farm—Without

PART II. SECT. 5, SUB-SECT. 9.—B.

h. Horses—In actual use.]—A pair of horses belonging to a stranger, which were driven on to the premises & tied, the party in whose charge they were going into the house:—Held: not seizable for rent if they were in actual use at the time of the distress.—COUCH v. CRAWFORD (1861), 10 C. P. 491.—CAN.

k. Cows—Knowledge of landlord.]—

The lessee of a house & garden had under his lease the right to run four horses & two cows on the landlord's farm. A single cow only ran on the farm under the lease, & this was the property of the lessee's son, who lived with him & paid no rent. No notice was given to the lessor that the cow was not the property of the lessee, but the manager of the farm knew that the cow was the property of the lessee's son:—Held: as the son had allowed

*Sect. 5.—What may or may not be distrained: Sub-
[ss. 10 & 11.]*

Saffery v. Elgood (1834), 3 L. J. K. B. 151. **Mentd.**
Banks v. Angell (1838), 7 Ad. & El. 843; *Angell v.*
Harrison (1847), 12 Jur. 114; *Brown v. Glenn* (1851),
16 Q. B. 254; *American Concentrated Must Corp'n. v.*
Hendry (1893), 62 L. J. Q. B. 388.

362. ———. ———.]—**ANON.** (1696), 3 Salk.
136; 91 E. R. 737.

Annotations:—Consd. *Hutchins v. Chambers* (1758), 1
Burr. 579. **Refd.** *McCraigh v. Cox & Ford* (1923), 92
L. J. K. B. 855.

363. ———. ———.]—The cattle of a
stranger may be distrained for a modern rent
service the instant they come upon the premises
liable to the distress, if they came thereon either
by the default of the owner, or with his consent,
but if through the default of the tenant, not
until after notice. Where a deft. justifies taking
the cattle of a stranger as a distress for rent, a
replication generally that they were not levant &
couchant will be bad upon demurrer, but unex-
ceptionable after verdict. — *KEMPE v. CRUWES*
(1697), 1 Ld. Raym. 167; 91 E. R. 1007; *sub*
nom. *KIMP v. CRUWES*, 2 Lut. 1573.

Annotations:—Consd. *Jones v. Powell* (1826), 5 B. & C.
647. **Apld.** *Saffery v. Elgood* (1834), 1 Ad. & El. 191.
Mentd. *Morgan v. Seaward* (1837), 2 M. & W. 514; *Gordon*
v. Ellis (1844), 7 Man. & G. 607.

364. ———. ———. **Owner making immediate
pursuit.**—*LACIE'S CASE* (1620), Palm. 43; 81
E. R. 969.

Annotation:—Refd. *Kimp v. Cruwes* (1697), 2 Lut. 1573.

365. ———. ———.]—**RENOLDS v.**
OAKLEY (1610), 1 Brownl. 170; 123 E. R. 735.

366. ———. ———.]—**JONES v. POWELL**, No. 250,
ante.

367. ———. **Consent of landlord to agistment.**—
FOWKES v. JOYCE, No. 617, *post.*

368. ———.]—**TATE v. GLEED** (1784), 2 Wms.
Saund. 290 a, n.; 85 E. R. 1075.

369. ———.]—Cattle going to, or at a fair or
market are privileged &, as a consequence arising
out of the necessity for their refreshment on their
passage towards such fair or market, if distant,
they have been held to be privileged during any
temporary agistment on the road (*ALDERSON, B.*).
—*MUSPRATT v. GREGORY* (1838), 3 M. & W. 677;
1 Horn. & H. 184; 7 L. J. Ex. 385; 150 E. R.
1316, Ex. Ch.

Annotations:—Consd. *Re Russell, Ex p. Russell* (1870), 18
W. R. 753. **Refd.** *Joule v. Jackson* (1841), 7 M. & W.
450; *Parsons v. Gingell* (1847), 4 C. B. 545; *Williams*
v. Holmes (1853), 8 Exch. 861; *Lyons v. Elliott* (1876),
45 L. J. Q. B. 159; *Clarke v. Millwall Dock Co.* (1886),
17 Q. B. D. 494.

370. ———.]—**MILES v. FURBER**, No. 281,
ante.

371. ———. **"At a fair price"**—**Agricultural
Holdings Act, 1923, c. 9, s. 35.**—Live stock
agisted for a fair equivalent is within the Agri-
cultural Holdings Act, 1883 (c. 61), s. 45, as taken
in to be fed at a "fair price," & may, therefore,

knowledge of stranger.—Pltf. left cattle
with a third party, who two years
later removed them to deft.'s farm,
portion of which he leased from deft.
The cattle were attached in execution
of a judgment obtained by deft.
against the third party:—**Held:** in
the absence of evidence that pltf. knew
of the removal of the cattle to deft.'s
land, & expressly or impliedly con-
sented to it, the cattle were not subject
to the landlord's lien.—*NCORA v.*
UNTIEDT (1916), E. D. L. 328.—**S. AF.**

PART II. SECT. 5, SUB-SECT. 9.—C.

**378 i. Sheep—Protected if sufficient
other distress.**—It is illegal to distrain
sheep for rent where there are other
goods upon the premises liable to

satisfy the claim.—*HOPE v. WHITE*
(1871), 22 C. P. 5.—**CAN.**

**m. Cattle—Straying by default of
owner.**—Where sheep or cattle by
default of their owner stray upon un-
enclosed land they may be immediately
distrained for rent in arrear.—*MAGUIRE*
v. DIXON (1869), 6 W. W. & A'B. 227.
—**AUS.**

**n. ———. Grazing outside property
leased.**—Cattle in a lessee's custody,
stabled & kraaled on the property
leased & which would have been liable
to attachment by the lessor under his
lien for arrear rent had they been
attached in such property are not free
from such liability because at the time
of attachment they are grazing on
adjoining land belonging to the lessor,

be exempt from distress, even although such
equivalent be not money.

Cows were agisted on the terms "milk for
meat," i.e. that the agister should take their milk
in exchange for their pasturage:—**Held:** the
agistment was within the Act.—*LONDON & YORK-*
SHIRE BANK v. BELTON (1885), 15 Q. B. D. 457;
54 L. J. Q. B. 568; 50 J. P. 86; 34 W. R. 31.

372. ———. ———.]—Cattle were distrained
while on a holding pursuant to an agreement by
which the tenant in consideration of £2 allowed
the owner "the exclusive right to feed the grass
on the land for four weeks":—**Held:** the cattle
were not "Taken in" by the tenant "to be fed
at a fair price," within the meaning of Agriculture
Holdings Act, 1883 (c. 61), s. 45, & were therefore
not privileged from distress.—*MASTERS v. GREEN*
(1888), 20 Q. B. D. 807; 59 L. T. 476; 52 J. P.
597; 36 W. R. 591, D. C.

Annotation:—Mentd. *Richards v. Davies*, [1921] 1 Ch. 90.

**373. Cattle on pasturage sold by auction —
Implied agreement.**—*HORSFORD v. WEBSTER*,
No. 610, *post.*

374. ———. Estoppel.—*CRESSWELL v. JEFFREYS*,
No. 620, *post.*

375. Horses in stable let to tenant.—A land-
lord may distrain at once horses, in a stable let
by his tenant to an innkeeper during races.—
CROSIER v. TOMKINSON (1759), 2 Keny. 439;
Barnes, 472; 96 E. R. 1237.

Annotations:—Consd. *Williams v. Holmes* (1853), 8 Ex. Ch.
861. **Apld.** *Lyons v. Elliott* (1876), 1 Q. B. D. 210.

**376. Tenants in common — Right of one co-
tenant to destrain—Cattle on premises by licence
of other co-owner.**—One who has a third part
of a tenement which he demises cannot seize, in
distrain for rent, cattle on the tenement by the
licence of him in whom the other two parts are
vested.—*KEMPE v. CORY* (1690), 2 Vent. 283;
86 E. R. 442.

Annotations:—Refd. *Gilbert v. Parker* (1704), 2 Salk. 629;
Re Potter, Ex p. Parke (1874), De Colyar's County
Court Cases 235.

C. Other Animals.

377. Deer—In private ownership.—*DAVIES*
v. POWELL (1738), Willes, 46; *Cooke Pr. Cas.*
146; 7 Mod. Rep. 249; 125 E. R. 1048.

Annotations:—Mentd. *Steel v. Lacy* (1810), 3 Taunt. 285;
Morgan v. Abergavenny (1849), 8 C. B. 768; *Ford v.*
Tynte (1861), 31 L. J. Ch. 177.

**378. Sheep — Protected if sufficient other dis-
tress.**—*KEEN v. PRIEST*, No. 356, *ante.*

**SUB-SECT. 10.—AGRICULTURAL CROPS AND
IMPLEMENTS OF HUSBANDRY.**

*See Distress for Rent Act, 1737 (c. 19), ss. 8, 9,
& the Landlord & Tenant Act, 1851 (c. 25), s. 2.*

379. Corn in sheaves — Not distrainable at

in pursuance of a right granted to the
lessee in terms of the lease.—*DE WET*
v. BRINK (1910), T. P. D. 336.—**S. AF.**

**o. ———. On way to market—Resting
& grazing in field.**—Cattle belong-
ing to a drover, on their way to market
for the purpose of being sold there,
& put to graze for the night, imme-
diately before the morning on which
the market is to be held, are privileged
from distress by the landlord of the
locus in quo for rent due out of that
place.—*NUGENT v. KIRWAN* (1838),
1 Jebb, & S. 97.—**IR.**

PART II. SECT. 5, SUB-SECT. 10.

**p. Wheat mixed with chaff on
ground—Postponed to beasts of plough.**
—The rule that a landlord must

common law.]—WILSON v. DUCKET, No. 258, *ante*.

380. ———.]—(1) The reason why shocks of corn could not be distrained at common law was because they could not be carried off without damage to the tenant (REYNOLDS, J.).

(2) Unless in cases in which a distrainer is authorised by statute to keep the distress on the premises upon which he distrained, he is liable to an action of trespass if he suffers them to remain there an unreasonable time.—GRIFFIN v. SCOTT (1726), 1 Barn. K. B. 3; 2 Ld. Raym. 1424; 2 Stra. 717; 94 E. R. 2.

381. ——— Under Distress Act, 1689, c. 5.]—SIMPSON v. HARTOPP, No. 247, *ante*.

382. ———.]—BELASYSE v. BURBRIDGE (1696), 1 Lut. 213; 125 E. R. 112; *sub nom.* BELLASIS v. BURBRIDGE, 1 Ld. Raym. 170.

Annotations:—*Mentd.* Eaton v. Jaques (1780), 2 Doug. K. B. 455; Birch v. Wright (1786), 1 Term Rep. 378; Denn d. Jacklin v. Cartright (1803), 4 East, 29; Williams v. Bosanquet (1819), 1 Brod. & Bing. 238; Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957.

383. ——— Arrears of rentcharge.]—Distress of *carelat tritici* for arrears of an annuity, good.

The word *carelat* signifies the cart loaded with sheaves, as well as a cart-load, so a good distress & a good count (*per CUR.*).—HORTON v. ARNOLD (1731), Fortes. Rep. 361; 92 E. R. 891.

384. ———.]—(1) A deed granting an annuity, charged upon certain premises, gave a power to the grantee, if the annuity should be behind for twenty days, to enter upon the premises & distrain, “& the distress & distresses then & there found to take, seize, lead, drive, carry away, & impound, detain & keep, & sell & dispose of the same, in the same manner as the law directs in cases of rent in arrear”:—*Held*: this clause gave the grantee of a rentcharge the same power to take hay or corn in the stack, as a distress, as was given to landlords by 2 Will. & Mar., 1690 (c. 5), s. 3.

(2) The goods of a stranger may be distrained for the arrears.

(3) If, where a seisin is alleged in the avowry, & a subsequent grant of the rentcharge by the party seised, pltf. relies on exemption from the distress, on the ground of an interest anterior to the grant, it is matter for him to plead.—JOHNSON v. FAULKNER (1842), 2 Q. B. 925; 2 Gal. & Dav. 184; 11 L. J. Q. B. 193; 6 Jur. 833; 114 E. R. 358.

385. Growing crops—Within Distress for Rent Act, 1737, c. 19.]—Growing crops may be considered in the nature of goods & chattels, under Distress for Rent Act, 1737 (c. 19), as they may be distrained in the same manner as articles of the latter description.

Where, therefore, the condition of a replevin bond was, that deft. should prosecute his action with effect against pltf. for taking & detaining his goods, chattels, & growing crops, & in the declaration the bond was set out as conditioned to prosecute with effect for taking & detaining the goods & chattels in the condition mentioned:—*Held*: this was no variance.—GLOVER v. COLES (1822), 1 Bing. 6; 7 Moore, C. P. 231; 130 E. R. 3. Annotation:—*Mentd.* Short v. Hubbard (1824), 9 Moore C. P. 667.

386. ——— Arrears of rentcharge.]—Deft. made cognisance in replevin, under a power of distress for an annuity granted by O. to H. in Sept. 1806.

distrain all other distrainable goods before seizing beasts of plough does not apply to heaps of wheat mixed with chaff, lying on the ground as thrown by the heaper, nor to any goods distrainable by statute only.—GOODFELLOW v. GREIG (1870), 4 S. A. L. R.

113.—AUS.

q. *Hop poles*.]—Hop poles left standing in the ground after the hops have been gathered, are not distrainable.—ALWAY v. ANDERSON (1848), 5 U. C. R. 34.—CAN.

Pltf. pleaded that in May, 1806, G. for securing another annuity, & in consideration of £3,000, granted, bargained, sold, & demised the premises to F., for 99 years:—*Held*: (1) no bar, without alleging entry by F., or that F. elected that the deed should enure by way of bargain & sale; (2) standing crops cannot be taken under a power to distrain for the arrears of an annuity.—MILLER v. GREEN (1831), 8 Bing. 92; 2 Cr. & J. 142; 1 Moo. & S. 199; 1 L. J. Ex. 51; 131 E. R. 336, Ex. Ch.

Annotations:—*As to* (1) *Refd.* Haigh v. Jaggard (1847), 16 M. & W. 525; Mann, Crossman & Paulin v. Land Registry, [1918] 1 Ch. 202. *As to* (2) *Distd.* Johnson v. Faulkner (1842), 2 Q. B. 925. *Generally, Mentd.* Doe d. Agar v. Brown (1853), 1 C. L. R. 1048; Hogan v. Hand (1861), 14 Moo. P. C. C. 310.

387. ———.]—Growing corn sold under a *fi. fa.* cannot be distrained for rent, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe.

A stranger became possessed of a crop of growing corn by purchase at a sale, under a *fi. fa.*, upon which sale the landlord was paid a year's rent. The landlord, before the corn was ripe, distrained it for rent due subsequently to the sale:—*Held*: the distress was ill.—PEACOCK v. PURVIS (1820), 2 Brod. & Bing. 362; 5 Moore, C. P. 79; 129 E. R. 1006.

Annotations:—*Folld.* Wright v. Dowes (1834), 1 Ad. & El. 641. *Consd.* Wharton v. Naylor (1848), 12 Q. B. 673. *Refd.* Foulger v. Taylor (1860), 5 H. & N. 202; *Re Davis, Ex p. Pollen's Estate Trustees* (1885), 3 Morr. 27. *Mentd.* Cocker v. Musgrove & Moon (1846), 10 Jur. 922; Carter v. Hughes (1858), 27 L. J. Ex. 225.

388. ——— Excessive quantity seized—Liability of landlord.]—PIGGOTT v. BIRTLES, No. 355, *ante*.

389. Trees, shrubs, etc., in nursery garden — Not within Distress for Rent Act, 1737 (c. 19).]—Trees, shrubs, & plants growing in land which deft. had demised to pltf. for a term, & which they had converted into nursery ground, & planted subsequently to the demise are not distrainable by the former for rent, under the above statute, as that applies only to corn & other products of the land which may become ripe, & are capable of being cut & laid up.—CLARK v. GASKARTH (1818), 8 Taunt. 431; 2 Moore, C. P. 491; 129 E. R. 450.

Annotation:—*Folld.* Clark v. Calvert (1819), 8 Taunt. 742.

390. ———.]—Trees growing in a nurseryman's ground, who was a yearly tenant to pltf., & removable by such tenant from time to time, are not distrainable for rent, under sect. 8 of the above Act.—CLARK v. CALVERT (1819), 8 Taunt. 742; 3 Moore, C. P. 96; 129 E. R. 573.

Annotations:—*Mentd.* Rogers v. Spence (1844), 13 M. & W. 571; Beckham v. Drake (1849), 2 H. L. Cas. 579; Rose v. Buckett, [1901] 2 K. B. 449.

391. Implements of husbandry — Whether distrainable at common law.]—ANON. (1696), 3 Salk. 136; 91 E. R. 737.

Annotations:—*Refd.* Hutchins v. Chambers (1758), 1 Burr. 579. *Mentd.* McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

392. ———.]—SIMPSON v. HARTOPP, No. 247, *ante*.

SUB-SECT. 11.—GOODS OF STRANGERS.

See, now, Law of Distress Amendment Act, 1908 (c. 53), s. 1.

393. Not privileged—At common law.]—On a

PART II. SECT. 5, SUB-SECT. 1.

r. *Whether distrainable—Piano*.]—A piano was lent by pltf. to one who lodged in a house kept by B., who rented the same from deft. The piano having been seized by deft. for rent

Sect. 5.—What may or may not be distrained: Subsects. 11 & 12, A.]

lease for years, with a clause of re-entry on non-payment of rent, the lessor on demand & refusal, may either enter or distrain although the lessee be disseised by a stranger.—*HUMPHRY v. DAMION* (1812), Cro. Jac. 300; 79 E. R. 257.

394. ———.] — *LIGO v. CHIFFIN* (1669), 2 Keb. 561; 84 E. R. 353.

395. ———.] — *GORTON v. FALKNER*, No. 248, *ante*.

396. ———.] — *GILMAN v. ELTON*, No. 249, *ante*.

397. ———.] — *CRAMER v. MOTT*, No. 252, *ante*.

———.] — *LYONS v. ELLIOTT*, No. 253, *ante*.

399. — **Arrears of rentcharge.**] — (1) A rentcharge granted for life by a tenant for years, is not void but is good as a chattel interest.

(2) The goods of a stranger not shown to hold the premises by title paramount to the rentcharge, as by a prior demise, may be distrained for the arrears.—*SAFFERY v. ELGOOD* (1834), 1 Ad. & El. 191; 3 Nev. & M. K. B. 346; 3 L. J. K. B. 151; 110 E. R. 1180.

Annotation:—As to (2) Folld. Johnson v. Faulkner (1812), 2 Q. B. 925.

400. ———.] — *MUSPRATT v. GREGORY* No. 369, *ante*.

due by B.:—*Held*: the piano was furniture within 15 Vict., No. 11, s. 6, & the seizure was therefore lawful.—*HUENERBEIN v. GERBER* (1886), 7 N. S. W. L. R. 112.—**AUS.**

s. ———.] — **Purchase by distrainor.**] — In Jan. 1872, pltf., a musical instrument maker rented a piano to J., at \$6 per month, with the right of purchase, the rent to go towards payment of purchase-money, which was fixed at \$150; & several months afterwards, when J. had paid three months' rent, a written contract was signed by J. Deft., J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for \$75, deft. being the purchaser, & deft. afterwards allowed J. \$125 extra in settlement with him, making \$200 in all:—*Held*: (1) the evidence sufficiently showed the piano to be pltf.'s property, & that he was entitled to maintain trover for it against deft.; (2) the sale to deft. passed nothing, for as landlord he could not himself purchase goods sold by his bailiff, & although, as between J. & deft., deft.'s claim might be complete by the subsequent arrangement with J., yet pltf., the owner, was not bound by it; (3) deft. could not set up a lien for the rent as against pltf., for the distress was at an end, & the goods in no way in the custody of the law.—*WILLIAMS v. GREY* (1874), 23 C. P. 561.—**CAN.**

t. ———.] — *LANGHOFF v. BOYER* (1895), Q. R. 9 S. C. 216.—**CAN.**

a. ———.] — The lessor does not lose his privilege on a piano in the leased premises, because of his knowledge that the article is not the property of the lessee, but is merely leased by him.—*WILLIS v. NAVERT* (1897), Q. R. 12 S. C. 280.—**CAN.**

b. ———.] — A. assigned a pianoforte to B., under a bill of sale by way of mtge. security for a debt, with a clause for re-demise on payment, a proviso that until default A. should retain possession, & a power of sale by B. on default. Subsequently A. transferred the pianoforte to C. under a *bona fide* sale, & C. took possession of the pianoforte accordingly, & removed same from A.'s premises. D., who was the landlord of A., & to whom a year's rent was due, then in ignorance

both of the mtge. to B. & the sale to C., & without the knowledge of B., caused the pianoforte to be taken & replaced in the house of A. C. asked D. why he had done so, & D. replied that he had done so for the benefit of A.'s creditors, as he was a bkpt., but there was no express demand of the pianoforte by C., or refusal to deliver possession by D. On the next day D. distrained for the rent due upon A.'s premises, & seized the pianoforte under such distress. B. thereupon claimed it as his property under his bill of sale, but did not appear to controvert the right of distress. D. proceeded, however, to sell the pianoforte under the distress, & it was purchased by B., who then paid D. the amount due for rent & costs, & retained the balance of the purchaser-money. In an action of trespass & trover brought by C. against D., in respect of the seizure & conversion of the pianoforte:—*Held*: deft. was liable, & was not entitled to rely, as against C., upon the *ius tertii* by reason of B.'s property in the pianoforte.—*HAGGAN v. PAISLEY* (1878), 13 I. L. T. 27.—**IR.**

c. ———.] — Claimant had lent to deft. who had had possession of them for more than two months, a piano, his carpet, & his stool, which he had left with deft. in hope of selling them to him:—*Held*: these things not being upon the premises accidentally or by chance, were subject to the claim of the landlord of deft.—*MEKCHER v. GERVAIS* (1897), Q. R. 12 S. C. 336.—**CAN.**

d. ———.] — A tenant hired a piano under a contract which gave him no right to acquire the piano or retain it indefinitely:—*Held*: the piano was not subject to the landlord's lien.—*TURPIN v. WAGSTAFF & SONS* (1906), T. S. 597.—**S. AF.**

e. — **Ships in distrainee's yard—Repairs.**] — M., a ship builder, carried on his business in a yard leased from A. Pltf. sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that pltf. should furnish the materials, & he purchased from M. for the purpose, some oak timber then in the yard. Pltf.'s foreman took possession of it, & a portion had been worked up by pltf.'s & M.'s

401. ———.] — *JOHNSON v. FAULKNER*, No. 384, *ante*.

———.] — *See, further, RENTCHARGES & ANNUITIES.*

402. **Distrain by grantee of rentcharge — Grantor without legal estate.**] — *FREEMAN v. EDWARDS*, No. 10, *ante*.

403. **Stranger occupying as agent of landlord.**] — In an action of ejectment it appeared that pltf. had demised four adjoining houses by a lease containing a proviso in the usual form for re-entry. The tenant sublet the houses, & two of them being deserted, were entered upon & kept possession of for some time by a police constable, but merely to prevent their becoming a public nuisance. Afterwards, pltf. put one, T., into possession of these two houses to take care of them, on a verbal understanding that the four should be let to him as soon as pltf. obtained possession of the other two, but there was no other tenancy. Subsequently, there not being any sufficient distress upon the two houses not in the possession of pltf. to countervail the arrears of rent due under the lease upon all four, pltf. brought ejectment & obtained judgment, it being left at the trial uncertain whether there were or were not goods upon the other two houses to meet the arrears of rent reserved under the lease:—*Held*: there had been no eviction, & T.'s possession was the possession of pltf., who had no right to distrain upon

men, when A. distrained both it & the vessels for rent:—*Held*: there had been a sufficient change of possession of the timber to dispense with a registered assignment, & both it & the vessels were exempt from distress.—*GILDERSLLEEVE v. AULT* (1858), 16 U. C. R. 401.—**CAN.**

f. — **Agricultural implement.**] — The intervening party purchased an agricultural implement from deft., a dealer in such things, with the understanding that it should be removed without delay. Shortly after the sale intervenant went for it, but, in consequence of snow having fallen & ice formed about the instrument, it was feared that it might be injured by being cut out, & it was allowed to remain until the spring, when it was seized for rent due by deft.:—*Held*: in the circumstances, it was transiently & accidentally on the premises, & not subject to the landlord's privilege.—*MCGREEVY v. GINGRAS & COTE* (1877), 3 Q. L. R. 196.—**CAN.**

g. ———.] — W. supplied a wagon to G., a general dealer, & debited G. with the price. On Sept. 2, 1914, the sale was cancelled by mutual consent, G. being credited with the price, & on the same date G. agreed to hold the wagon on consignment for W. & sell it on W.'s behalf:—*Held*: the facts constituted a *constitutum possessorium* & as the holding of the wagon by G. for W. was an isolated transaction for the benefit of W. & for the special purpose of being sold on behalf of W., G.'s landlord had no lien on such wagon even although a month's rent had fallen due before the arrangement between G. & W. had been entered into.—*GOLDINGER'S TRUSTEE v. WHITELOW & SONS* (1916), T. P. D. 230.—**S. AF.**

h. — **Furniture.**] — A landlord's lien for rent extends over furniture of strangers left for the permanent use of the tenant.—*CHOLWICH v. PENNY* (1888), 5 E. D. C. 270.—**S. AF.**

k. — **Machinery.**] — An agreement upon the sale of certain machinery & other goods contained a provision that until the balance of the purchase-money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, & that no

T.'s goods for the arrears of rent due under the lease, & pltf. was entitled to bring ejectment.—*WHEELER v. STEVENSON* (1860), 6 H. & N. 155; 30 L. J. Ex. 46; 3 L. T. 702; 9 W. R. 233; 158 E. R. 64.

404. Goods brought to premises by landlord—Right to distrain lost.]—A landlord cannot distrain upon the goods of a third person, brought by himself on to the demised premises, without the authority of the third person, even though the goods had been originally placed on the premises by the authority of the third person & wrongfully removed by some one else.—*PATON v. CARTER* (1883), Cab. & El. 183.

Goods sent to trader to be worked upon.]—See Part II., Sect. 5, sub-sect. 4, *ante*.

Animals of stranger.]—See Part II., Sect. 5, sub-sect. 9, B., *ante*.

Payment to landlord to redeem goods distrained—Right of stranger to reimbursement.]—See CONTRACT, Vol. XII., pp. 526, 527, Nos. 4385–4387; p. 529, Nos. 4402–4405.

Tenants of mortgagor—Distress by mortgagee.]—See Part II., Sect. 4, sub-sect. 7, B. (b), *ante*.

Trade privilege.]—See Part II., Sect. 5, sub-sect. 4, *ante*.

SUB-SECT. 12.—GOODS OF UNDERTENANTS AND LODGERS.

A. In General.

405. General rule—Goods not privileged.]—*WALTERS v. NORTHERN COAL MINING CO.*, No. 99, *ante*.

406. Right of undertenant to reimbursement—Action for money paid to use of sub-lessor—Distress sold by landlord.]—An undertenant, whose

goods were distrained & sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter, for, immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, & never was the money of the undertenant.—*MOORE v. PYRKE* (1809), 11 East, 52; 103 E. R. 923.

Annotations:—*Reid*. *West v. Nibbs* (1847), 4 C. B. 172; *Yates v. Eastwood* (1851), 6 Exch. 805; *Griffinhoofe v. Daubuz* (1855), 5 E. & B. 746; *King v. England* (1864), 28 J. P. 230; *O'Donoghue v. Coalbrook & Broadoak Co.* (1872), 26 L. T. 806. **Mentd.** *Maxwell v. Jameson* (1818), 2 B. & Ald. 51; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Bandy v. Cartwright* (1853), 22 L. J. Ex. 285; *Blaker v. Seager* (1897), 76 L. T. 392.

407. ——— Implied indemnity.]—Where the tenant of certain premises underlet a part by deed, & the original landlord distrained for rent upon the undertenant:—*Held*: *assumpsit* would not lie by the latter against his lessor upon an implied promise to indemnify him against the rent payable to the superior landlord.—*SCHLENCKER v. MOXSY* (1825), 3 B. & C. 789; 5 Dow. & Ry. K. B. 747; 107 E. R. 926.

Annotations:—*Fold*. *Baber v. Harris* (1839), 9 Ad. & El. 532. **Mentd.** *Spencer v. Parry* (1835), 3 Ad. & El. 331; *Doe d. Egremont v. Date* (1842), 3 Q. B. 609; *Marker v. Kenrick* (1853), 22 L. J. C. P. 129.

408. ——— ———.]—Where a lessee assigns & grants over his lease by deed, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word "grant" in the deed. Consequently, if, upon such distress, he has paid the rent to release his own goods, he cannot sue the assignor in *assumpsit* for the amount paid, although the assignor, after

actual delivery of such property should be made, nor should possession be parted with, until such balance & interest should be fully paid. After the sale the vendee took possession of the goods, & subsequently, on Apr. 1, 1890, with the assent of the vendor, who surrendered a former lease, defts. leased to the vendee the premises upon which the goods were situated. Afterwards, & while the balance of the purchase-money was still unpaid, defts. distrained for rent upon the goods in question:—*Held*: the stipulation in the agreement for a vendor's lien was inappropriate & inconsistent & must be read out as mere surplusage; & so reading the agreement, the transaction was one of conditional sale, & under 57 Vict. c. 43, only the interest of the tenant in the goods could be distrained on.—*CARROLL v. BEARD* (1895), 27 O. R. 349.—CAN.

l. ——— ———.]—A threshing machine, the property of a stranger, left upon a farm for the purpose of threshing, may not be distrained for taxes due in respect of the farm.—*LE BRUYNE v. LAURIER* (1915), 33 W. L. R. 107; 8 Sask. L. R. 251; 25 D. L. R. 746; 9 W. W. R. 682.—CAN.

m. ——— Crops & grain—Construction of statute.]—The meaning of Distress Act, R. S. M. (1913), s. 5, is that the landlord may distrain on crops or grain on the premises claimed under execution or attachment against the tenant, & may distrain on goods & chattels on the premises belonging to a third person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mtge. or otherwise, but the statute does not preserve the right of distress in the landlord in respect to mortgaged goods, where the mtge. has not been made

by the tenant himself, but by another person, & the mtgor.'s equity of redemption has been acquired by the tenant.—*ENRIGHT v. LITTLE & BRAD* (1916), 35 W. L. R. 123; 11 W. W. R. 123; 27 Man. L. R. 80.—CAN.

n. ——— Goods in co-ownership of distrainee & stranger—Whether stranger can compel sale.]—Where a landlord has distrained for arrears of rent, goods upon the demised premises liable to such distress, belonging in part to the tenant & in part to a third person, such third person has no right to compel, or to ask the ct. to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person.—*PEGG v. STARR* (1892), 23 O. R. 83.—CAN.

o. ——— Goods in co-ownership of tenant & stranger.]—A landlord, having distrained on property found on the premises occupied by his tenant, is not bound first to sell all the property of the tenant before selling the property of a third person found on the demised premises.—*MILLER BROTHERS v. TWOHEY* (1904), 40 N. S. R. 424.—CAN.

p. ——— Distraint ineffectual if goods not attached on premises of tenant.]—To render a landlord's hypothec effectual over the goods of a third person found on the leased premises, they must be attached thereon. If the landlord removes them from those premises, even though his tenant have vacated, he will lose his hypothec.—*BOURNE & Co. v. LINDSAY* (1912), T. P. D. 142.—S. AF.

q. ——— Goods brought on premises for permanent purpose.]—The landlord's lien for rent due extends not only over the goods of the lessee but also over the goods of a third person which have been brought on the premises, not temporarily, but for a permanent

purpose with the consent of such third person, either expressly or tacitly given.—*ROSEN v. MANOLIDIS* (1916), J. D. R. 107.—S. AF.

r. Tenancy by estoppel—Third persons not bound by estoppel—Whether third person's goods distrainable.]—A clause in a memorandum of mtge. under Land Transfer Act, 1885, whereby the mtgor. attorns tenant to the mtgee. creates no tenancy except by estoppel, & therefore, as third persons are not bound by the estoppel, their goods on the premises are not liable for distress for rent due to the mtgee.—*JELlicoe v. WELLINGTON LOAN CO.* (1886), 4 N. Z. L. R. 330.—N.Z.

s. Construction of statute—Goods subject of lien must be tenant's only.]—Under Distress Act, 1885, a landlord has a lien on goods on the demised premises belonging to the tenant only, & not, as formerly, on goods merely because found on the premises.—*WERTHEIM v. SAMSON* (1886), 5 N. Z. L. R. 208.—N.Z.

t. Public trustee—Declaration of trust.]—The Public Trustee, acting as trustee under a will, made an advance of certain moneys under an order of ct. to an infant, out of a fund to which he was presumptively entitled under the will, such moneys to be expended in the purchase of stock, etc., for a farm of which the infant's mother was tenant. A declaration of trust was executed by the mother, by which she declared she held the stock, etc., upon trust for the Public Trustee. These facts were known to the landlord at the time he granted the lease:—*Held*: the stock, etc., was the property of the Public Trustee, & was not, therefore, liable to seizure under a distress for rent owing under the lease.—*PUBLIC TRUSTEE v. GARRETT* (1888), 6 N. Z. L. R. 696.—N.Z.

Sect. 5.—What may or may not be distrained: Sub-sect. 12, A. & B. (a) i., ii. & iii. & (b) i., ii. iii.]

such distress & payment, has promised pltf. to repay him the amount, at least if there be not a new consideration for such promise, as forbearance.—*BABER v. HARRIS* (1830), 9 Ad. & El. 532; 1 Per. & Dav. 360; 2 Will. Woll. & H. 1; 8 L. J. Q. B. 153; 112 E. R. 1313.

Annotation:—Mentd. Yates v. Aston (1843), 4 Q. B. 182.

409. — Express indemnity clause—Right of sub-lessor to set off.]—To a count upon an absolute contract by deft. to indemnify pltfs., his tenants, against the consequences of the non-payment of his rent to the superior landlord, alleging for breach, that, the rent being in arrear, pltfs.' goods were seized by the superior landlord, deft. pleaded, that, at the time of the distress, more was due from pltfs. to deft. for rent, than the amount distrained for as in the declaration alleged:—*Held*: no answer to the action, the payment of their rent by pltfs. not being a condition precedent.—*BRIANT v. PILCHER* (1855), 16 C. B. 354; 1 Jur. N. S. 1020; 139 E. R. 795; *sub nom. BRYANT v. PILCHER*, 25 L. T. O. S. 147; 3 W. R. 483.

410. Agreement not to distrain as long as rent paid—Breach of agreement—Tender of balance due—Right to distrain.]—Pltf. being about to take an apartment of deft.'s tenant, deft. promised pltf. never to trouble him or his property so long as he paid the tenant the rent of the apartment. Pltf. paid the rent up to a certain period, & had made a tender of the residue remaining due, when deft., who had received no notice of the tender, distrained pltf.'s goods for rent due from the tenant to deft.:—*Held*: his right to distrain was not barred.—*WELSH v. ROSE* (1830), 6 Bing. 638; 4 Moo. & P. 484; 8 L. J. O. S. C. P. 246; 130 E. R. 1427.

Tenants of mortgagor—Distress by mortgagee.]—*See Part II., Sect. 4, sub-sect. 7, B. (b), ante.*

B. Statutory Protection.

(a) Persons Protected.

i. "Undertenants."

See Law of Distress Amendment Act, 1908 (c. 53), ss. 1, 5, & 9.

411. Liable to pay rent equivalent to full annual value of premises—Meaning of "rent"—Sum of money—Not contingent profit or advantage.]—The word "rent" in Law of Distress Amendment Act, 1908 (c. 53), s. 1, which in certain circumstances

exempts the goods of an undertenant from distress by a superior landlord if such undertenant is liable to pay a "rent which would return in any whole year the full annual value of the premises," means a sum of money & does not include a contingent profit or advantage agreed to be given by the undertenant to his immediate landlord.—*PARSONS v. HAMBRIDGE* (1916), 33 T. L. R. 117; *reversd.* without affecting this point (1917), 33 T. L. R. 346, C. A.

412. — "Full annual value" — Whether payments amounting to.]—Deft. let a house & premises to S. at £50 a year, S. covenanting to do repairs & pay rates & taxes. S. sublet the house to pltf. at 8s. a week, part of the agreement between S. & pltf. being that S. should remain in the house as a boarder & pay pltf. £1 a week for board & lodging, & S. continued to be liable for the rates, taxes, & repairs. Deft. afterwards levied a distress for rent owed to him by S. & seized furniture which was claimed by pltf. In an action by pltf. against deft. for the value of the goods distrained upon, pltf. contended that she was protected from distress by Law of Distress Amendment Act, 1908 (c. 53), s. 1, as being an undertenant liable to pay a rent amounting to the full annual value of the premises. The jury found that pltf. was paying the full annual value, & judgment was given for pltf.:—*Held*: there being no evidence that pltf. was paying the full annual value within the sect. judgment must be entered for deft.—*PARSONS v. HAMBRIDGE* (1917), 33 T. L. R. 346, C. A.

ii. "Lodgers."

See Lodgers' Goods Protection Act, 1871 (c. 79); Law of Distress Amendment Act, 1908 (c. 53), ss. 1, 9.

413. Relationship of landlord & lodger — Question of fact.]—(1) If the landlord, reserving a room in a house, lets the rest of it to a person, but retains such control & dominion over it as is usually retained by masters of houses let in lodgings, the relation of landlord & "lodger" may exist between the parties within the meaning of Lodgers' Goods Protection Act, 1871 (c. 79), although the lodger has the right of exclusively occupying the greater part of the premises, & has separate & uncontrolled power of ingress & egress, & neither the landlord nor his agent sleeps or resides in the house, & the lodger acts as caretaker of the part reserved.

(2) The existence of the relationship of landlord & lodger is a question of fact.—*NESS v.*

PART II. SECT. 5, SUB-SECT. 12.—

B. (a) i.

a. Sub-tenants in possession of premises—House agent acting in excess of authority—In demising premises—Goods of sub-tenants not liable to distress.]—Persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees & without authority to let or grant possession of them, were not in occupation "under" the assignees, & their goods were not liable to distress.—*FARWELL v. JAMESON* (1896), 27 O. R. 141; 23 A. R. 517; 26 S. C. R. 588.—*CAN.*

b. Right of landlord to one-third of crops of sub-tenant.]—A landlord cannot distrain upon the goods of a sub-tenant for the rent due by his lessee. The sub-tenant is not "a person liable for the rent" nor is he the "tenant," within R. S. Sask. c. 51, s. 4. The sub-tenant was to yield to the tenant as rent one-third of the crops:—*Held*: the tenant's one-

third interest could not be seized by the landlord under the distress-warrant against the tenant; for the property would remain in the sub-tenant until division.—*ANDERSON v. SCOTT* (1912), 22 W. L. R. 876; 3 W. W. R. 609; 8 D. L. R. 816.—*CAN.*

c. Lessee allowing company to occupy land subject of lease — No assignment of lease — Whether company "tenant."]—Land was leased but, instead of the lessee, a ranching co. which was formed occupied the land, carried on its business thereon, & paid the rent. There was no assignment of the lease to the co.:—*Held*: the co. was the "tenant" under Distress Act, s. 5, & goods remaining on the premises but which had been sold by the co. to claimant could be distrained upon for rent.

Some horses & cows included in the chattels sold had been removed by one representing the co. but it did not appear that they were delivered to claimant or where they were removed to. They strayed back to

the leased premises prior to the seizure:—*Held*: they were still under the co.'s control, upon its premises & in the same position as if they were let off & on the premises for pasturage or other purposes by the tenant, & being found upon the premises, were liable to seizure for rent.—*PHALEN v. LEVITT*, [1923] 2 D. L. R. 600; 1 W. W. R. 1264.—*CAN.*

d. Whether receiver may distrain—When immediate tenant cannot be discovered.]—The ct. does not in general allow undertenants to be distrained by the receiver, but when the representative of the immediate tenant cannot be discovered, in order that an attachment might be applied for against him, the ct. will permit it.—*ANON.* (1829), 3 Ir. L. Rec. 1st ser. 35.—*IR.*

e. Tacit hypothecation — Extent of.]—A landlord has no tacit hypothecation upon the goods of a *bona fide* sub-tenant beyond the amount due for rent by such sub-tenant to the tenant.—*SMITH v. DIERKS* (1884), 3 S. C. 142.—*S. AF.*

STEPHENSON (1882), 9 Q. B. D. 245; 47 J. P. 134, D. C.

Annotation:—*As to* (2) *Refd.* Ancketill v. Roberts (1882), 46 J. P. 791.

414. — When constituted—Landlord retaining control of house—Residence on premises not essential.—To constitute a person a lodger so as to entitle him to the protection of Lodgers' Goods Protection Act, 1871 (c. 79), against a levy on his goods for rent due from his immediate landlord to the superior landlord, there must be evidence of the retention by the immediate landlord, by himself or his servants, of some such dominion & power over the house which he sublets as the master of a house let in lodgings usually has, although it is not absolutely necessary that the immediate landlord should himself reside on the premises so sublet by him.—MORTON v. PALMER (1881), 51 L. J. Q. B. 7; 45 L. T. 426; 46 J. P. 150; 30 W. R. 115, C. A.

Annotations:—*Expld.* Ness v. Stephenson (1882), 9 Q. B. D. 245. *Foll.* Lowe v. Dorling, [1906] 2 K. B. 772. *Refd.* Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen (1881), Colt. 163; Ancketill v. Baylis (1882), 52 L. J. Q. B. 104.

415. — — — — —.]—NESS v. STEPHENSON, No. 413, *ante*.

416. — — — — — Lodger sleeping on premises.]
(1) In order to constitute a person a "lodger" within the meaning of the Lodgers' Goods Protection Act, 1871 (c. 79), it is necessary that he should live, *i.e.* habitually sleep, on the premises.

(2) The protection afforded by the Act does not extend to the occupation of premises for business purposes only.—HEAWOOD v. BONE (1884), 13 Q. B. D. 179; 51 L. T. 125; 48 J. P. 710; 32 W. R. 752, D. C.

417. — — — — — Not by occupation of premises for business purposes only.]—HEAWOOD v. BONE, No. 416, *ante*.

418. — — — — — Part of premises let on weekly tenancy—By tenant at will or sufferance.]—A tenant at will or on sufferance can create between himself & a third party the relationship of landlord & lodger by letting part of the premises to such third party on a weekly tenancy so as to entitle his lodger to the benefit of Lodgers' Goods Protection Act, 1871 (c. 79).—BENSING v. RAMSAY (1896), 62 J. P. 613; 14 T. L. R. 345, D. C.

419. Whether undertenant may be lodger.]—By an agreement in writing pltf. hired from F. rooms in a house held by her under an unexpired lease from deft., for which pltf. was to pay F. £27 10s. per quarter, she paying rates & taxes, & keeping the premises in repair. The rooms so hired by pltf. substantially constituted the whole house, F. only retaining possession of the house, keeper's room on the basement & of two or three empty attics & a stable. Rent being due from F. to deft., the latter distrained & sold household furniture belonging to pltf., who relying upon the provisions of Lodgers' Goods Protection Act, 1871 (c. 79), sued him for an illegal distress:—*Held*: although the agreement under which he held might make him an "undertenant," pltf. was not the less a "lodger" entitled to the protection of the statute.—PHILLIPS v. HENSON

(1877), 3 C. P. D. 26; 47 L. J. Q. B. 273; 37 L. T. 432; 42 J. P. 137; 26 W. R. 214.

Annotations:—*Refd.* Morton v. Palmer (1881), 51 L. J. Q. B. 7; Ness v. Stephenson (1882), 9 Q. B. D. 245.

See, now, Law of Distress Amendment Act, 1908 (c. 53), s. 9.

iii. "*Persons not Tenants or having Beneficial Interests in Tenancy.*"

See Law of Distress Amendment Act, 1908 (c. 53), s. 1, & Sect. 11, *ante*.

(b) *Goods not Protected.*

i. "*Goods belonging to Husband or Wife of Tenant.*"

See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (1).

ii. "*Goods comprised in any Bill of Sale.*"

See, generally, BILLS OF SALE, Vol. VII., pp. 3 *et seq.*; Law of Distress Amendment Act, 1908 (c. 53), s. 4 (1).

iii. "*Goods comprised in Hire-Purchase Agreement.*"

See Law of Distress Amendment Act, 1908 (c. 53), ss. 1, 4.

420. "Made by such tenant" — Tenant must be party to agreement—Agreement with wife of tenant.]—Deft., a broker distraining for rent due to a landlord from his tenant, seized a pianoforte let by pltf. to the wife of the tenant on a hire-purchase agreement in consideration of monthly payments & on the terms that, in case of default in the punctual payment of the monthly sums, pltf. might retake possession of the piano. At the date of the seizure the monthly payments were in arrear. Pltf. performed the conditions specified in Law of Distress Amendment Act, 1908 (c. 53), ss. 1 & 2. Deft. detained the piano:—*Held*: the words "hire-purchase agreement" in sect. 4 means hire-purchase agreement to which the tenant is a party, & therefore, the piano was not "comprised in any hire-purchase agreement" within the meaning of that sect.; on the facts there was no evidence that the piano was in the possession, order, or disposition of the tenant by the consent & permission of pltf. under such circumstances that the tenant was the reputed owner thereof; & consequently, the piano was not within the exception made by sect. 4 to the protection conferred by sects. 1 & 2, & deft. was liable.—SHENSTONE & CO. v. FREEMAN, [1910] 2 K. B. 84; 79 L. J. K. B. 982; 102 L. T. 682; 26 T. L. R. 416; 54 Sol. Jo. 477, D. C.

Annotations:—*Foll.* Rogers, Eungblut v. Martin (1910), 103 L. T. 527. *Refd.* Chappell v. Harrison (1910), 103 L. T. 594.

421. —.]—A piano, which belonged to pltf., a firm of pianoforte manufacturers, & had been let by them under a hire-purchase agreement to the wife of the tenant of a dwelling-house, was seized by deft., a bailiff, under a distress for rent put in by the landlord upon the demised premises. Pltf. thereupon served upon deft. a declaration in writing, in pursuance of Law of

PART II. SECT. 5, SUB-SECT. 12.— B. (a) ii.

414 i. Relationship of landlord & lodger—When constituted—Landlord retaining control of house—Residence on premises not essential.]—A person may be a "lodger" in a house within Landlord & Tenant Act, 1890, ss. 86–88, though his immediate landlord does not reside there, provided the latter has

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some dominion or right over the house.—FREEMAN v. WELLS, [1909] V. L. R. 361.—AUS.

i. — *Furniture.*—A., who was of age, resided with her widowed mother, who kept a boarding-house. A. occupied a sitting-room & a bedroom which, with some money left her by her father, she had furnished. It did not appear that she paid her

mother any rent, but she assisted in the boarding-house, & in return for her services received board & lodging. A.'s mother then became indebted to her landlord for rent for the house:—*Held*: the landlord was entitled to take possession of A.'s furniture in the bed & sitting-rooms for the rent due.—ULRICH v. ULRICH'S TRUSTEE (1883), 2 S. C. 319.—S. AF.

Sect. 5.—What may or may not be distrained: Subsect. 12, B. (b) iii., iv., v., vi., vii., viii., ix., x.

Distress Amendment Act, 1908 (c. 53), s. 1, stating that the piano was the property of pltfs. This declaration, which was not a declaration under Statutory Declarations Act, 1835 (c. 62), was signed by one member of pltfs.' firm with the authority of his partners. Deft. having refused to give up the piano, an action for its detention was brought by pltfs. against deft.:—*Held*: Law of Distress Amendment Act, 1908 (c. 53), s. 1, does not require a statutory declaration to be made in order to satisfy its terms; it was not necessary that the declaration should be signed by all the partners in pltfs.' firm; & the piano did not come within the exemption created by sect. 4 (1) of the Act, inasmuch as the words "made by such tenant" in the sub-section refer not only to the word "settlement," which immediately precedes them, but also to the previous words "bill of sale" & "hire-purchase agreement," & the piano could not be deemed to have been "in the possession, order, or disposition of such tenant by the consent & permission of the true owner under such circumstances that such tenant" was "the reputed owner thereof."—*ROGERS, EUNGBLUT & Co. v. MARTIN*, [1911] 1 K. B. 19; 80 L. J. K. B. 208; 103 L. T. 527; 75 J. P. 10; 27 T. L. R. 40; 55 Sol. Jo. 29, C. A.

—*Refd.* *Chappell v. Harrison* (1910), 103 L. T.

594.

422. Effect of notice by owners terminating agreement — & demanding return of goods.] — Pltfs., a firm of house-furnishers, let certain articles to L. under a hire-purchase agreement dated Aug. 14, 1911. By clause 6 of the contract the hirer agreed to "regularly & punctually pay the rent, rates, & taxes of the house, buildings, or apartments in which the articles of furniture . . . shall lawfully be for the time being . . . & to keep the articles of furniture . . . free & exempt from all legal process." By clause 8 it was provided "that if the hirer do not duly perform & observe this agreement the owners may retake possession of the furniture. . . ." L. became in arrears with the rent of the premises where the furniture was kept, & this having come to pltfs.' knowledge, they wrote to her on Sept. 12, informing her that in consequence of the non-compliance by her with the terms of the agreement they had decided to terminate same. Upon the following day pltfs. sent a van for the goods, but the carman was informed that rent was owing to L.'s landlord, & the goods were not removed. Pltfs. thereupon served a declaration on the landlord, under Law of Distress Amendment Act, 1908 (c. 53), claiming the goods & stating that L. had no beneficial interest therein. Notwithstanding such notice, the landlord put in a distress for the goods. In an action by pltfs. against the landlord to recover the goods seized or their value:—*Held*: upon breach by the hirer of the terms of the agreement, pltfs. were entitled to determine it by notice, so as to deprive the hirer of any beneficial interest in the goods, & having so determined it the goods were not liable to seizure by the landlord for non-payment of rent.—*LONDON FURNISHING Co., LTD. v. SOLOMON* (1912), 106 L. T. 371; 28 T. L. R. 265, D. C.

Annotations:—*N.F. Hackney Furnishing Co. v. Watts*, [1912] 3 K. B. 225. *Refd.* *Jay's Furnishing Co. v. Brand* (1914), 83 L. J. K. B. 505.

423. — — —.] — Pltfs. let certain goods to D. under a hire-purchase agreement dated Sept. 29, 1909. The agreement entitled the owners to

resume possession of the goods if D. made default in payment of any of the instalments & in certain other events. On Oct. 4, 1911, D. being in arrear in payment of some instalments, pltfs. wrote him a letter purporting to terminate the hiring agreement & claiming repossession of the goods. On Nov. 6, deft., who was D.'s landlord, distrained on the goods, which still remained on D.'s premises, for rent due to him. Pltfs. served on deft. a declaration under Law of Distress Amendment Act, 1908 (c. 53), s. 1, claiming the goods. The landlord refused to deliver up the goods, claiming that by sect. 4 of the above Act they were exempted from the protection afforded by the Act as being goods comprised in a hire-purchase agreement:—*Held*: the demand for the possession of the goods by pltfs. was not sufficient to make the goods no longer comprised in a hire-purchase agreement within the meaning of sect. 4 of the Act, & they were accordingly liable to be distrained on by the landlord.—*HACKNEY FURNISHING Co. v. WATTS*, [1912] 3 K. B. 225; 81 L. J. K. B. 993; 106 L. T. 676; 28 T. L. R. 417, D. C.

Annotation:—*Confd.* *Jay's Furnishing Co. v. Brand*, [1915] 1 K. B. 458.

424. — — —.] — Pltfs. let furniture to the tenant of a flat under a hire-purchase agreement which provided that "If the hirer does not duly perform & observe this agreement, same shall *ipso facto* be determined & the hirer shall forthwith . . . return the goods to the owners, & the owners shall be entitled to retake possession of same as being goods wrongfully detained by the hirer, & for that purpose to enter on any premises where the goods may be." The hirer having fallen into arrear with his weekly payments under the agreement, pltfs. served upon him a written notice that the agreement was terminated & demanding the return of the goods, & they endeavoured unsuccessfully to retake possession. On the next day the landlord distrained upon the goods for arrears of rent of the flat where the goods were:—*Held*: the goods were at the time of the distress "comprised in a hire-purchase agreement," within the meaning of Law of Distress Amendment Act, 1908 (c. 53), s. 4, therefore, were not protected from distress by sects. 1 & 2.—*JAY'S FURNISHING Co. v. BRAND & Co.*, [1915] 1 K. B. 458; 84 L. J. K. B. 867; 112 L. T. 719; 31 T. L. R. 124; 59 Sol. Jo. 160, C. A.

iv. "*Goods comprised in Settlement by Tenant.*"

See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (1).

v. "*Goods in Possession, Order or Disposition of Tenant.*"

See Law of Distress Amendment Act, 1908 (c. 53), ss. 1, 4.

425. "By consent & permission of true owner"—*Goods let to wife of tenant—Under hire-purchase agreement.]*—*SHENSTONE & Co. v. FREEMAN*, No. 420, *ante*.

426. — — —.]—*ROGERS, EUNGBLUT & Co. v. MARTIN*, No. 421, *ante*.

427. — Custom of hiring pianos—Evidence of insufficient to exclude reputed ownership.]—Applts., who were piano manufacturers, lent a piano to the tenant of a theatre of which resp. was the superior landlord. Resp. levied a distress for rent on the piano, & on the hearing of a summons by applts. against resp. for levying a distress on goods which belonged to them, applts. contended that there was a custom on the part of piano manufacturers to lend pianos to lessees of theatres, & that the custom of letting pianos on the hire-

purchase system having received judicial notice, therefore, although the piano in question had not come into the tenant's possession by a contract of that kind, it was not in the reputed ownership of the tenant:—*Held*: the alleged custom as to the lending of pianos not having been proved, the piano was in the reputed ownership of the tenant, &, therefore, was not protected from distress for rent.—*CHAPPELL & CO., LTD. v. HARRISON* (1910), 103 L. T. 594; 75 J. P. 20; 27 T. L. R. 85.

vi. "*Live Stock within Agricultural Holdings Acts.*"

See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (1).

See Sect. 5, sub-sect. 9, *ante*.

vii. "*Goods of Partner of Immediate Tenant.*"

See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (2) (a).

viii. "*Goods (not being Goods of Lodger) upon Premises where Trade or Business carried on.*"

Trade privilege.—See Sect. 5, sub-sect. 4, *ante*.

"*In which both immediate tenant & under-tenant have an interest.*"—See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (2) (b).

ix. "*Goods (not being Goods of Lodger) on Premises used as Offices or Warehouses.*"

"*Where owner of goods neglects for one calendar month after notice*"—"To remove goods & vacate premises."—See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (2) (c).

Deposit in warehouses.—See Sect. 5, sub-sect. 4, *ante*.

x. "*Goods belonging to and in Offices of any Company or Corporation.*"

"*On premises the immediate tenant whereof is a director or officer*"—"Or in the employment of such company or corporation."—See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (2) (d).

xi. *Jurisdiction of Magistrates.*

See Law of Distress Amendment Act, 1908 (c. 53), s. 4 (2).

(c) *Declaration and Inventory by Person Protected.*

See Lodgers' Goods Protection Act, 1871 (c. 79), s. 1; Law of Distress Amendment Act, 1908 (c. 53), s. 1.

428. Terms of statute to be strictly complied with.—(1) A declaration under Lodgers' Goods Protection Act, 1871 (c. 79), s. 1, will not protect a lodger's goods against seizure & sale by a superior landlord for rent due from his immediate tenant, unless it has been made after the distress has been levied or authorised or threatened.

(2) A declaration is inoperative against a distress subsequently levied, which has not been authorised or threatened before the declaration is made. *Pltf.* was a lodger in one of three rooms let to *T.*, who was the immediate tenant of *deft.* Rent to the amount of £8 being due from *T.* to *deft.*, *deft.* distrained the goods in the rooms including *pltf.*'s. She, thereupon, made a declaration under sect. 1 of the above Act which was correct in all respects. *T.* & *deft.* came to an arrangement whereby £1 was to be paid down, & the remaining £7 by instalments. The distress was thereupon withdrawn by *deft.* None of the agreed instalments having been paid by *T.*, & a further sum of £1 having accrued due for rent, *deft.* afterwards levied a second distress for the sum of £8, under which

pltf.'s goods were again seized & sold. She made no further declaration under the Act, but she owed no rent to *T.*:—*Held*: no action of trespass would lie against *deft.* for distraining *pltf.*'s goods, for the declaration made at the time of levying the first distress was ineffectual against the second, & the first distress had not been voluntarily abandoned.

(3) I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with (*BOWEN, L.J.*).—*THWAITES v. WILDING* (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; 49 L. T. 396; 48 J. P. 100; 32 W. R. 80, C. A.

Annotations:—*Apld.* *Crosse v. Welch* (1892), 8 T. L. R. 401. *Refd.* *Godlonton v. Fulham & Hampstead Property Co.*, [1905] 1 K. B. 431; *Lowe v. Dorling*, [1906] 2 K. B. 772.

429. Second declaration necessary—On second distress.]—*THWAITES v. WILDING*, No. 428, *ante*.

430. Form of—Lodger—No rent due.]—A declaration made by a lodger under Lodgers' Goods Protection Act, 1871 (c. 79), ss. 1 & 2, did not state that the declarant was a lodger & whether or no any rent was due from the lodger to her immediate landlord, no such rent being in fact due:—*Held*: such declaration was nevertheless sufficient, on the ground that the Act does not require it to be stated that the declarant is a lodger, & the declaration stating nothing about rent must be treated as importing that no such rent was due.—*Ex p.* *HARRIS* (1885), 16 Q. B. D. 130; 55 L. J. M. C. 24; 53 L. T. 655; 50 J. P. 164; 34 W. R. 132; *sub nom.* *HARRIS v. BEVEN*, 2 T. L. R. 167, C. A.

431. —Declarant a company—Signature of all partners not essential.]—*ROGERS, EUNGBLUT & Co. v. MARTIN*, No. 421, *ante*.

432. Inventory annexed to—"Subscribed" by person protected—Inventory not signed by lodger—Referred to in signed declaration.]—The superior landlord of a house having levied a distress upon the goods of a lodger for rent due from the immediate tenant, the lodger served the superior landlord with a correct declaration under Lodgers' Goods Protection Act, 1871 (c. 79). The declaration stated that the goods, "a list of which is hereunto annexed," were the property of the lodger, & also that "the list of articles hereto annexed is a correct inventory" of the goods referred to in the declaration, & upon a subsequent part of the same piece of paper there was an inventory. The declaration was signed by the lodger at the foot thereof, but the inventory was not otherwise signed by him:—*Held*: the inventory was "subscribed" by the lodger within the meaning of sect. 1 of the above Act, which provides that "to such declaration shall be annexed a correct inventory, subscribed by the lodger."—*GODLONTON v. FULHAM & HAMPSTEAD PROPERTY CO.*, [1905] 1 K. B. 431; 74 L. J. K. B. 242; 92 L. T. 362; 21 T. L. R. 223, D. C.

433. Effect of service of declaration & inventory—After illegal sale by landlord.]—*Pltf.* was a lodger to a tenant upon whose premises a distress had been levied by *deft.*, the superior landlord. The distress was on Oct. 17, & among the goods seized was certain property belonging to *pltf.* The goods so seized were sold on Oct. 22, that is to say, before the time limited by the provisions of 2 Will. & Mar., Sess. I, c. 5, had expired. On Oct. 23, *pltf.* served on *deft.* the declaration required by the Lodgers' Goods Protection Act, 1871 (c. 79), s. 1, & subsequently brought an action against him for a wrongful sale of the goods:—*Held*: *pltf.* was entitled to recover, inasmuch as the sale by *deft.* on Oct. 22, was

Sect. 5.—What may or may not be distrained: Sub-sect. 12, B. (c) & (d); sub-sect. 13. Sect. 6: Sub-sects. 1 & 2.]

illegal, & pltf. had thereby lost the opportunity which he would otherwise have had of protecting his goods under the provisions of Lodgers' Goods Protection Act, 1871 (c. 79).—*SHARPE v. FOWLE* (1884), 12 Q. B. D. 385; 50 L. T. 758; 48 J. P. 680; 32 W. R. 539; *sub nom. SHARP v. FOX*, 53 L. J. Q. B. 309.

434. — & tender of rent due — Distress by bailiff subsequent to—Whether liable to action.]—Where a lodger's goods are seized under a distress for rent due to a superior landlord from his immediate tenant, & the superior landlord, after having been served by the lodger with the declaration & inventory required by Lodgers' Goods Protection Act, 1871 (c. 79), s. 1, & been paid the rent due from the lodger, proceeds with the distress, an action for an illegal distress at the suit of the lodger will not lie against the bailiff or other person levying the distress, but only against the superior landlord under sect. 2 of the Act.—*PAGE v. VALLIS* (1903), 19 T. L. R. 393.

Annotation:—Refd. Lowe v. Dorling, [1906] 2 K. B. 772.

435. — — — — —.]—Under Lodgers' Goods Protection Act, 1871 (c. 79), s. 2, an action for illegal distress lies against a bailiff who levies or proceeds with a distress upon the goods of a lodger after being served with the declaration & inventory mentioned in sect. 1 of the Act, & after the lodger has paid or tendered to the superior landlord or his bailiff the rent, if any, due from him to his immediate landlord, or so much thereof as is sufficient to discharge the claim of the superior landlord.—*LOWE v. DORLING & SON*, [1906] 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243; 22 T. L. R. 779, C. A.

Annotation:—Refd. Shenstone v. Freeman, [1910] 2 K. B. 84.

(d) Notice by Landlord to Undertenant or Lodger as to Future Payments of Rent.

See Law of Distress Amendment Act, 1908 (c. 53), s. 6.

436. Service of notice requiring payment to be made to landlord—Personal service sufficient—Service by registered post not essential.]—The provision in Law of Distress Amendment Act, 1908 (c. 79), s. 6, relating to the service by registered post on the undertenant of a notice requiring future payments of rent to be made to the superior landlord till arrears of the immediate tenant's rent have been paid, is inserted only to enable the superior landlord to effect service by registered post if he so desires. The object of the sect. is that the notice should come to the knowledge of the undertenant, & personal service is sufficient.—*JARVIS v. HEMMINGS*, [1912] 1 Ch. 462; 81 L. J. Ch. 290; 106 L. T. 419; 28 T. L. R. 195; 56 Sol. Jo. 271; 76 J. P. Jo. 39.

Notice of distress—Whether personal service sufficient.]—*See Part II., Sect. 10, sub-sect. 5, A.*

PART II. SECT. 5, SUB-SECT. 13

*g. War Precautions (Active Service Moratorium) Regulations, 1916, regulation 12.]—*Under the above regulation no person shall under a bill of sale or writ of execution or other process issued by a ct. or by way of distress or under a hire-purchase agreement made prior to June 1, 1916, or to the enlistment of a member of the Forces, whichever last happens, seize or take possession of any chattels which are used by any female dependent of that member of the Forces to support or assist in supporting herself or any of the family of the member; or any

furniture or wearing apparel belonging to any such member or female dependent: *mens rea* is not to constitute an offence regulation, & the words "to" connote beneficial ownership by the member of the Forces or female dependent; a person therefore who seized by way of distress for rent chattels in the possession of a female dependent under a hire-purchase agreement by the terms of which the dependent had hired the chattels from a third person with an option of purchase, the property in the chattels remaining in the third person until the option was exercised, was not

SUB-SECT. 13.—THINGS PROTECTED BY PARTICULAR STATUTES.

437. Railway Rolling Stock Protection Act, 1872 (c. 50)—Locomotive engine.]—A locomotive engine, which was hired by a railway contractor from resps., was seized under a distress for rent due from the contractor to applts. At the time the engine was seized it was standing in a shed which the contractor rented from applt., & which was connected by a siding with the railway:—*Held*: (1) the engine was rolling stock in a "work" within the meaning of Railway Rolling Stock Protection Act, 1872 (c. 50), s. 3, & was, therefore, not liable to distress for rent payable by the tenant of the work; (2) the word "work" in sect. 3, means any establishment or place, used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled.—*EASTON ESTATE & MINING CO. v. WESTERN WAGGON & PROPERTY CO.* (1886), 54 L. T. 735; 50 J. P. 790, D. C.

See, further, RAILWAYS.

438. Gasworks Clauses Act, 1847 (c. 15)—Gas stove let on hire.]—By Gasworks Clauses Act, 1847 (c. 15), s. 14, "the undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, & any fittings for the gas . . . & such meters & fittings shall not be subject to distress . . . for rent of the premises where the same may be used":—*Held*: a gas stove for heating purposes let for hire was within the words "fittings for the gas," & therefore, was not subject to distress for rent.—*GASLIGHT & COKE CO. v. HARDY* (1886), 17 Q. B. D. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 51 J. P. 6; 35 W. R. 50; 2 T. L. R. 851, C. A.

439. — — — — —.]—A gas stove for cooking is a "fitting" exempted from distress within Gasworks Clauses Act, 1847 (c. 15), s. 14.—*GAS LIGHT & COKE CO. v. SMITH (HERBERT) & CO.* (1886), 3 T. L. R. 15.

See, further, GAS.

Agricultural Holdings Acts.]—*See Sub-sect. 10, ante.*

Diplomatic Privileges Act, 1708 (c. 12)—Goods of Ambassadors.]—*See Sect. 5, sub-sect. 3, ante.*

Waterworks Acts—Water pipes, meters & apparatus.]—*See Waterworks Clauses Act, 1847 (c. 17), s. 44; Waterworks Clauses Act, 1863 (c. 93), s. 14; WATER SUPPLY.*

Electric lighting Acts—Electric light meters, fittings, etc.]—*See Electric Lighting Act, 1882 (c. 56), s. 25; Electric Lighting Act, 1909 (c. 34), s. 16.*

National Insurance Act, 1911 (c. 55), s. 68—Goods of insured person receiving sickness benefit.]—*See WORK & LABOUR.*

SECT. 6.—WHEN DISTRESS MAY BE MADE.

SUB-SECT. 1.—RENT IN ARREAR.

440. General rule.]—(1) If there is lord & tenant by fealty & rent, & the tenant makes a

guilty of an offence against the regulation.—*MYERSON v. COLLARD & THE COMMONWEALTH* (1918) 25 C. L. R. 154.—AUS.

*h. War Relief Act, s. 2.]—*The levying of a distress upon the goods of a volunteer by a landlord is a proceeding outside the civil etc. of the province, & therefore, forbidden by the above act.—*NICHOLSON v. GREGORY & WILLIS & Co.*, [1917] 1 W. W. R. 304.—CAN.

PART II. SECT. 6, SUB-SECT. 1.

440 i. General rule.]—Until rent falls due the landlord has no lien on property on the premises. On sale &

lease for years, & the lessor has done fealty & paid the rent continually, & the lord distrains the cattle of the lessee for the rent when none is in arrear, & avows upon a stranger who never had anything, as upon his very tenant for the arrearages of the rent, the lessee, upon special matter pleaded, may have aid of his lessor, & shall abate the avowry made upon him who has nothing.

(2) If when the lord comes to distrain, the tenant drives the cattle into other land not held of him, & the lord freshly follows & distrains them there, this is within 21 Hen. 8, c. 19, for the view of the lord & his fresh suit are in judgment of law a taking within his fee.

(3) If one comes to distrain for damage feasant & sees the cattle, & the owner drives them off, he cannot distrain them damage feasant, but is put to his action of trespass.

(4) If there is lord, mesne, & tenant, & the lord avows upon a stranger, & not upon the mesne, the tenant cannot plead any plea as nothing in arrear, etc., nor can he by special pleading pray in aid of the mesne, but in such case, if the mesne pays the rent & does the services, & yet the lord distrains the tenant paravail for them, & impounds his cattle, the mesne upon request by the tenant may put his own cattle in the pound in lieu of the cattle of the tenant, & bring replevin & compel the lord to avow upon him, & if the mesne will not do it on request, the tenant shall have a writ of mesne, & recover his damages.

(5) If the lessee in the principal case, or if the tenant paravail in the case of the mesnalty, is present when the lord or his bailiff comes to distrain, if nothing is in arrear, he may make rescous.—CASE OF AN AVOWRY (1588), 9 Co. Rep. 20 a; 77 E. R. 759.

441. —.]—In avowry for rent arrear for two years & a quarter, under a *scilicet*, where the issue is upon the tenure it is not necessary to prove the whole rent to be due for the whole of the time, but it is sufficient to prove rent due for any part of it.—FORTY v. IMBER (1805), 6 East, 434; 2 Smith, K. B. 548; 102 E. R. 1354.

442. Rent due on Sunday—In arrear on following Monday—Sunday not a "*dies non*."—(1) At common law Sunday is not a *dies non*.

(2) Rent may lawfully be paid by a tenant on a Sunday. Therefore, where it is due on that day, & is not paid, it will be in arrear on the following

Monday, & the landlord may then lawfully levy a distress for it.—CHILD v. EDWARDS, [1909] 2 K. B. 753; 78 L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706; 73 J. P. Jo. 337.

443. Written agreement for annual tenancy—Subsequent verbal agreement to pay quarterly—Quarterly payments made.]—After a tenant had signed a written agreement, not under seal, for hiring premises at an annual rent, he was asked by the landlord how he would like to pay his rent, & replied quarterly. Quarterly payments of rent were proved. The landlord having distrained for a quarter's rent:—*Held*: the distress was illegal, as the original taking was not altered, & no new terms of letting had been agreed on between the parties.—TURNER v. ALLDAY (1836), Tyr. & Gr. 819.

SUB-SECT. 2.—RENT PAYABLE IN ADVANCE.

444. By custom.]—If a trader, after committing an act of bkpcy., take a shop, & agree to pay half a year's rent in advance, where by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, & before the year expired, may distrain the goods on the premises for half a year's rent, or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent.—BUCKLEY v. TAYLOR (1788), 2 Term Rep. 600; 100 E. R. 323.

445. By agreement—Execution pending.]—In an action against the sheriff for removing goods taken in execution, without paying the landlord a year's rent it is not necessary to prove that a year's rent is due. It is sufficient to prove the occupation by the tenant. It lies on deft. to show that the rent has all been paid. Such a claim may be supported for forehand rent, or rent stipulated by the lease to be paid in advance as being rent due within Landlord & Tenant Act, 1709 (c. 18), & such rent may be distrained for by the landlord, although he is aware that an execution is about to be sent down at the suit of a judgment creditor. If a landlord who has distrained for rent, does not sell within the five days by arrangement between him & the tenant, that is no proof *per se* of collusion.—HARRISON v. BARRY (1819), 7 Price, 690; 146 E. R. 1103.

removal of such property the landlord cannot look to it for payment of rent which subsequently accrues due. The only right which the landlord has is to distrain on whatever property is found on the premises at the time the rent falls due.—RE O'MULLIN & JOHNSTONE (1874), R. E. D. 157.—CAN.

440 ii. —.]—Under a proviso in a lease, on the tenant commencing to remove the goods from the demised premises the then current year's rent immediately became due & in arrear. On Oct. 31, on the tenant proceeding to sell & dispose of all the goods on the demised premises, with the intention of finally quitting the place before Nov. 21 following, when the rent became due & the lease terminated, the landlord entered & distrained:—*Held*: under the proviso the current year's rent became due & in arrear, & the distress was therefore legal.—YOUNG v. SMITH (1878), 29 C. P. 109.—CAN.

440 iii. —.]—A landlord has no right to seize for rent until the rent is in arrear.—SEIBEL v. DWYER ELLEVATOR CO., LTD., [1923] 4 D. L. R. 1184; 2 W. W. R. 1051; *affg.*, [1923] 1 W. W. R. 497.—CAN.

k. Payment of rent conditional—

Option to purchase.]—The town of C. by an agreement giving a wire co. an option for five years to purchase land leased the premises to the co. for that period at an annual rental payable at its expiration if the purchase was not completed or, *pro rata*, at any earlier period at which the option was relinquished, such rent to be paid prior to removal from the premises of the co.'s plant & machinery. At the end of three & a half years the co. sold some of its machinery & was negotiating with a junk dealer for sale of the rest, when the town distrained for rent claimed as due under the agreement, & the contents of the co.'s factory were seized & sold. In an action claiming damages for illegal distress:—*Held*: as the option of purchase had not been relinquished no rent was due & the distress was illegal.—COBBOURG TOWN v. CYCLONE WOVEN WIRE FENCE CO. (1919), 57 S. C. R. 289; 44 D. L. R. 34.—CAN.

l. Rent due on gale day.]—An agreement to change the gale days on which rent is to be paid, & ascertaining the fraction payable on the then last new gale day, will be evidence to go to the jury of rent being in arrear on that day so as to support a distress.—

PURCELL v. NOLAN (1839), 1 I. L. R. 258; Smythe, 53.—IR.

m. Rent due on particular day.]—Deft. avowed for rent due on a particular day; pltf. pleaded in *bar riens* in arrear; & the jury found that there was no rent due on the particular day named in the avowry:—*Held*: such finding of the jury did not dispose of the actual issue knit between the parties, the precise day specified by the avowry not constituting a parcel of the issue; & in such case the time is immaterial.—NEVINS v. PHELAN (1849), 1 Ir. Jur. 166.—IR.

n. Arrears due by deceased tenant—Liability of succeeding tenant.]—A plea of distress for rent, on a demise of a house & other premises to A. at a certain rent, & that pltf. occupied the house with A. during A.'s lifetime, & after his death continued as deft.'s tenant, & that deft. distrained for the rent of the house & other premises on pltf.'s goods in the house:—*Held*: bad, as pltf., under the demise to him, was liable for the rent of the house only after A.'s death, & could not be distrained on for the rent due for the entire premises demised to A.—STRATHEY v. CROOKS (1843), 6 O. S. 587.—CAN.

Sect. 6.—When distress may be made: Sub-sects. 2, 3, 4, 5 & 6, A.]

446. ——— *If demand made.]* — CLARKE v. HOLFORD, No. 122, *ante*.

447. ——— *—.]* — WITTY v. WILLIAMS, No. 124, *ante*.

448. ——— *—.]* — LONDON & WESTMINSTER LOAN & DISCOUNT CO. v. LONDON & NORTH-WESTERN RY. CO., No. 123, *ante*.

449. ——— *Agreement void — Receipts as evidence.]* — A., by writing not under seal, agreed to take B.'s house at a specified rent, for a term exceeding three years, the rent to be paid in advance. The receipts granted by B. bore to be for rent due in advance. In an action for excessive distress for rent in advance:—*Held*: notwithstanding Real Property Act, 1845 (c. 106), there was sufficient evidence that A. had agreed to be tenant from year to year on the terms of paying forehand rent.—LEE v. SMITH (1854), 9 Exch. 662; 2 C. L. R. 1079; 23 L. J. Ex. 198; 23 L. T. O. S. 70; 156 E. R. 284: *sub nom.* LEES v. SMITH, 2 W. R. 377.

450. ——— *—.]* — WALSH v. LONSDALE, No. 63,

451. *Effect of insolvency—Winding up of company.]* — A co. was tenant of premises at a yearly rent payable in advance. The lessor distrained before the commencement of the winding up of the co. for a year's rent in advance that had accrued due:—*Held*: the fact that the rent was payable in advance was not a special reason for restraining the lessor from proceeding with his distress.—VENNER'S ELECTRICAL COOKING & HEATING APPLIANCES, LTD. v. THORPE, [1915] 2 Ch. 404; 84 L. J. Ch. 925; 113 L. T. 1137; 60 Sol. Jo. 27; [1915] H. B. R. 201, C. A.

SUB-SECT. 3.—GOODS REMOVED TO AVOID DISTRESS.

See Sect. 17, sub-sect. 1, C., post.

SUB-SECT. 4.—EARLIEST TIME FOR DISTRESS.

452. *Rent due on Christmas Day—Distress day after.]* — Pltf. was tenant of a house from Michaelmas Day, 1852, at a rent payable quarterly. On the morning of Christmas Day he fraudulently removed all his goods from the demised premises. On the following day deft. followed the goods, & distrained them. In trespass against deft.:—*Held*: the rent being due & payable on the quarter-day, deft. was justified under Distress for Rent Act, 1737 (c. 19), s. 1.—DIBBLE v. BOWATER (1853), 2 E. & B. 564; 1 C. L. R. 877; 22 L. J. Q. B. 396; 17 J. P. 792; 17 Jur. 1054; 1 W. R. 435; 118 E. R. 879.

453. *Rent due on Sunday—Distress day after.]* — CHILD v. EDWARDS, No. 442, *ante*.

454. *Distress exercisable after default—Common law right.]* — Where by a lease an express right of distress is given, extending to property

which could not be distrained upon at common law, but exercisable only after the expiration of a certain period after default, but no negative words are contained in the lease, the common law right of distress is not ousted, but is exercisable immediately upon default upon such property as can properly be distrained upon at common law.

If the lessor exercises his express right & his legal right of distress simultaneously, but before the express right is exercisable in respect of a portion of the amount for which the distress is put in, he will be entitled to marshal the property seized so as to cast the debt in respect of which he exercises the common law right in the first instance upon the goods properly seizable under that right.—*Re RIVER SWALE BRICK & TILE WORKS, LTD.* (1883), 52 L. J. Ch. 638; 48 L. T. 778; 32 W. R. 202.

Fulfilment of condition precedent.] — *See Sect. 3, sub-sect. 1, ante.*

SUB-SECT. 5.—PROHIBITED PERIODS.

455. *Not at night—After dark.]* — (1) If a tenant from year to year give a notice to quit, not expiring with the year, the landlord, if the notice be in writing, & signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy.

(2) A landlord cannot justify making a distress for rent after dark.—ALDENBURGH v. PEAPLE (1834), 6 C. & P. 212, N. P.

Annotation:—As to (1) Dbd. Doe d. Murrell v. Milward (1838), 3 M. & W. 328.

456. ——— *After sunset.]* — A landlord sent a man to distrain for rent, who entered the premises after sunset, on Dec. 23, & possession was kept until an officer entered, on Dec. 26, with a warrant, & gave notice of the distress. The tenant having become a bkpt., his assignee brought an action of trover, to recover the goods:—*Held*: (1) the first taking was unlawful; (2) the second distress was not a distinct distress, independent of the first, & consequently, the assignee might recover the goods.—BRICE v. HARE (1824), 2 L. J. O. S. K. B. 194.

457. ——— *—.]* — Rent being due to deft. from pltf. who was about to remove her goods, deft. entered the house after sunset & for some hours prevented her from so doing, & locked some of the doors:—*Held*: pltf. was entitled to a verdict, but only for the actual damage.

Deft. entered at a time at which it was not lawful to distrain, & did more than demand his rent. But the measure of damage should be the real actual damage, if any caused to pltf. (WIGHTMAN, J.).—LAMB v. WALL (1859), 1 F. & F. 503, N. P.

458. ——— *Before sunrise—Even though daylight.]* — (1) A distress for rent before sunrise or after sunset is illegal, although there may be daylight.

(2) *Qu.*: whether for such purpose the time of sunrise is to be reckoned from the first appearance

Man. L. R. 5.—CAN.

PART II. SECT. 6, SUB-SECT. 5.

456 i. *Not at night—After sunset.]* — A distress made after sunset is illegal.—RUSSELL v. BUCKLEY (1885), 25 N. B. R. 264.—CAN.

456 ii. ——— *—.]* — It is legal to distrain between the hours of sunset & sunrise.—MOYNIHAN v. DENNY (1891), 28 L. R. Ir. 272.—IR.

PART II. SECT. 6, SUB-SECT. 4.

o. Distress exercisable after default—Common law right—Weekly tenancy.] — The common law right to distrain for rent immediately on default in payment continues in the case of a weekly tenancy.—LYONS v. GUY (1899), 18 N. Z. L. R. 124.—N. Z.

p. No time fixed for payment of rent—Distress at expiration of tenancy.]

—Under a lease for a year, dated Apr. 6, reserving as rent one-third of the crops, & providing that the lessee should thresh the grain & draw it to the elevator or cars to be stored & shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be done, there is no rent due until the end of the year, & a distress by the landlord in Nov., following is illegal.—MEIGHEN v. ARMSTRONG (1906), 16

of the beams of the sun above the horizon or from the time when the entire sun has emerged.

(3) An entry to make a distress through an open window is lawful.—*TUTTON v. DARKE, NIXON v. FREEMAN* (1860), 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. 361; 6 Jur. N. S. 983; 157 E. R. 1338.

Annotation:—As to (3) *Consd. Nash v. Lucas* (1867), L. R. 2 Q. B. 500.

459. — Time a question of fact — Must be proved.]—Where the time is material, it must be proved. It is true that the ct. will take judicial notice of the days in the calendar, but not of the hours. The time of sunset must be proved like any other fact (*WILDE, C.J.*).—*COLLIER v. NOKES* (1849), 2 Car. & Kir. 1012; 15 L. T. O. S. 189.

460. Prevention of removal of goods—After sunset—Not conversion.]—Pltf. was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, & afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by deft., M.'s landlord, who told him that rent was in arrear, & that until it was paid the goods should not be removed, & measures were taken by deft. to use force, if necessary, to prevent their removal. It was then after sunset, & therefore, too late in the day to distrain, & deft. intended to prevent pltf. from removing the goods, with a view of distraining on the day following. Pltf. continued in possession of the goods, but made no attempt actually to remove them, & except by intimating his intention to prevent their being removed, deft. did not take possession of, or assume dominion over them. In an action of trover:—*Held*: there was no evidence of conversion.—*ENGLAND v. COWLEY* (1873), L. R. 8 Exch. 126; 42 L. J. Ex. 80; 28 L. T. 67; 21 W. R. 337.

Annotation:—*Refd. Van Oppen v. Tredgars* (1921), 37 T. L. R. 504.

461. Waiver of irregularity by tenant.]—*WERTH v. LONDON & WESTMINSTER LOAN & DISCOUNT CO.* (1889), 5 T. L. R. 521, D. C.; *previous proceedings*, 5 T. L. R. 320, D. C.

Annotation:—*Consd. Perring v. Emerson*, [1906] 1 K. B. 1.

462. Not on Sunday.]—*WERTH v. LONDON & WESTMINSTER LOAN & DISCOUNT CO.* (1889), 5 T. L. R. 521, D. C.; *previous proceedings*, 5 T. L. R. 320, D. C.

Annotation:—*Refd. Perring v. Emerson*, [1906] 1 K. B. 1.

463. —.]—*CHILD v. EDWARDS*, No. 442, *ante*.

SUB-SECT. 6.—AFTER EXPIRATION OF TENANCY.

A. In General.

464. Cannot be levied—Estate for years.]—(1) In an avowry on a distress for rent under a scisin in fee, if, upon "*non concessit*" the jury find that the rent issued out of an estate for years, determined before the distress taken, the judgment shall be for pltf., though the issue be found against him.

(2) The return of a *venire facias* made before the *teste* shall be amended.—*HARRISON v. METCALF* (1617), Cro. Jac. 442; 79 E. R. 377.

PART II. SECT. 6, SUB-SECT. 6.—A.

q. Expiration on assignment by tenant—But accruing by agreement.]—Deft. made a lease under seal to R., dated Nov. 8, 1884, for five years from Nov. 12, at the rent of \$400, payable half-yearly in advance on Nov. 12, & May 12, in each year. The lease contained a covenant that if the

lessee should make any assignment for the benefit of creditors, the said term should immediately become forfeited & void, & the full amount of the current yearly rent should be at once due & payable. R. paid the first half-year's rent. On May 5, 1885, R. made an assignment for the benefit of creditors; & on May 8, deft., claiming to do so under the above covenant, distrained

465. — Applies also to penalty.]—*TUTTER v. FRYER* (1622), Win. 7; 124 E. R. 6.

466. — Tenant at will—Crop purchased by third person.]—(1) The corn sown by a tenant at will, who died before harvest, & purchased by another person, cannot be distrained by the landlord for rent due to him from a subsequent tenant.

(2) Whether an action be real or personal depends on the thing to be recovered by it, & not on the nature of the defence, & therefore, a replevin is a personal action, though the title to land be brought in question.

(3) A distress cannot be made upon a tenant at will after the tenancy is determined, nor can a distress be made of goods taken in execution.—*EATON v. SOUTHEY* (1738), Willes, 131; 7 Mod. Rep. 251; 125 E. R. 1094.

Annotations:—As to (1) *Consd. Peacock v. Purvis* (1820), 2 Brod. & Bing. 362. As to (3) *Refd. Wright v. Dewes* (1834), 1 Ad. & El. 641.

467. — Acquiescence by landlord—To superior title.]—Although in general a tenant cannot dispute his landlord's title in an action of replevin, or use & occupation, he may yet, under particular circumstances, show that it has expired.

Where, therefore, a tenant for life having a power to lease for 21 years, granted a lease for 53 years, which, after several mesne assignments got into possession of defts., who, after the death of the tenant for life underlet to pltf.'s father, & in the following year the person next in remainder after giving the father & defts. notice to quit, granted a new lease to the father at an increased rent, which was paid for more than six years, at the expiration of which period defts., having acquiesced to such payments being made in the interval, & without any previous demand of rent distrained on pltf. as the extrix. of her father, for six years & a quarter's rent due to them under the original letting to her father:—*Held*: such distress could not be supported, & pltf. might deny the title of defts., as it must be taken to have been determined by the notice to quit to them, & their acquiescence to an adverse or superior title by their omitting to demand any rent for so long a period after the service of such notice.—*NEAVE v. MOSS* (1823), 1 Bing. 360; 8 Moore, C. P. 389; 3 L. J. O. S. C. P. 25; 130 E. R. 145.

Payment of rent made by mistake.]

In an action of trespass, for distraining the goods of pltf., he is at liberty to show that the title of deft., by whom he was not let into possession, has determined, & is not concluded by payment of rent to deft., if he can show that such payment was made under a mistake.—*CLARIDGE v. MACKENZIE* (1842), 4 Man. & G. 143; 4 Scott, N. R. 796; 11 L. J. C. P. 72; 134 E. R. 59.

469. — Death of mortgagor—Heir-at-law in possession.]—*SCOBIE v. COLLINS*, No. 173, *ante*.

470. — Landlord resuming possession—Equitable right of re-entry.]—Pltfs. in an action for specific performance of an agreement for a lease to deft. co., having under an *interim* order entered into possession of the demised premises, claimed the right to distrain on the goods of strangers on the premises for past arrears of rent due from deft. co. as lessees:—*Held*: (1) the order had suspended the relationship of landlord

for the half-year's rent, which, in the regular course of time, would have been payable in advance on May 12:—*Held*: the distress was valid; for under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, & not thereafter; but, even if that construction could not be given to it, the distress would

Sect. 6.—When distress may be made: Sub-sect. 6,

7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 36 J. P. 663; 20 W. R. 972.

Annotations:—Consd. Gentle v. Faulkner (1899), 68 L. J. Q. B. 848. *Refd. Evans v. Wyatt* (1880), 43 L. T. 176; *Kirkland v. Briancourt* (1890), 6 T. L. R. 441; *Serjeant v. Nash, Field*, [1903] 2 K. B. 304. *Mentd. West v. Rogers* (1888), 4 T. L. R. 229; *R. v. Paulson*, [1921] 1 A. C. 271; *Works Comrs. v. Hull*, [1922] 1 K. B. 205; *Civil Service Co-Op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

483. —. —.]—*KIRKLAND v. BRIANCOURT* (1890), 6 T. L. R. 441.

Annotation:—Refd. Shepherd v. Berger (1891), 7 T. L. R. 332.

484. Effect of tenant's wrongful disclaimer.]—In an ejectment by a landlord against his tenant the landlord relied on a disclaimer. It was proved that the tenant disclaimed in Mar. 1833. In Nov. 1833, the landlord put in a distress for rent:—*Held*: (1) it was a waiver of the disclaimer; (2) Landlord & Tenant Act, 1709 (c. 14), s. 6, which enables a landlord to distrain after the determination of a tenancy, does not apply to cases where the tenancy is put an end to by the tenant's wrongful disclaimer.—*DOE d. DAVID v. WILLIAMS* (1835), 7 C. & P. 322, N. P.

Annotation:—As to (2) *Refd. Grimwood v. Moss* (1872), L. R. 7 C. P. 360.

Goods removed to avoid distress.]—See Sect. 17, sub-sect. 1, C., post.

C. Continuation of Possession.

(a) By Agreement or Custom.

485. By agreement.]—Re POWERS, MANISTY v. ARCHDALE, No. 218, *ante*.

486. —. —.]—*WILKINSON v. PEEL*, No. 481, *ante*.

487. By custom.]—LEWIS v. HARRIS (1778), 1 Hy. Bl. 7, n.; 126 E. R. 4.

Annotation:—Folld. Beavan v. Delahay (1788), 1 Hy. Bl. 5.

488. —. —.]—*BEAVAN v. DELAHAY*, No. 476, *ante*.

489. —. —.]—By agreement, as well as by custom of the country, a tenant was to have the use of the barns & gate-rooms to thrash out his corn & fodder his cattle till the May-day after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises corn in the straw; in Jan. 1825, his landlord distrained a rick of corn on the premises:—*Held*: the distress was valid.—*KNIGHT v. BENETT* (1826), 3 Bing. 364; 11 Moore, C. P. 227; 4 L. J. O. S. C. P. 95; 130 E. R. 553.

Annotation:—Refd. Re Powers, Manisty v. Archdale (1890), 63 L. T. 626.

(b) Tenant Holding Over.

490. Whether power to distrain.]—ANON. (1507), Keil. 95; 72 E. R. 260.

491. —. —.]—*STANFILL v. HICKES* (1697), 1 Ld. Raym. 280; 91 E. R. 1084.

year's rent) had been paid to the landlord by the execution creditor.—*WACHTER v. WHITE, TURNBULL & ERRATT* (1915), 30 W. L. R. 873; 7 W. W. R. 671; 8 W. W. R. 493; 21 D. L. R. 454.—*CAN.*

PART II. SECT. 6, SUB-SECT. 6.— **C. (b).**

d. Whether power to distrain—Letting at annual rent.]—A letting at an annual rent constitutes a yearly tenancy, which continues, at the same rent for the second year as the first, if the tenant remains in possession of the premises; & the landlord may distrain for the first year's rent at the

end of the second year.—*MCULENAGHAN v. BARKER* (1844), 1 U. C. R. 26.—*CAN.*

492 i. —. —.]—*Without renewal of tenancy.]—*Pltf. having remained in possession & paid rent after the expiry of his term, defts. levied a distress upon pltf.'s goods in the premises, situate six miles from Toronto, for two months' arrears of rent, & removed the goods to Toronto to impound & sell. Pltf. brought an action of trespass, claiming that he was not deft.'s tenant:—*Held*: that the relation of landlord & tenant existed at the time of the distress.—*MACGREGOR v. DEFOE* (1887), 14 O. R. 87.—*CAN.*

492. **Without renewal of tenancy.]—**A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy.—*JENNER v. CLEGG* (1832), 1 Mood. & R. 213, N. P.

Annotations:—Distd. Williams v. Stiven (1846), 9 Q. B. 14. *Mentd. Hurley v. Hanrahan* (1867), 15 W. R. 990.

493. —. —.]—Notice to quit was given, & it expired at Lady-day, 1840. The tenant held on till Lady-day, 1841, but since the former period there had been no payment of rent, nor any other overt act to show that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841:—*Held*: the distress was not justifiable. The landlord ought to have sued for use & occupation.—*ALFORD v. VICKERY* (1842), Car. & M. 280.

494. In lieu of emblements—Landlord & Tenant Act, 1851 (c. 25).]—The above Act provides that where the lease of "any farm or lands" shall determine by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the tenant shall continue to hold such farm or lands until the expiration of the then current year of his tenancy, & shall then quit upon the terms of his lease, as if it had expired by effluxion of time or otherwise, & the succeeding landlord shall be entitled to recover & receive of the tenant a fair proportion of the rent for the period since the lessor's death or cesser of estate.

H. held as tenant from year to year of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, & partly sown with corn & planted with potatoes. A. died in the middle of a year of H.'s tenancy, & M. thereupon became entitled to the reversion, & at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A.:—Held: (1) the Act applied to all tenancies in respect of which there might be a claim to emblements; (2) but for the Act, there might have been a substantial claim to emblements here, & the premises were, therefore, "a farm or lands" within sect. 1 of the Act, & that sect. gave a right to distrain for the rent, as well as to recover it by action.—*HAINES v. WELCH* (1868), L. R. 4 C. P. 91; 38 L. J. C. P. 118; 19 L. T. 422; 17 W. R. 163.

495. What constitutes holding over—Not merely leaving animals behind.]—TAYLERSON v. PETERS, No. 480, *ante*.

SUB-SECT. 7.—NECESSITY FOR DEMAND.

See Sect. 3, sub-sect. 7, ante.

SECT. 7.—WHERE DISTRESS MAY BE MADE.

496. General rule—Land out of which rent issues.]—ANON. (1311), Sel. Soc. Y. B. Vol. VI., p. 126.

492 ii. —. —.]—A tenant holding over after the expiration of a notice to quit by the landlord, is not liable to a distress, unless there has been an agreement for a new tenancy, or a renewal of the former one.—*DALY v. COLBERT* (1841), 3 L. L. R. 355; 1 Leg. Rep. 165; Ir. Cir. Rep. 150.—*IR.*

e. What constitutes holding over.]—A distress more than six months after expiration of the tenancy is illegal, & a continuation of the tenancy will not necessarily be implied from the mere fact of the party remaining in possession.—*SOPER v. BROWN* (1835), 4 O. S. 103.—*CAN.*

505. Distinct messuages at distinct rents—Distress only on premises owing rent.]—A joint distress for two distinct messuages, at two distinct rents, cannot be justified.

This is goods taken for the rent of several premises upon one of them, so that he may have taken the greatest part upon premises which are not liable (LORD HARDWICKE, C.J.).—*ROGERS v. BIRKMIRE* (1736), Lee *temp.* Hard. 245; 2 Stra. 1040; 95 E. R. 157.

Annotations:—Distd. Bristol Grdns. v. Walt (1834), 1 Ad. & El. 264; *Phillips v. Whitsed* (1860), 2 E. & E. 804; *Turnor v. Cameron* (1870), 22 L. T. 525. *Reid. Tancred v. Leyland* (1851), 16 Q. B. 669. *Mentd. Bowler v. Nicholson* (1840), 12 Ad. & El. 341; *Angell v. Harrison* (1847), 12 Jur. 114.

506. ———.]—PHILLIPS *v.* WHITSED, No. 730, *post*.

507. On other than demised premises—By agreement.]—Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the deed demised shall for the time being be in course of working by the lessors, their exors., administrators, & assigns. Pltfs. being assignees of the lease with notice, under a trust deed made by the lessees in favour of creditors, sued debtors for a distress made under the above-mentioned power after the assignment, at pits not included in the demise, but referred to in it, & then worked by the lessees:—*Held*: whether the power was or was not a valid power of distress against strangers, pltfs., taking as assignees with notice, were bound by it.—*DANIEL v. STEPNEY* (1874), L. R. 9 Exch. 185; 22 W. R. 662, Ex. Ch.

Annotations:—Consd. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373. *Mentd. Cooke v. Chilcott* (1876), 3 Ch. D. 694; *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403.

508. ———.]—THORP *v.* HURT, [1886] W. N. 96.

509. ——— “Adjoining or neighbouring collieries.”]—(1) A power in a mining lease for the landlord to distrain for rent in arrear upon chattels of the lessee in the demised colliery, or “any adjoining or neighbouring collieries,” must be construed as limited to the demised colliery & such collieries only as might be or become connected with it by underground workings.

The power to distrain off the premises demised so construed is a power of distress for a real rent, & so outside the scope of the Bills of Sale Acts, & the lease in which it is contained does not require registration as a bill of sale either as conferring a licence to take possession of chattels as security for a debt within Bills of Sale Act, 1878 (c. 31), s. 4, or as conferring a power of distress by way of security for a debt within sect. 6; but if it cannot be so regarded, then, being a power not uncommon in mining leases, it would come within the exception in favour of such leases made in sect. 6.

(2) Where a co. has issued debentures which are a floating charge on its chattels, a distress under a power conferred either before the debentures were issued, or while they were a floating security, & levied before the debentures ceased to be a floating security, is valid against the holders of the debentures.

The debentures would not cease to be a floating security for this purpose by reason of the passing by the co. of the first only of the two special resolutions to wind up, nor by reason of the making of an order in a debenture-holders' action appointing a receiver subject to his giving security, which

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order was never drawn up & never came to the notice of the landlord distraining.

(3) *Semble*: in a compulsory winding up, the ct. has power to restrain further proceedings under a distress levied, or execution issued, at the commencement of the winding up but not completed by sale. But the power, if it exists, will not be exercised unless special reasons exist making it inequitable to allow the sale.—*Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

Annotation:—As to (3) *Reid*. *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 404.

— *Goods fraudulently removed.*—*See Sect. 17, post.*

Copyholds.—*See COPYHOLDS*, Vol. XIII., p. 96, No. 1194.

SECT. 8.—FOR WHAT AMOUNT DISTRESS MAY BE MADE.

SUB-SECT. 1.—IN GENERAL.

510. General rule — Rent reserved.—In an ordinary case of landlord & tenant, the amount of rent for which a distress may be levied, apart from statutory restrictions as regards arrears, is dependent upon the terms of the *reddendum* (ACTON, J.).—*TOWNSEND v. CHARLTON*, No. 129, *ante*.

511. Part of rent due.—*PALMER v. STANAGE* (1661), 1 Lev. 43; 1 Keb. 95, 113; T. Raym. 21; 83 E. R. 288; *sub nom.* *PAMER v. STABICK*, 1 Sid. 44.

512. —.—A man may distrain for parcel of his rent.—*TUTTHILL v. ROBERTS* (1673), Freem. K. B. 344; 89 E. R. 256; *sub nom.* *ROBERTS v. TUTTIL*, 3 Keb. 201.

513. Amount due at date of distress — Agreement for increased rent.—A fire having occurred upon leasehold premises, the lessor entered. Subsequently an executory agreement was entered into between the parties for a new lease at an in-

creased rent, as was evidenced by letters which passed between them, in one of which a suggestion was made that a memorandum should be indorsed upon the old lease, referring to the increase of rent. This was not carried out, but payments of the increased rent were demanded, and made, but under protest by the lessee's solr. Upon the bkpcy. of the lessee, the lessor distrained for rent at the increased rate:—*Held*: the old lease was surrendered by operation of law, & the agreement for an increased rent having been made & acted upon, the distress for such increased rent was lawful.—*Re YOUNG, Ex p. VITALE* (1882), 47 L. T. 480.

514. Amount demanded — Rent payable in advance.—*CLARKE v. HOLFORD*, No. 122, *ante*.

515. Distinct messages at distinct rents — Whether joint distress may be made.—*ROGERS v. BIRKMIRE*, No. 505, *ante*.

516. Power reserved by deed.—By his will, Nov. 1831, W. devised certain lands & premises to his daughters A. & H. as tenants in common in tail. A. married H. A. & H. the deft.

In 1858 by a deed of settlement on her marriage H. disentailed her moieties & settled them upon trust to pay the income to deft. for his life or until he became bkpt., & then for the issue of the marriage, & in default of issue, which was the case, in default of appointment for her next of kin. H. died in 1863, & deft. became bkpt. in 1878, & thereupon A. became entitled to the whole.

In 1881 a deed was executed between A. her husband & deft., whereby A. with the assent of her husband, in contemplation of deft.'s second marriage, agreed to grant to deft. an annuity of £300 charged upon the moieties, shares, & premises comprised in the marriage settlement, of 1858 payable out of the rents & profits & income thereof respectively. By that deed if the annuity should be in arrear deft. could enter into & distrain upon all or any of the moieties, share, or premises & hold them & receive & take the rents & profits thereof until arrears were satisfied. The rental value of the undivided moiety had been of late years quite insufficient to satisfy the annuity the profits of the whole hardly amounting to that sum:—*Held*: although there was power

PART II. SECT. 8, SUB-SECT. 1.

f. Agreement to charge work against rent—Tenant's delay in performance.—A landlord agreed with his tenant that if he should not paint the tavern outside, & the sheds & driving house, etc., in 1843, the tenant might do it in 1844, & charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June, 1845, during which month he painted one side & two ends of the tavern, but had not finished painting any of the buildings on July 12, 1845, when the landlord distrained for a quarter's rent due on July 1, 1845:—*Held*: under the terms of the lease with respect to the painting, the landlord might distrain for the quarter's rent due on July 1, 1845, though the painting which had been then begun, but not completed, exceeded the quarter's rent, for which the landlord had distrained.—*MILLMINE v. HART* (1848), 4 U. C. R. 525.—*CAN.*

g. Limited to one year's rent—Insolvent Act, 1869, s. 81.—*Insolvent Act, 1869, s. 81*, restricts the landlord to one year's rent, even where he has distrained for more before the insolvency of the tenant.—*MASON v. HAMILTON* (1872), 22 C. P. 411; *reversg.* 22 C. P. 100.—*CAN.*

h. Amount stipulated in acceleration clause.—*R. S. O.*, 1897 (c. 170),

s. 34 (1).—By a lease made on Oct. 31, 1895, certain premises were demised for a term of three years from Nov. 1, 1895, at a yearly rent of \$480, payable, in advance, in even portions monthly on the first day of each month, the first payment to be made on Nov. 1, 1895. The lease contained the usual statutory covenants & provisos, & an express power of entry & distress for rent in arrear, & also the following provision:—"If the lessee shall make any assignment for the benefit of creditors the then current quarter's rent shall immediately become due & payable." On Jan. 31, 1896, the lessor, who also held a chattel mtgo. on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessee, took possession both as mtgeo. & by way of distress for rent in arrear, only \$40 having up to that time been paid to her on account of rent. On the same day the lessee made an assignment for the benefit of creditors & by consent the goods on the demised premises which were of far more value than \$200, were sold by the lessor & were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods \$200, rent for Dec. 1895, & Jan., Feb., Mar. & Apr. 1896:—*Held*: *R. S. O.*, 1897, s. 34 (1), is a restrictive provision, & limits the landlord's lien even though

in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, & it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made.—*LANGLEY v. MEIR* (1898), 25 A. R. 372.—*CAN.*

k. Amount due at rate of distress—Lease previously determined—Rent for subsequent occupation of tenant of lessee.—Deft. leased premises to M., one of plffs., the lease containing this clause: "Should the lessee at any time become bkpt. or insolvent or assign or transfer his interest or any portion of his interest in the goods & chattels upon the said premises to any other person or cease in any way to control them, three months' rent shall immediately become due & payable forthwith, & distress may be made to collect such rent, & the term hereby demised shall immediately become forfeited & void." Rent was payable in advance on the fifteenth day of each month. On Dec. 12, 1913, a chattel mtgeo. seized M.'s goods for default in payment under the mtgo., & thereupon deft. demanded & distrained for three months' rent from Dec. 15, 1913, to Mar. 15, 1914. Deft.'s bailiff sold the goods to M.'s co-pltf., to whom pltf. had on Dec. 23, 1913, made an assignment for the benefit of creditors, & the bailiff held the proceeds pending

to distrain on the entirety of the lands, the deed gave him no power to distrain for more than one-half of the rents & profits of the whole.—*ASHWIN v. BULLOCK* (1899), 81 L. T. 48.

517. Limited to six years' rent—Real Property Limitation Act, 1833, c. 27, s. 42.]—As long as the relation of landlord & tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under above sect. the amount to be recovered is limited to six years.—*ARCHBOLD v. SCULLY* (1861), 9 H. L. Cas. 360; 5 L. T. 160; 7 Jur. N. S. 169; 11 E. R. 769, H. L. *Annotations*:—*Mentd.* *Webster v. Southey* (1887), 36 Ch. D. 9; *Beighton v. Beighton* (1895), 64 L. J. Ch. 796; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Dominion Coal Co. v. Maskinong S.S. Co.*, [1922] 2 K. B. 132.

SUB-SECT. 2.—WHAT MAY AND WHAT MAY NOT BE SET OFF OR DEDUCTED.

Compensation under Agricultural Holdings Act.]

—*See* Agricultural Holdings Act, 1923 (c. 9), s. 37.

518. General rule—No right of set-off.]—*ABSOLON v. KNIGHT & BARBER* (1743), Barnes, 450; 94 E. R. 998.

Annotation:—*Reid.* *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37.

519. ———.]—Pltf. in replevin cannot plead a set-off in bar to an avowry for rent.—*YCOCK v. TUFNELL* (1787), 2 Chit. 531.

20. ———.]—Bill for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the amount of the rent:—*Held*: it was a legal set-off. *Qu.*: whether this ct. can relieve by allowing an equitable set-off on a demand for rent.

The tenant here claims to set off a legal demand against the distress of his landlord for rent. The policy of the law does not permit a set-off against a distress for rent; & a ct. of equity must follow the law, & cannot relieve against the rule of law, where the claim to set off is founded on a legal demand. It is not necessary to consider how the case might be if the tenant had a counter demand, not at law, but in equity (*LEACH, V.-C.*).—*TOWNROW v. BENSON* (1818), 3 Madd. 203; 56 E. R. 484.

Annotations:—*Reid.* *Hamp v. Jones* (1840), 9 L. J. Ch. 258; *Pratt v. Keith* (1864), 33 L. J. Ch. 528.

521. ———.]—A. rented certain premises of B. & certain other premises adjoining of C. A. afterwards underlet the whole to D. at a rent payable quarterly. All rent was paid up to, & including Lady-day, 1845. On Oct. 27, 1845, A. became bkpt. The assignees elected to take those premises rented of B. but not those rented of C. In Feb. 1846, A. owed C. three-quarters of a year's rent, & he distrained on the premises he had let. D. paid the full amount, & on Feb. 28 the assignees assigned a portion of the premises held under B. & brought this action to recover from the under-tenant half a year's rent which became due at Michaelmas, 1845, before the bkpcy., & also a quarter's apportioned rent due at Christmas, 1845, for the premises rented of B.:—*Held*: the undertenant was liable to the whole claim, not-

withstanding the rent paid by him to C. in respect of the distress which had been made.

A tenant who has been compelled by the superior landlord or other incumbrancer having a title paramount to his immediate landlord to pay a sum due for ground rent or other like charges may meet such payment as having been made in satisfaction, or part satisfaction, of rent due to the immediate landlord, & may plead it, as far as the charges do extend, in bar, to an avowry for rent in arrear. The principle is that the immediate landlord is bound to protect the tenant from all paramount claims, & when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of land in respect of which his rent is paid, to make payments which, as between himself & the landlord, ought to have been paid by the latter, he is considered as having been authorised by the landlord so to apply the rent due, or accruing due, & all such payments would certainly give the tenant a right of action against his landlord as for money paid to his use; & so would, in an action of debt for rent, form a legitimate object of set-off; & although in replevin the general set-off cannot be pleaded, the cts. have given to a tenant the benefit of set-off as to payments of this description, by holding them to be, in fact, the payment of rent itself, or in part. The rent due to C. was money which, as between bkpt. & deft., bkpt. were bound to pay; therefore, the payment of it by deft., under the pressure of C.'s distress, was a payment to the use of bkpt., which, supposing there had been no bkpcy., would have given deft. a good right of action against bkpt. Here the payment of rent to C. could give no right of action against present plffs., the assignees. There was never any obligation on them to protect deft. against C.'s demand. The assignees were, in fact, in the situation of owners of a different estate; & so the payment of C. could not have had the effect of defeating the right of action already vested in the assignees. With respect to the quarter's apportioned rent, due at Christmas, 1845, the case is even more clear. The rent became due to the assignees themselves, & not to bkpt. The assignees had nothing to do with the other part of the premises held by deft.; therefore, with regard to this rent, they are properly the landlord's, & they claim a quarter's rent due (*ROLFE, B.*).—*GRAHAM v. ALLSOPP* (1848), 3 Exch. 186; 18 L. J. Ex. 85; 12 L. T. O. S. 273; 154 E. R. 809.

Annotations:—*Consd.* *Jones v. Morris* (1849), 3 Exch. 742. *Appld.* *O'Donoghue v. Coalbrook & Broadoak Co.* (1872), 26 L. T. 806.

522. Not amount held in separate right by trustees.]—A. rented land of B., who was trustee of certain property, a part of which was this land, the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:—*Held*: this could not be set off against the rent without a special agreement to that effect.—*WILLSON v. DAVENPORT* (1833), 5 C. & P. 531.

523. By agreement—Repairs.]—Where the tenant of premises, under a lease, & at a rent payable half-yearly, agreed to pay all taxes,

decision as to the validity or effect of the above clause:—*Held*: deft.'s act of Dec. 12, was a determination of the lease. Deft. was allowed a sum for use & occupation by the lessee, at the same rate as the rent, for any period of time the lessee was in possession after Dec. 15. Subject to this, the moneys in the bailiff's hands, less the costs of

seizure & sale, were to be paid to the assignee.—*McKINNON v. COHEN* (1914), 26 W. L. R. 828.—*CAN.*

1. Demand for more than one year's rent.]—A distress by a landlord for rent is unlawful if the particular in writing of the rent demanded include rent which became due more than one

year before the making of the distress.—*TRACEY v. BRENNAN* (1874), 1. T. 8 C. L. 527.—*IR.*

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523 i. By agreement—Repairs.]—To an avowry under a distress for rent, pltf. replied *riens* in arrear, & also set out specially an agreement to be

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Sub-sect. 2.]

except the landlord's property-tax, which the landlord agreed to allow, & the tenant agreed to lay out £20 in repairs, which the landlord also agreed to allow, but afterwards distrained for half a year's rent, & sold to the whole amount, without allowing either for repairs or property-tax, which he knew the tenant had paid to the collector:—*Held*: the tenant might recover, in respect of the property-tax, but not in respect of the repairs, in an action for money had & received against the landlord.

The tenant was obliged to pay the full amount of the rent under the distress, if the landlord would not consent to make the deduction in respect of the property-tax; & it does not appear to me that he has any remedy except by bringing an action. If so, the only question is as to the form of the action. It seems to me that he may waive the tort & bring an action for money had & received, if, in the result, the landlord has got money into his pocket, which does not belong to him. If any consequential injury had been sustained, damages for such injury must have been recovered in another form of action (*LORD ELLENBOROUGH, C.J.*).—*GRAHAM v. TATE* (1813), 1 M. & S. 609; 105 E. R. 228.

Annotations:—*Distd. Spragg v. Hammond* (1820), 2 Brod. & Bing. 59. *Refd. Cumming v. Bedborough* (1846), 10 J. P. 442; *Yates v. Eastwood* (1851), 6 Exch. 805.

524. ———.]—An agreement for the lease of a house contained the following clauses: " & D., the lessee, doth hereby agree to spend within one year from the date hereof, £200 at the least, in erecting a kitchen to the messuage, & also in altering the large room into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection & alteration or repairs to be inspected & approved of by K., the lessor, & to be done in a substantial manner; & it is agreed that D. shall be allowed £200 towards such erection & alterations or repairs & shall be at liberty to retain the same out of the first year's rent of the premises." The lessee laid out more than £200 but the lessor did not approve of all the work, & distrained for the balance of the first year's rent:—*Held*: the approval of the lessor was not a condition precedent, & after the jury had found that £200 was expended by pltf. in substantial repairs, he was entitled to recover in the action.—*DALLMAN v. KING* (1837), 4 Bing. N. C. 105; 3 Hodg. 283; 5 Scott, 382; 7 L. J. C. P. 6; 132 E. R. 729.

Annotations:—*Mentd. Braunstein v. Accidental Death Insee.* (1861), 1 B. & S. 782; *Stadhard v. Lee* (1863), 3 B. & S. 364; *Diggle v. Ogston Motor Co.* (1915), 84 L. J. K. B. 2165.

525. ——— Expenses under Metropolis Local Management Act, 1862 (c. 102), s. 96.]—Above Act empowers a local authority to require the payment of any expenses, which the owner of any premises may be liable to pay, from the owner or occupier of the premises, & provides that the owner shall allow the occupier to deduct what he so pays " out of the rent from time to time becoming due in respect of the said premises, as if the same had been paid to such owner as part of such rent "; & there is a proviso that nothing in the sect. contained

allowed to make certain repairs & to deduct the amount from the rent, which he averred he had done:—*Held*: good.—*WHEELER v. SIME* (1847), 3 U. C. R. 143.—*CAN.*

523 il. ———.]—Deft. having distrained for rent in arrear, pltf. claimed that deft. was indebted to him in

damages for breach of the covenants in the lease to repair & to lease to pltf. an adjoining piece of land, & obtained *ex parte* an interim injunction restraining proceedings under the distress, which was dissolved on the ground of concealment of facts:—*Held*: the damages claimed by pltf. were not a

shall be taken to affect any contract whatsoever between landlord & tenant:—*Held*: (1) a payment made by a tenant to a local authority under this sect. is not a payment of or on account of rent, but a payment of or on account of expenses; (2) when a tenant had covenanted with his landlord that he would bear the expenses which he had under s. 96 paid to the local authority, he had, by reason of the proviso no right to deduct from the rent the amount which he had so paid, & the landlord's right to distrain for unpaid rent was unaffected.—*SKINNER v. HUNT*, [1904] 2 K. B. 452; 73 L. J. K. B. 680; 91 L. T. 270; 68 J. P. 402; 20 T. L. R. 556; 2 L. G. R. 769, C. A.

526. Customary deduction allowed to previous tenants — Inadequate provision in lease.]—Pltf. held under a lease, reserving £40 *per annum* in the body thereof; but, before the lease was executed, the following words were added, between which & the body of the lease the signatures were written. " The allowance of the road to the Six Bells' Yard to be made as usual." It had been usual for the lessor to allow the lessee £5 *per annum* for so much annually paid by the lessee to a third party for the use of such road to the demised premises:—*Held*: this did not reduce the reservation to £35 *per annum*, so as to entitle pltf. to a verdict on the plea of *non tenuit*.—*DAVIES v. STACEY* (1840), 12 Ad. & El. 506; 4 Per. & 157; 9 L. J. Q. B. 393; 113 E. R. 904.

527. Payment made on authority of landlord's agent—Before rent due.]—*CROOKE v. WILSON* (1844), 4 L. T. O. S. 98.

528. Costs due by landlord to tenant.]—A bill will not lie by a tenant against his landlord to restrain proceedings upon a replevin bond on the ground of set-off against the rent distrained for.

Deft., with his mother's money, purchased certain leaseholds, which were assigned to him, & subsequently, at her request, he covenanted to hold them upon trust for her for life, & afterwards for himself & two others. He afterwards re-assigned them to his mother, who sub-let them to pltf. The mother received the rents from the sub-lease during her lifetime, & on her death pltf., in ignorance of the real nature of his lessor's title, paid the rent to her extrix. Disputes arose between the persons interested under the settlement, & a suit was instituted, in the course of which deft. was declared to be a trustee of the leasehold upon the trusts of the settlement. Deft. subsequently brought an action of ejectment against pltf., & failed in it; but succeeded in an action of replevin. Pltf. then filed the bill in this suit, for a declaration that he was entitled to set off the costs due to him in the ejectment & other items against the rent due from him to pltf.; Deft. demurred for want of equity:—*Held*: the demurrer must be allowed.—*PRATT v. KERR* (1864), 3 New Rep. 406; 33 L. J. Ch. 528; 10 L. T. 15; 10 Jur. N. S. 305; 12 W. R. 394.

529. Rent due by sub-lessee to immediate lessor—Distress by superior landlord on sub-lessee.]—Where a superior landlord distrains on a sub-lessee for rent due to him from the mesne lessee, & the sub-lessee owes rent to his immediate lessor, the amount realised by the distress is a satisfaction, *pro tanto*, of the rent due by the

debt so as to constitute a set-off against the rent; & although they might be the subject of counterclaim, they would not justify an injunction against a distress levied as here.—*WALTON v. HENRY* (1889), 18 O. R. 620.—*CAN.*

m. ——— *Work on land—Failure*

sub-lessee to his landlord, & this is so not only where the sub-lessee pays out the distress, but also where goods belonging to him are sold under the distress.

The goods of a sub-lessee, who owed rent to his immediate lessor, having been sold under a distress put in by a superior landlord for rent due to him; in an action by the sub-lessee against his immediate lessor to recover damages for a breach of his covenant to pay the rent to the superior landlord:—*Held*: the sum for which the goods were sold should be deducted from the amount of damages recoverable, as that sum operated as a satisfaction, *pro tanto*, of the rent due by the sub-lessee to his immediate lessor.—*O'DONOGHUE v. COALBROOK & BROADOAK CO., LTD.* (1872), 26 L. T. 806, Ex. Ch.

530. Compulsory payments on account of mesne tenant—To superior landlord—For ground rent.]—To an avowry for rent the tenant may plead payment of a ground rent to the original landlord.—*SAPSFORD v. FLETCHER* (1792), 4 Term Rep. 511; 100 E. R. 1147.

Annotations:—*Apld.* Taylor v. Zamira (1816), 6 Taunt. 524. *Distd.* Andrew v. Hancock (1819), 1 Brod. & Bing. 37; Stubbs v. Parsons (1820), 3 B. & Ald. 516. *Apld.* Dyer v. Bowley (1824), 9 Moore, C. P. 196. *Consd.* Carter v. Carter (1829), 5 Bing. 406. *Apld.* Johnson v. Jones (1839), 9 Ad. & El. 809. *Distd.* Davies v. Stacey (1840), 12 Ad. & El. 506; Graham v. Allsopp (1848), 18 L. J. Ex. 85. *Fold.* Jones v. Morris (1849), 3 Exch. 742. *Mentd.* Wilkinson v. Cawood (1797), 3 Anst. 905; Pope v. Biggs (1829), 9 B. & C. 245; Boodle v. Campbell (1844), 7 Man. & G. 386; Griffinhoofe v. Daubuz (1855), 5 E. & B. 746; Stephens v. Hotham (1855), 1 Jur. N. S. 842; O'Donoghue v. Coalbrook & Broadoak Co. (1872), 26 L. T. 806; Underhay v. Read (1887), 36 W. R. 298; Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161.

531. ——— Time given to pay.]—(1) A payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment, because the ground-landlord on demanding it allows the occupier time to pay.

(2) Growing rent may be discharged by such payments as well as rent actually due.

(3) Where growing rent has been reduced by payments of land-tax, etc., if the landlord distrains for the whole sum reserved, the tenant may properly sue in case.—*CARTER v. CARTER* (1829), 5 Bing. 406; 2 Moo. & P. 732; 7 L. J. O. S. C. P. 141; 130 E. R. 1118.

Annotations:—*Distd.* Davies v. Stacey (1840), 12 Ad. & El. 506; Graham v. Allsopp (1848), 18 L. J. Ex. 85. *Mentd.* Spencer v. Parry (1835), 3 Ad. & El. 331; Valpy v. Manley (1845), 1 C. B. 594.

532. ———.]—(1) A tenant is presumed to be authorised by his landlord to pay a ground rent or a payment in the nature of a ground rent to a superior landlord, & may plead such payment against his immediate landlord.

In an action of replevin, where pltf. pleaded the facts showing such payment specially:—*Held*: to amount to a plea of *riens in arrear* & ought to have been so pleaded concluding to the country.

(2) A pltf. in replevin may, in bar to an avowry for rent, plead payment to the ground landlord or other incumbrancers having claims paramount to those of the immediate landlord making the distress. The ground of this decision is that a compulsory payment by a tenant of a ground rent or other like charge is in truth a partial eviction, & the landlord is presumed to authorise the payment by the tenant of the rent to those who have a

claim on the land paramount to his own, & against which, as being a partial eviction, he is bound to protect the property holding under him. If, at the time of the demise, it had been expressly stipulated that the tenant might so apply his rent, or a competent part of it, no question could arise, & even although no such stipulation has been made in express terms, the law considers it as implied in every contract of a demise (*POLLOCK, C.B.*).—*JONES v. MORRIS* (1849), 3 Exch. 742; 18 L. J. Ex. 477; 154 E. R. 1044; *sub nom.* *MORRIS v. JONES*, 14 L. T. O. S. 41.

Annotation:—*Generally, Mentd.* Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161.

533. ——— For rent—Whether available against assignees of bankrupt landlord.]—*GRAHAM v. ALLSOPP*, No. 521, *ante*.

534. ——— Annuity—Secured by former demise.]—To an avowry for rent, pltf. in replevin may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain.—*TAYLOR v. ZAMIRA* (1816), 6 Taunt. 524; 2 Marsh. 220; 128 E. R. 1138.

Annotations:—*Distd.* Andrew v. Hancock (1819), 1 Brod. & Bing. 37; Stubbs v. Parsons (1820), 3 B. & Ald. 516; Alchorne v. Gomme (1824), 2 Bing. 54. *Apld.* Dyer v. Bowley (1824), 2 Bing. 94; Carter v. Carter (1829), 5 Bing. 406; Johnson v. Jones (1839), 9 Ad. & El. 809. *Distd.* Davis v. Stacey (1840), 12 Ad. & El. 506; Graham v. Allsopp (1848), 18 L. J. Ex. 85. *Apld.* Jones v. Morris (1849), 3 Exch. 742. *Mentd.* Pope v. Biggs (1829), 9 B. & C. 245; Wheeler v. Branscombe (1843), 5 Q. B. Underhay v. Read (1887), 36 W. R. 298; Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161.

535. ——— Interest on mortgage—Created prior to tenancy.]—In 1796, H. demised to S. for 68 years, premises which in 1793 had been mortgaged to F. S. assigned to N., who underlet to D. In 1818, H. conveyed the premises in fee to R. N., who was also agent of H., paid the interest on the mtge. to F. from 1816 to 1820, to the amount of the rent reserved. R. distrained for rent in 1820:—*Held*: D., who replevied at the instigation of N. might, under the plea of *riens in arriere*, avail himself of these payments.—*DYER v. BOWLEY* (1824), 2 Bing. 94; 9 Moore, C. P. 196; 2 L. T. O. S. C. P. 129; 130 E. R. 240.

Annotations:—*Refd.* Johnson v. Jones (1839), 8 L. J. Q. B. 124; Wheeler v. Branscombe (1843), 5 Q. B. 373.

536. ———.]—Plea to an avowry of distress for rent arrear, "that before the lessor, who claimed title under a pretended agreement between him & T. had anything in the premises & before the demise by the lessor to the lessee, T. mortgaged them in fee to J.; that the mtges. being forfeited, notice of the forfeiture being given to the lessee, & the lessee having been required to attorn & having attorned to the mtgee. he distrained for the rent, when the lessee paid him, to save the goods from being sold":—*Held*: plea was bad.—*ALCHORNE v. GOMME* (1824), 2 Bing. 54; 9 Moore, C. P. 130; 2 L. J. O. S. C. P. 118; 130 E. R. 225.

Annotations:—*Refd.* Gravenor v. Woodhouse (1824), 9 Moore, C. P. 148; Dyer v. Bowley (1824), 2 Bing. 94; Gregory v. Doidge (1826), 11 Moore, C. P. 394; Johnson v. Jones (1839), 9 Ad. & El. 809. *Mentd.* Hill v. Saunders (1824), 2 Bing. 112; Pope v. Biggs (1829), 9 B. & C. 245.

537. ———.]—To an avowry of a

to give account before distress.]—*GRAHAM v. GILBERT* (1878), 1 Pug. 239.—*CAN.*

n. ——— Power to distrain not suspended.]—Under a lease, dated Dec. 21, 1874, for five years, to commence from Apr. 1, 1875, the rent

of \$80 was to be payable annually on June 1, in each year, but subject to a proviso that if the lessee "shall yearly & every year during the said term, or earlier, if he shall think proper, chop, clear, & fence in a proper manner six acres of the said land, then the current

year's rent shall be considered as paid & satisfied." The rent not being paid on June 1, 1875, & the lessee then having three acres cleared, the lessor distrained:—*Held*: the rent reserved, payable on June 1, 1875, was then due & might be distrained for, & the effect

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distress for rent pltf. pleaded that, before deft. had any interest in the premises, they were mortgaged in fee; that mtgor. remained in possession, & demised to deft.; that deft., the mtge. money being still due, demised to pltf.; that afterwards, the mtge. money being still due, & interest thereon, & £14 avowed for by deft., being also in arrear, mtgee. gave notice to pltf. to pay the £14 to him instead of to deft., & threatened, in case of non-payment, to put the law in force, & was then about to put the law in force, wherefore pltf. necessarily paid that sum to mtgee., & so the sum was not in arrear; concluding with a verification:—*Held*: the plea was good, being a plea of payment, & not of *nil habuit in tenementis*, & it was not bad for setting out the circumstances of the payment, or for concluding with a verification.—*JOHNSON v. JONES* (1839), 9 Ad. & El. 809; 1 Per. & Dav. 651; 8 L. J. Q. B. 124; 112 E. R. 1421.

Annotations:—*Mentd.* Boodle v. Cambell (1844), 7 Man. & G. 386; *Carpenter v. Parker* (1857), 3 C. B. N. S. 206; *Underhay v. Read* (1887), 20 Q. B. D. 209.

538. — Drainage tax—After payment of rent—Right to recover from landlord.—(1) Where by a local Act it was provided that a drainage tax should be paid by the tenants of the land, & grounds charged with the same who might deduct & retain the same out of the rents payable to their landlord; & also that in case of neglect to pay, the tax might be levied by distress on the goods & chattels which should be found on the lands charged with the tax in arrear, & if the same should be untenanted or no sufficient distress could be found, the lands & the grounds chargeable should remain as a surety for the payment thereof, & might be taken possession of & let in discharge of the tax:—*Held*: the tenants to be charged with the tax:—those in whose time the tax accrued due, & the tenants for the time being.

(2) Where an outgoing tenant having paid his rent in full had left property on the premises which was afterwards distrained for the tax due during his tenancy, & he was obliged to pay it:—*Held*: he might recover the same in an action against his landlord for money paid.—*DAWSON v. LINTON* (1822), 5 B. & Ald. 521; 1 Dow. & Ry. K. B. 117; 106 E. R. 1281.

Annotations:—*Mentd.* Spencer v. Parry (1835), 3 Ad. & El. 331; *Griffinhoofe v. Daubuz* (1855), 5 E. & B. 746; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161.

539. — Landlord's property tax.—*GRAHAM v. TATE*, No. 523, *ante*.

—*See, further, INCOME TAX.*

540. — Land tax—Must be deducted from rent of current year.—An allegation of payment of land tax & paving rates due for any period preceding the current year, is no plea in bar to an avowry for rent arrear. If the land tax & paving rates are not deducted, as they ought to be, from the rent of the current year, they cannot be deducted, or the amount of them be recovered back, from the landlord in any subsequent year.—*ANDREW v. HANCOCK* (1819), 1 Brod. & Bing. 37; 3 Moore, C. P. 278; 129 E. R. 637.

Annotations:—*Distd.* Carter v. Carter (1829), 5 Bing. 406. *Fold.* Dawes v. Thomas, [1892] 1 Q. B. 414. *Refd.* Bramston v. Robins (1826), 4 Bing. 11. *Mentd.* Hales v. Freeman (1819), 1 Brod. & Bing. 391; *Smith v. Alsop* (1824), M'Cle. 622; *Smith v. Humble* (1854), 18 J. P.

of the proviso was not to suspend the right to distrain during the currency of the year.—*PRACEY v. OVAS* (1876), 26 C. P. 464.—**CAN.**

c. Compulsory payments on ac-

count of mesne-tenants—To superior landlord.—A sub-tenant whose goods have been distrained upon by the superior landlord, & who purchases them at the sale under the distress,

760; *Hackney & Lamberhurst Tithe Commutation Rentcharges* (1858), E. B. & R. 1; *Piggott v. Cuckfield Union Assmt. Com.* (1921), 125 L. T. 402.

541. — — — — ——A plea in bar in replevin stated, that divers sums of money amounting to a certain sum, had been, from time to time, duly assessed & rated upon the premises for land tax, & from time to time paid by pltf. wherefore he deducted the sum, being the amount of the tax deft., as landlord, was liable to bear in respect of the rent:—*Held*: this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, & in not stating that the payment was made after the rent distrained for had accrued, or was accruing.—*STUBBS v. PARSONS* (1820), 3 B. & Ald. 516; 106 E. R. 750.

Annotations:—*Refd.* Mattison v. Hart (1854), 14 C. B. 357. *Mentd.* Earle v. Maugham (1863), 14 C. B. N. S. 626; *Lamb v. Brewster* (1879), 4 Q. B. D. 220.

542. — — — Continued payment without sufficient protest—Right to recover lost.—In 1814, a distress was made on a tenant for the whole of the rent due from him, & deduction for land tax was refused, the lease being silent as to the land tax; the tenant having protested against his liability, paid, during five succeeding years, the land tax, without renewing in any sort the objection of his non-liability to pay:—*Held*: in 1820 he could not recover, in an action for money paid to deft.'s use, any of the sums so paid for land tax. *SPRAGG v. HAMMOND* (1820), 2 Brod. & Bing. 59; 4 Moore, C. P. 431; 129 E. R. 880.

Annotation:—*Consd.* Bramston v. Robins (1826), 12 C. P. 68.

543. — — — Payment made & allowed by mistake.—A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts:—*Held*: he could not distrain for the amount erroneously allowed, though the receipt given every year showed the amount paid & the amount deducted.—*BRAMSTON v. ROBINS* (1826), 4 Bing. 11; 12 Moore, C. P. 68; 130 E. R. 671; *sub nom.* *BRANSTON v. ROBINS*, 5 L. J. O. S. C. P. 13.

Annotations:—*Mentd.* Waller v. Andrews (1838), 3 M. & W. 312; *Edinburgh Ry. v. Wauchope* (1842), 8 Cl. & Fin. 710; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692; *Daniell v. Sinclair* (1881), 29 W. R. 569; *Beaufort v. I. R. Comrs.*, *I. R. Comrs. v. Anglesey*, [1913] 3 K. B. 48; *Rossdale v. Fryer*, [1922] 2 K. B. 303.

544. — — — — ——*CARTER v. CARTER*, No. 531, *ante*.

545. — Rates—Paving—Must be deducted from rent of current year.—*ANDREW v. HANCOCK*, No. 540, *ante*.

546. — — — Sewers.—A sewers' rate, not being imposed directly by Act of Parliament, is not a "parliamentary tax."

"The tenant was under no obligation to pay the whole rent without deduction, & at the time of distress he tendered enough" (*PARKE, B.*).—*PALMER v. EARITH* (1845), 14 M. & W. 428; 14 L. J. Ex. 256; 5 L. T. O. S. 287; J. P. 842; 153 E. R. 542.

Annotations:—*Mentd.* Bedford Union Gdns. v. Bedford Comrs. (1852), 7 Exch. 777; *R. v. Kent JJ.* (1860), 2 E. & E. 911; *Associated Newspapers v. London City Corpn.*, [1916] 2 A. C. 429; *Pole-Carew v. Craddock*, [1920] 3 K. B. 109.

547. — Tithe.—Tithe Act, 1836 (c. 71), s. 80, permits a tenant or occupier who shall pay tithe rentcharge to deduct the amount thereof

may recover the amount so paid from his immediate landlord, as money paid to his use at his request.—*NOYES v. ELLIS* (1877), 3 V. L. R. 307.—**AUS.**

from the rent payable by him to his landlord, & he is to be allowed the same in account with his landlord.

A tenant paid the tithe rentcharge, in respect of the land he occupied, for several years, during which he made no deductions, in respect of such payments, from the rent as it became due. On a further payment of rent becoming due & being demanded by the landlord, the tenant claimed under above sect. to deduct the aggregate amount of the payments so made by him in respect of the tithe rentcharge in the previous years:—*Held*: each deduction in respect of a payment of tithe rentcharge should have been made from the next payment of rent, & could not be carried into account in the payment of any subsequent rent.—*DAWES v. THOMAS*, [1892] 1 Q. B. 414; 61 L. J. Q. B. 482; 86 L. T. 451; 56 J. P. 326; 40 W. R. 305; 8 T. L. R. 307; 36 Sol. Jo. 253, C. A.

—.]—*See, generally, ECCLESIASTICAL LAW.*

548. When deductions can be made Rent not due when payment made.]—*CARTER v. CARTER*, No. 531, *ante*.

549. ——— Payments must have been made—Assessment under Metropolis Management Act, 1855 (c. 120).]—By Metropolis Management Amendment Act, 1862 (c. 102), s. 96, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays the vestry or district board for works done by them under the Act:—*Held*: to entitle the occupier to avail himself of that provision, the money must have been actually paid; & consequently, a distress for rent which became due after service of a notice from the vestry, made before payment to the vestry clerk, was not illegal.—*RYAN v. THOMPSON* (1868), L. R. 3 C. P. 144; 37 L. J. C. P. 134; 17 L. T. 506; 32 J. P. 135; 16 W. R. 314.

Annotation:—*Consd. Skinner v. Hunt*, [1904] 2 K. B. 452.

SUB-SECT. 3.—AGRICULTURAL HOLDING.

See Agricultural Holdings Act, 1923 (c. 9), s. 3.

550. "Course of dealing"—Rent due but not yet payable.]—By Agricultural Holdings Act, 1883 (c. 61), s. 44, a landlord cannot distrain for rent which became due more than year before the distress, provided that where according to the ordinary course of dealing payment of the rent has been allowed to be deferred until the expiration of a quarter or half-year after rent legally became due, for the purpose of the sect. the rent shall be deemed to have become due at the expiration of such quarter or half-year, & not when it legally became due:—*Held*: the landlord was entitled to distrain for rent then legally due, but not yet payable according to the course of dealing & also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously although the total amount distrained for exceeded one year's rent.—*Re BEW, Ex p. BULL* (1887), 18 Q. B. D. 642; 56 L. J. Q. B. 270; 56 L. T. 571; 51 J. P. 710; 35 W. R. 455; 4 Morr. 94, D. C.

Annotation:—*Refd. Crosse v. Welch* (1892), 8 T. L. R. 401.

551. ——— Deferred payment.]—*FAIRLAMB v. BEAUMONT* (1887), 31 Sol. Jo. 272.

SUB-SECT. 4.—APPORTIONED RENT.

552. Share of tenant in common—Whole amount paid to one—After notice.]—*HARRISON v. BARNBY*, No. 230, *ante*.

553. In replevin.]—An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, & not on a personal contract; & in case of eviction the rent may be apportioned, as in debt or replevin. *Aliter* in covenant against the lessee himself who who is liable on his personal contract.—*STEVENSON v. LAMBARD* (1802), 2 East, 575; 102 E. R. 490.

Annotations:—*Refd. Doe d. Vaughan v. Meyler* (1814), 2 M. & S. 276; *Holgate v. Kay* (1844), 1 Car. & Kir. 341; *Badeley v. Vigurs* (1854), 4 E. & B. 71; *Norval v. Pascoe* (1864), 4 New Rep. 390; *Swansea Corpn. v. Thomas* (1882), 10 Q. B. D. 48; *Baynton v. Morgan* (1888), 22 Q. B. D. 74; *Matthey v. Curling*, [1922] 2 A. C. 180; *United Dairies v. Public Trustee*, [1923] 1 K. B. 469. *Mentd. Harris v. Morrice* (1842), 10 M. & W. 260.

554. Necessity for apportionment—To confer rights & remedies.]—*BLISS v. COLLINS* (1822), 5 B. & Ald. 876; 1 Dow. & Ry. K. B. 291; 106 E. R. 1411.

Annotations:—*Refd. Swansea Corpn. v. Thomas* (1882), 10 Q. B. D. 48. *Mentd. Henniker v. Turner* (1825), 6 Dow. & Ry. K. B. 72.

555. Arrears of prior lessee—By part of land demised.]—A lessee of one hundred acres of land accepted the lease & entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, & that person kept possession of the eight acres, until half a year's rent became due, & excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of & averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease:—*Held*: the latter demise was wholly void as to the eight acres; & the rent was not apportionable, & the lessor was not entitled to distrain for the whole rent or any part of it.—*NEALE v. MACKENZIE* (1836), 1 M. & W. 747; 2 Gale, 174; 6 L. J. Ex. 263; 150 E. R. 635, Ex. Ch.

Annotations:—*Distd. Watson v. Waud* (1853), 8 Exch. 335. *Mentd. Slack v. Sharp* (1838), 7 L. J. Q. B. 225; *Harris v. Morrice* (1842), 10 M. & W. 260; *Matthey v. Curling*, [1922] 2 A. C. 180.

556. Arrears of sub-tenants.]—Pltf. occupied two parcels of land with the understanding that he should let off a portion of it when he could. He paid the rent agreed upon for more than a year, & he then let off a portion of each parcel to A. & B. separately, who paid rent to defts. & the pltf. continued to hold the residue himself. The rent becoming in arrear the landlord distrained:—*Held*: there was evidence that the rent was apportionable, & the landlord was entitled to distrain.—*FLESHER v. TROTMAN* (1862), 6 L. T. 218, Ex. Ch.

SUB-SECT. 5.—DOUBLE RENT.

557. Distress for Rent Act, 1737 (c. 14), s. 18—Valid notice by tenant necessary.]—A tenant held under a demise from Mar. 26 for one year then next ensuing, & fully to be complete & ended, & so from year to year, for so long as the landlord & tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before Mar. 25 that he would quit on that day, & the landlord accepted & assented to the notice:—*Held*: (1) the tenancy was not thereby determined, there not having been either a sufficient

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notice to quit, or a surrender in writing, or by operation of law within the meaning of Stat. Frauds; (2) the tenant having held over after the expiration of the time mentioned in the notice to quit, the landlord was not entitled to distrain for double rent under Distress for Rent Act, 1737 (c. 19), s. 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, & where he actually gave a valid notice sufficient to determine it.—**JOHNSTONE v. HUDLESTONE** (1825), 4 B. & C. 922; 7 Dow. & Ry. K. B. 411; 4 L. J. O. S. K. B. 71; 107 E. R. 1302.

Annotations:—As to (1) **Apld.** Doe d. Murrell v. Milward (1838), 1 Horn & H. 79. **Refd.** Cadby v. Martinez (1840), 11 Ad. & El. 720; Bessell v. Landsberg (1845), 7 Q. B. 638; Giddins v. Dodd (1856), 20 J. P. 580; *Re* Bebington's Tenancy, Bebington v. Wildman, [1921] 1 Ch. 559. **Generally, Refd.** Northcott v. Roche (1921), 37 T. L. R. 364. **Mentd.** Weddall v. Capes (1836), 1 Gale, 432; Furnivall v. Grove (1860), 8 C. B. N. S. 496; Phillips v. Miller (1875), 32 L. T. 638.

558. Whether applicable to weekly tenancies—Landlord & Tenant Act, 1730, c. 28, s. 1.]—A landlord has no right to distrain for double rent upon a weekly tenant, who holds over after a notice to quit.—**SULLIVAN v. BISHOP** (1826), 2 C. & P. 359; *subsequent proceedings*, 5 L. J. O. S. C. P. 8.

*See, further, as to double rent & double value—***LANDLORD & TENANT.**

SECT. 9.—HOW THE RIGHT TO DISTRAIN MAY BE LOST.

SUB-SECT. 1.—BY MERGER IN JUDGMENT FOR RENT.

559. Decree that agreed rent be paid.]—Qu.: where a lease has been granted, but by reason of a mistake the rent has been misstated at a lower sum than agreed to, & a bill filed & a decree obtained that such lease be cancelled, & the whole amount of rent, as agreed to, be paid, whether landlord's right to distrain merges in the decree.—**SHOUBRIDGE v. SMITH** (1847), 9 L. T. O. S. 82.

560. Subsequent distress illegal.]—(1) Deft. having commenced an action for recovery of arrears of rent obtained judgment therefor. After judgment was signed he distrained in respect of the rent:—**Held:** the distress was illegal, the debt for rent due having become by law merged in the judgment.

(2) Pltf. sought to recover double the value of the goods distrained, but inasmuch as they did not belong to pltf., she could not receive more than their actual value (**BRUCE, J.**).—**CHANCELLOR v. WEBSTER** (1893), 9 T. L. R. 568; 37 Sol. Jo. 633.

Annotation:—**Folld.** Potter v. Bradley (1894), 10 T. L. R. 445.

561.]—POTTER v. BRADLEY & Co. (1894), 10 T. L. R. 445.

PART II. SECT. 9, SUB-SECT. 1.

p. Garnishee order.]—A landlord's right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment, by the service on the tenant, before such distress, of an order attaching the rent, & distress for such portion is wrongful.—**PATTERSON v. KING** (1895), 27 O. R.

56.—CAN.

PART II. SECT. 9, SUB-SECT. 3.

566 i. General rule.]—Where a tenant, with the knowledge & consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law, & the right to distrain is gone.—**LEWIS v. BROOKS**

SUB-SECT. 2.—BY DETERMINATION OF LESSOR'S INTEREST.

562. General rule—No right of distress.]—**BURNE v. RICHARDSON**, No. 244, *ante*.

563. Defeasible title—Re-entry for breach of covenant.]—K. demised land to H. for building, with a proviso for re-entry by K. in case of the non-completion of the houses contracted to be built thereon by a given time. H. demised one of the houses to pltf. for one year certain, with an agreement for a further lease, at a rent payable quarterly. Before any rent became due from pltf. to H., K. re-entered for a breach of the covenant of H. to complete the buildings within the time, & pltf. was turned out of possession. Pltf. subsequently took the house he formerly occupied under H., from K. upon a new agreement; under which he, after an interval of a few weeks, resumed possession:—**Held:** H. could not legally distrain the goods of pltf. for rent subsequently accruing; & the eviction by the superior landlord might be given in evidence under the plea of *non tenuit*.—**HOPCRAFT v. KEYS** (1833), 9 Bing. 613; 2 Moo. & S. 700; 131 E. R. 744.

Annotation:—**Mentd.** Jew v. Wood (1841), Cr. & Ph. 185.

564. Notice of change of ownership by lessor.]—G. demised premises to D. who entered & paid him rent. During the term, a third party, T., disputed G.'s title, & they agreed to be bound by the opinion of a barrister, who decided in T.'s favour. G. thereupon delivered up the title deeds, & permitted T.'s attorney to tell D., the tenant, that he must, in future, pay the rent to T. as his landlord. D. then paid rent accordingly; but G. afterwards distrained upon him for the same rent. On replevin, avowry, & plea in bar stating the above facts:—**Held:** G.'s claim of title as landlord to D. had expired; his conduct amounted to an admission of that fact; & D. was not estopped from alleging it.

G. was estopped from setting up his relation of landlord against D., having himself induced D. to pay rent to another person (**LORD DENMAN, C.J.**).—**DOWNS v. COOPER** (1841), 2 Q. B. 256; 1 Gal. & Dav. 573; 11 L. J. Q. B. 2; 6 Jur. 622; 114 E. R. 100.

Annotation:—**Refd.** Roberts v. Shalless (1858), 1 F. & F. 139.

565. Assignment of interest.]—**NASH v. LUCAS**, No. 1273, *post*.

Relationship of landlord & tenant.]—*See* Sect. 3, sub-sect. 2, A., *ante*.

SUB-SECT. 3.—BY ASSIGNMENT OF THE REVERSION.

566. General rule.]—Lessee for years assigns to his lessor reserving rent without deed: the reservation is in the nature of rent, & recoverable by action of debt; but not by distress.—**CARTRIGHT v. PINGREE** (1675), Freem. K. B. 398; 89 E. R. 296; *sub nom.* **CARTWRIGHT v. PINKNEY**, 3 Keb. 488; 1 Vent. 272.

567. —.]—When a termor assigns his whole term, rendering rent, he may maintain debt for the rent, but cannot distrain. There may be an

(1853), 8 U. C. R. 576.—**CAN.**

566 ii. —.]—After rent became due the lessor mortgaged the property:—**Held:** the mtgor. could not distrain, because he had parted with the reversion; nor could the mtgee., because the rent was not due to him.—**DAUPHINAIS v. CLARK** (1885), 3 Man. L. R. 225.—**CAN.**

exor. *de son tort* of a term ; unless it be merged in the reversion by surrender.—**FLOYD v. LANGFIELD** (1676), *Freem. K. B.* 218 ; 89 *E. R.* 155.

Annotation :—**Refd.** *Pluck v. Digges* (1831), 5 *Bli. N. S.* 31.

568. —.]—Lessee for years assigns his term, he cannot distrain for rent.— *v. COOPER* (1768), 2 *Wils.* 375 ; 95 *E. R.* 870.

Annotations :—**Folld.** *Parmenter v. Webber* (1818), 2 *Moore, C. P.* 656 ; *Preece v. Corrie* (1828), 2 *Moo. & P.* 57. **Consd.** *Pluck v. Digges* (1831), 5 *Bli. N. S.* 31. **Refd.** *Langford v. Selmes* (1857), 3 *K. & J.* 220 ; *Jolly v. Arbutnot* (1859), 4 *De G. & J.* 224. **Mentd.** *Lecoy v. Mogford* (1856), 2 *Jur. N. S.* 1084.

569. —.]—**SMITH v. MAPLEBACK**, No. 78, *ante*.

570. —.]—The lessee of two farms agreed with A. that he should have them during the leases for the same, A. to remain tenant to the lessee during the leases ; & at the leaving of the farms A. was to be paid for the fallows & dung. A. took possession, & paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrear :—**Held** : this distress could not be supported, as the agreement operated as an absolute assignment of all the lessee's interest in the farms.—**PARMENTER v. WEBBER** (1818), 8 *Taunt.* 593 ; 2 *Moore, C. P.* 656 ; 129 *E. R.* 515.

Annotations :—**Consd.** *Pluck v. Digges* (1831), 5 *Bli. N. S.* 31. **Apld.** *Pascoe v. Pascoe* (1837), 3 *Bing. N. C.* 898 ; *Lewis v. Baker*, [1905] 1 *Ch.* 46. **Refd.** *Preece v. Corrie* (1828), 2 *Moo. & P.* 57 ; *Wollaston v. Hakewill* (1841), 3 *Man. & G.* 297. **Mentd.** *Barrett v. Rolph* (1845), 14 *M. & W.* 348 ; *Pollock v. Stacey* (1847), 9 *Q. B.* 1033 ; *Beardman v. Wilson* (1868), *L. R.* 4 *C. P.* 57 ; *Hyde v. Warden* (1877), 3 *Ex. D.* 72.

571. —.]—Avowant, who had a term which expired on Nov. 11, 1826, let the premises orally from Sept. 11, to Nov. 11, in that year, for £270 payable immediately :—**Held** : this was a lease, of which parol evidence might be given, & not an assignment requiring a writing ; but being a demise of the whole of avowant's interest, he had no right to distrain.—**PREECE v. CORRIE** (1828), 5 *Bing.* 24 ; 2 *Moo. & P.* 57 ; 6 *L. J. O. S. C. P.* 205 ; 130 *E. R.* 968.

Annotations :—**Folld.** *Pascoe v. Pascoe* (1837), 3 *Bing. N. C.* 898. **Apld.** *Lewis v. Baker*, [1905] 1 *Ch.* 46. **Refd.** *Hooker v. Nye* (1834), 1 *Cr. M. & R.* 258 ; *Angell v. Harrison* (1847), 17 *L. J. Q. B.* 25 ; *Pollock v. Stacey* (1847), 9 *Q. B.* 1033 ; *Jolly v. Arbutnot* (1859), 4 *De G. & J.* 224.

572. —.]—A., entitled to a lease for lives renewable for ever, assigned the whole of his estate & interest in the lands to B., reserving a rent, & a power of distress & re-entry, but no reversion. The rent being in arrear, A. distrained, & B. replevied ; A. avowed under Irish statute, 25 *Geo. 2*, c. 13, corresponding to English statute, 11 *Geo. 2*, c. 19, giving landlords the remedy by distress :—**Held** : the statutes applied only to those leases where there was a reversion, or an interest vested in the lessor at the expiration of the lease ; & here there was no reversion.

Under this deed there is no reversion as the whole interest is assigned. The power of entry & distress is renewed, but there is nothing to constitute a reversion (**LORD TENTERDEN**).—**PLUCK v. DIGGES** (1831), 5 *Bli. N. S.* 31 ; 2 *Dow. & Cl.* 180 ; 5 *E. R.* 219.

573. —.]—The doctrine of estoppel between landlord & tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*. But the lessee may plead to such an action that the lessor had an interest at the date

of the lease, but that such interest had determined before the alleged cause of action arose. Therefore, if a termor affect to grant a lease for a term exceeding his own term in duration, & to reserve an annual rent, that would operate as an assignment of his term, & there would be no estoppel between him & the person to whom he made such assignment ; & accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent. 4 *Geo. 4*, c. 28, does not give power to distrain for such a rent.—**LANGFORD v. SELMES** (1857), 3 *K. & J.* 220 ; 3 *Jur. N. S.* 859 ; 69 *E. R.* 1089.

Annotation :—**Mentd.** *Bryant v. Hancock*, [1898] 1 *Q. B.* 716.

574. —.]—**BROWN v. METROPOLITAN COUNTIES, ETC., SOCIETY**, No. 172, *ante*.

575. —.]—If a lessee with an original lease & a reversionary lease or an agreement therefor underlets the premises for a term exceeding the original lease, he cannot distrain for rent during the original lease either at common law for want of a reversion, or under Landlord & Tenant Act, 1730 (c. 28), s. 5, or Conveyancing Act, 1881 (c. 41), s. 44.—**LEWIS v. BAKER**, [1905] 1 *Ch.* 46 ; 74 *L. J. Ch.* 39 ; 91 *L. T.* 744 ; 21 *T. L. R.* 17.

Annotation :—**Mentd.** *Llangattock v. Watney Combe, Reid*, [1910] 1 *K. B.* 236.

576. Grant of reversionary lease—To commence on termination of first—Reversion not parted with.—Where A., being seised in fee, leased premises to B. for 61 years, & afterwards granted a lease to C. of the same premises, to commence at the expiration of the 61 years :—**Held** : by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease.—**SMITH v. DAY** (1837), 2 *M. & W.* 684 ; *Murp. & H.* 185 ; 6 *L. J. Ex.* 219 ; 150 *E. R.* 931.

Annotations :—**Folld.** *Lewis v. Baker*, [1905] 1 *Ch.* 46. **Refd.** *Llangattock v. Watney Combe, Reid* (1909), 79 *L. J. K. B.* 233. **Mentd.** *Hogan v. Hand* (1861), 14 *Moo. P. C. C.* 310.

577. By four of six joint tenants.—**STAVELY v. ALLCOCK**, No. 93, *ante*.

578. Inchoate contract by lessee to purchase reversion—Loss in equity of right to distrain.—A lease is not determined at law by a contract by the lessee to purchase the reversion ; but, in equity, the landlord's right to distrain is suspended pending completion of the contract, so long as the contract is subsisting & enforceable by action for specific performance ; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain.—**ELLIS v. WRIGHT** (1897), 76 *L. T.* 522.

SUB-SECT. 4.—BY EXPIRATION OF THE TENANCY.

See Sect 6, sub-sect. 6, A., *ante*.

SUB-SECT. 5.—PAYMENT OF RENT BY NEGOTIABLE INSTRUMENT.

579. Bill of exchange—Discounted by agent of landlord—Bill dishonoured.—A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority or knowledge,

indorsed notes at three months from date, the remainder to be paid in four equal annual instalments, with interest on the amount unpaid at each time of payment ; agreement to be drawn &

PART II. SECT. 9, SUB-SECT. 5.

q. *Promissory note—Not in accordance with agreement—Right to distrain not extinguished.*—A. rented

a house to B. by lease dated Sept. 1, 1854. B. took possession, & on May 17, following agreed with A. for purchase : " the one-fourth of the purchase-money to be paid by approved

Sect. 9.—How the right to distress may be lost: Sub-5 &

took a bill of exchange from the tenant for the amount of the rent & paid over the amount to the landlord in his settlement of account. The bill was afterwards dishonoured whilst in the hands of a third person & the rent was not paid by the tenant, whereupon the landlord distrained:—*Held*: it was a question for the jury, whether the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of the rent by the agent to the landlord, in which latter case he was entitled to distress.—*PARROTT v. ANDERSON* (1851), 7 Exch. 93; 21 L. J. Ex. 291; 155 E. R. 870; *sub nom.* *PERROTT v. ANDERSON*, 18 L. T. O. S. 172.

580. ———.] — *GRIFFITH v. CHICHESTER* (1851), 7 Exch. 95, n.; 155 E. R. 871, n.

Annotation:—*Refd.* *Parratt v. Anderson* (1851), 7 Exch. 93.

581. ——— *Taken by landlord — Suspension of right of distress.*]—The fact of a landlord taking a bill of exchange from his tenant for rent due is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill.—*PALMER v. BRAMLEY*, [1895] 2 Q. B. 405; 65 L. J. Q. B. 42; 73 L. T. 329; 11 T. L. R. 531; 14 R. 643, C. A.

Annotation:—*Mentd.* *Re Defries, Eicholz v. Defries*, [1909] 2 Ch. 423.

582. *Promissory note — Taken by landlord — Does not extinguish right to distress.*]—*HARRIS v. SHIPWAY* (1744), Buller's N. P. 7th ed., 182 a.

Annotation:—*Refd.* *Bramston v. Robins* (1826), 12 Moore, C. P. 68.

583. ———.] — (1) A promissory note given & received for rent, does not extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note. (2) Nor does the receipt of such note of itself suspend the right of distraining. (3) If the giving of such note be pleaded in bar to an avowry, it must be shown that the note was accepted in satisfaction; or that, by special agreement or from other circumstances pleaded, it suspended the right of distress.—*DAVIS v. GYDE* (1835), 2 Ad. & El. 623; 1 Har. & W. 50; 4 Nev. & M. K. B. 462; 4 L. J. K. B. 84; 111 E. R. 240.

Annotations:—*Consd.* *Palmer v. Bramley*, [1895] 2 Q. B. 405. *Refd.* *Parrott v. Anderson* (1851), 7 Exch. 93. *Mentd.* *Baker v. Walker* (1845), 14 M. & W. 465; *Belshaw v. Bush* (1851), 11 C. B. 191; *Bramwell v. Eglinton* (1864), 5 B. & S. 39; *Henderson v. Arthur*, [1907] 1 K. B. 10; *Re Defries, Eicholz v. Defries*, [1909] 2 Ch. 423.

SUB-SECT. 6.—TENDER OF RENT.

A. In General.

What constitutes tender.]—See *CONTRACT*, Vol. XII., p. 319, Nos. 2634 *et seq.*

584. Necessity for tender—When dispute as to amount due.]—A declaration alleged that pltf.

possession given on June 1, next, from which time payment of instalments commences." An agreement was prepared before June 1, but was not executed, owing to a misunderstanding about the note, B. not being prepared with such a note as A. would accept:—*Held*: there had been no surrender by operation of law, & that A. might distress for his rent.—*GRANT v. LYNCH* (1856), 14 U. C. R. 148.—*CAN.*

r. — Taken by landlord — Distress suspended until note dishonoured.]—The mere taking of a note for rent will not take away the right to distress, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to await

until it has been dishonoured. Pltf. being unable to pay his rent in arrear, deft., his landlord, proposed to him to go to the bank, & that deft. would indorse his note for the amount, on which deft. could get the money, deft. saying that if pltf. could not pay it in full at maturity he would renew. This was done, & deft. by discounting the note, which was not due until March, obtained the money. The bank already held other notes given for previous rent. In Jan. the note being still in the bank, deft. distrained:—*Held*: this evidence showed that deft. obtained the notes upon an express agreement that his right to distress should be suspended until they were dishonoured; & the distress

held certain premises as tenant thereof to deft. & that deft. wrongfully distrained upon the said premises certain goods of pltf., as a distress for alleged arrears of rent, to wit, the sum of £6 3s. by deft. then pretended to be due & in arrear; & deft. wrongfully remained in possession of the goods under colour of the distress until pltf. was compelled to pay, & did pay to deft. the pretended arrears of rent & costs of the distress in order to regain possession of the goods; whereas in truth, a small part only, to wit, £1 16s. 9d. of the pretended arrears was due:—*Held*: the count disclosed no cause of action, for, as the distress was lawful, deft. was entitled to a tender of the amount really due, & upon his refusal to accept that sum, pltf.'s course was to replevy the goods.—*GLYNN v. THOMAS* (1856), 11 Exch. 870; 25 L. J. Ex. 125; 26 L. T. O. S. 281; 20 J. P. 227; 2 Jur. N. S. 378; 4 W. R. 363; 156 E. R. 1085, Ex. Ch.

Annotations:—*Fold.* *French v. Phillips* (1856), 1 H. & N. 564. *Distd.* *Loring v. Warburton* (1858), E. B. & R. 507; *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120. *Refd.* *Johnson v. Upham* (1859), 28 L. J. Q. B. 252.

585. Tender of part of rent—Where distrainor's interest uncertain.]—*BECKESON v. GREAVES*, No. 92, *ante*.

B. Time for.

586. Before distress taken.]—(1) In a case of distress when no rent is due, the tenant may make rescous. (2) If the lord incroached on his tenant, he could not avoid it in avowry, unless against the lord's successor, or the issue in tail; or where the incroachment was by coercion of distress. (3) If the lord distrained for the rent & the incroachment also, the tenant might tender what was due, & make rescous on refusal; or the incroachment might be avoided in an action by the lord for the rescous or in trespass by the tenant for the distress.—*BEVIL'S CASE* (1585), 4 Co. Rep. 6 a; 76 E. R. 860.

Annotations:—*As to* (1) *Refd.* *Avowry Case* (1588), 9 Co. Rep. 20 a. *As to* (2) *Refd.* *Bucknal's Case* (1600), 9 Co. Rep. 33 a. *Generally, Mentd.* *Fawkeners v. Bellingham* (1627), Cro. Car. 80; *Wynne v. Wynne* (1743), 1 Wils. 42; *De Beauvoir v. Owen* (1850), 5 Exch. 166; *Abergavenny v. Brace* (1872), L. R. 7 Exch. 145.

587. ———.]—(1) Tender upon the land before the distress, makes the distress tortious.

(2) Tender after the distress, & before the impounding, makes the detainer & not the taking wrongful.

(3) Tender after the impounding, makes neither the one nor the other wrongful.—*SIX CARPENTERS' CASE* (1610), 8 Co. Rep. 146 a; 77 E. R. 695.

Annotations:—*As to* (1) *Consd.* *Gulliver v. Cosens* (1845), 1 C. B. 788; *Glynn v. Thomas* (1856), 11 Exch. 870. *As to* (2) *Consd.* *Horn v. Luines* (1700), 12 Mod. Rep. 352. *Apld.* *Evans v. Elliott* (1836), 2 Har. & W. 231. *Consd.* *Gulliver v. Cosens* (1845), 1 C. B. 788; *Glynn v. Thomas* (1856), 11 Exch. 870. *As to* (3) *Consd.* *West v. Nibbs* (1847), 4 C. B. 172. *Refd.* *Gulliver v. Cosens* (1845), 1 C. B. 788. *Generally, Mentd.* *Isaack v. Clark* (1615), 2 Bulst. 306; *Griffin v. Scott* (1726), 2 Ld. Raym. 1424; *Northampton Corp'n. v. Ward* (1745), 2 Stra. 1238;

therefore was not warranted.—*SIMPSON v. HOWITT* (1876), 39 U. C. R. 610.—*CAN.*

s. — Distress suspended during currency.]—Where a promissory note was given & accepted for rent due:—*Held*: the landlord's remedy by distress was suspended during the currency of the note.—*COLPITTS v. McCULLOUGH* (1900), 32 N. S. R. 502.—*CAN.*

PART II. SECT. 9, SUB-SECT. 6.—B.

t. Before demand made.]—Where a tenant had tendered his rent before any demand had been made, & afterwards a demand was made, to which he omitted to attend for reasons

Austin v. Whittred (1747), Willes, 623; *Moyse v. Cock-sedge* (1749), Willes, 636; *Gates v. Bayley* (1766), 2 Wils. 313; *Taylor v. Cole* (1791), 1 Hy. Bl. 555; *Phillips v. Bacon* (1808), 9 East, 298; *Winterbourne v. Morgan* (1809), 11 East, 395; *Ditcham v. Bond* (1814), 3 Camp. 524; *Thompson v. Lacy* (1820), 3 B. & Ald. 283; *Shorland v. Govett* (1826), 5 B. & C. 485; *Lucas v. Nockells* (1833), 10 Bing. 157; *Bristol Poor Governors v. Wait* (1834), 1 Ad. & El. 264; *Reece v. Taylor* (1835), 4 Nov. & M. K. B. 469; *Korbey v. Denby* (1836), 1 M. & W. 336; *Smith v. Egginton* (1837), 7 Ad. & El. 167; *Harvey v. Pocock* (1843), 11 M. & W. 740; *Jacobsohn v. Blake* (1844), 6 Man. & G. 919; *Peters v. Clarson* (1844), 7 Man. & G. 548; *Webster v. Watts* (1847), 17 L. J. Q. B. 73; *King v. Rochdale Canal Co.* (1851), 15 Jur. 896; *Ambergate, etc. Ry. v. Mid. Ry.* (1853), 2 E. & B. 793; *Mayo Case* (1874), 2 O'M. & H. 191; *O'Neil v. City & County Finance Co.* (1886), 17 Q. B. D. 234; *Long v. Clarke* (1893), 42 W. R. 130; *Durant v. Roberts & Keighley, Maxsted*, [1900] 1 Q. B. 629; *Hickman v. Maisey* (1900), 69 L. J. Q. B. 511; *Westminster Corpn. v. L. & N. W. Ry.*, [1905] A. C. 426; *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417.

588. ———.]—Rent-service tendered at the day of payment upon the land, yet the lord may distrain without a personal demand.—*CRANLEY v. KINGSWELL* (1617), Hob. 207; 80 E. R. 354; *sub nom. CRAWLEY v. KINGSWELL*, Hut. 13; *sub nom. KINGSWELL v. CRAWLEY*, Moore, K. B. 883.

Annotations:—**Consd.** *Horn v. Luines* (1700), 12 Mod. Rep. 352. **Refd.** *Blucke v. Mole* (1661), 1 Lev. 40; *Crouche v. Fastolfe* (1680), T. Raym. 418; *Mallam v. Arden* (1833), 3 Moo. & S. 793. **Mentd.** *Machell v. Clarke* (1702), 2 Ld. Raym. 778.

589. ———.]—Where the goods of A. were distrained for rent arrear after the amount had been tendered:—**Held**: A. might bring an action on the case for an excessive distress.—*BRANSCOMB v. BRIDGES* (1823), 1 B. & C. 145; 3 Stark. 171; 2 Dow. & Ry. K. B. 256; 1 L. J. O. S. K. B. 64; 107 E. R. 54.

Annotations:—**Consd.** *Sturch v. Clarke* (1832), 4 B. & Ad. 113; *Holland v. Bird* (1833), 10 Bing. 15; *Smith v. Goodwin* (1833), 4 B. & Ad. 413. **Expld.** *Boulton v. Reynolds* (1859), 2 E. & E. 369. **Refd.** *Carter v. Carter* (1829), 5 Bing. 406; *Lear v. Caldecott* (1843), 4 Q. B. 123. **Mentd.** *Williams v. Holland* (1833), 3 Moo. & S. 540; *Nargett v. Nias* (1859), 1 E. & E. 439.

590. ———.]—Under Land Tax Redemption Act, 1802 (c. 116), a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest, so as to free the land from the charge & payment of the interest to which it was subject for the benefit of such tenant under sect. 123. And a tenant in common of the remainder if he tender the whole amount & that is refused, & the interest distrained for, may plead the tender in bar of an avowry.—*COUSINS v. HARRIS* (1848), 12 Q. B. 726; 17 L. J. Q. B. 273; 12 L. T. O. S. 44; 12 Jur. 835; 116 E. R. 1043.

Annotations:—**Mentd.** *Kilderbee v. Ambrose* (1854), 10 Exch. 454; *Skene v. Cook*, [1902] 1 K. B. 682.

591. After issue of warrant but before execution—Without expenses.—A tender of rent without expenses, after a warrant of distress is delivered to the broker but before it is executed, is a good tender.

Pltf. was tenant of a dwelling-house the rent of which was received by defts. for the landlord. Rent being in arrear, defts. signed as agents of the landlord, & delivered to a broker, a warrant of distress. Before it was executed, pltf. tendered to defts. the amount of the rent, but they refused it receive it on the ground that the distress warrant had issued. Pltf. subsequently tendered the amount to the broker, who refused to receive it unless certain alleged costs were also paid. The broker afterwards distrained pltf.'s goods:—

explained in evidence, in an action of trespass for an illegal distress—it is for the jury to determine whether

there was a *bona fide* continuing readiness & willingness to pay; if they find there was, the pltf. is entitled

Held: the distress was illegal, & defts. were not mere agents conveying an authority from the landlord, but persons committing the wrongful act; & therefore liable in trespass for the damage sustained by pltf.—*BENNETT v. BAYES* (1860), 5 H. & N. 391; 29 L. J. Ex. 224; 2 L. T. 156; 24 J. P. 294; 8 W. R. 320; 157 E. R. 1233.

Annotation:—**Mentd.** *Morgan v. Alexander* (1875), 23 W. R. 321.

592. Before impounding—Renders detainer wrongful.—*SIX CARPENTERS' CASE*, No. 587, *ante*.

593. ———.]—Replevin for taking & detaining, etc. Avowry for rent arrear. Plea, that, after the taking & before the impounding, pltf. tendered the rent & expenses. On special demurrer, for that the plea did not go to the taking but only to the detaining:—**Held**: a good plea, the tortious detention being a taking.—*EVANS v. ELLIOTT* (1836), 5 Ad. & El. 142; 2 Har. & W. 231; 6 Nev. & M. K. B. 606; 6 L. J. K. B. 65, 259; 111 E. R. 1120.

Annotation:—**Consd.** *West v. Nibbs* (1847), 4 C. B. 172.

594. ———.]—An action lies for detaining goods taken under a distress for rent, after a sufficient tender made before impounding.—*LORING v. WARBURTON* (1858), E. B. & E. 507; 28 L. J. Q. B. 31; 4 Jur. N. S. 634; 6 W. R. 602; 120 E. R. 598.

Annotation:—**Folld.** *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120.

595. ——— Renders removal wrongful.—A tenant, tendering his rent after distress taken, but before it is impounded or removed, may maintain trespass for a subsequent removal of the distress.—*VERTUE v. BEASLEY* (1831), 1 Mood. & R. 21, N. P.

Annotations:—**Consd.** *West v. Nibbs* (1847), 4 C. B. 172. **Refd.** *Evans v. Elliott* (1836), 2 Har. & W. 231; *Johnson v. Upham & Best* (1859), 5 Jur. N. S. 681.

596. After impounding—Too late.—*SIX CARPENTERS' CASE*, No. 587, *ante*.

597. ———.]—Tender after impounding is too late. Tender of amends before action is not pleadable in replevin.—*TWINNING v. STEPHENS* (1680), Freem. K. B. 527; 89 E. R. 395.

598. ———.]—In an action of replevin a tender of amends, if relied on by pltf., must be made before the impounding.—*ALLEN v. BAYLEY* (1698), 2 Lut. App. 1594; 125 E. R. 877.

Annotation:—**Refd.** *Evans v. Elliott* (1836), 2 Har. & W. 231.

599. ———.]—A bailiff distrained for rent in the following manner:—he went a little way into a field where the cattle were, & touching one of the beasts upon the side, said, he distrained for rent; he then took a list of the cattle upon paper, but he made no change whatever in their situation & position, & left the gate of the field as he found it, unlocked, & without any additional fastening; he then gave notice of distress to the tenant, informing him that if rent & costs, etc., were not paid, he would sell in five days. The notice also stated that the cattle were impounded upon the premises, but did not say where: he himself remained in charge of the cattle for some time, & when he left he was succeeded by another person:—**Held**: the impounding of the cattle was complete & perfect from the time of giving the notice to the tenant; & consequently a tender of the rent & costs of distraining, etc. after such incident, was too late.—*THOMAS v. HARRIES* (1840), 1 Man. & G. 695; 1 Scott, M. R. 524; 9 L. J. C. P. 308; 4 Jur. 723; 133 E. P. 511.

Annotations:—**Consd.** *Johnson v. Upham* (1859), 2 E. & E.

to a verdict.—*QUINLIVAN v. DARCEY* (1880), 6 V. L. R. 370.—**AUS.**

Sect. 9.—How the right to distrain may be lost: Subsect. 6, [7.]

250. *Expd. & Distd.* Green v. Duckett (1883), 11 Q. B. D. 275. *Refd.* Ellis v. Taylor (1841), 8 M. & W. 415; Tennant v. Field (1857), 8 E. & B. 336. *Mentd.* Harris v. Thirkell (1852), 20 L. T. O. S. 98.

600. ———.]—(1) A tender of arrears of rent & expenses of distress is too late after the impounding of the goods distrained, & in an action of trespass for detaining the goods of pltf. after tender, where pltf. has obtained a verdict, the judgment will be arrested, if pltf. has not stated in his pleadings that the tender was made before the impounding; such omission not being cured by verdict.

(2) A tenant distrained upon for arrears of rent, tendering the amount of the rent & the expenses of the distress before the goods are impounded, may maintain trespass against the bailiff for continuing in possession after: and tender to the bailiff authorised to distrain, is sufficient.—LADD v. THOMAS (1840), 12 Ad. & El. 117; 4 Per. & Dav. 9; 9 L. J. Q. B. 345; 4 Jur. 797; 113 E. R. 755.

Annotations:—As to (1) Expd. Hatch v. Hale (1850), 15 Q. B. 10. *Distd.* Johnson v. Upham (1859), 2 E. & E. 250. *Generally, Mentd.* Tennant v. Field (1857), 3 Jur. N. S. 1178.

601. ———.]—A landlord entered upon a dwelling house held of him to distrain for rent arrears. To prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture, upon which he proposed to distrain, made up, from a list given to him by the tenant, an inventory of the furniture in the house, put a man into possession, & handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were:—*Held*: this constituted a distraining of the articles mentioned in the inventory & an impounding of them upon the premises; & a tender subsequently made was too late. Although the notice of distress did not state that the articles were impounded.—TENNANT v. FIELD (1857), 8 E. & B. 336; 27 L. J. Q. B. 33; 3 Jur. N. S. 1178; 6 W. R. 11; 120 E. R. 125.

602. ———.]—*Effect of acceptance of rent & expenses by landlord.*—A landlord who has accepted the rent in arrear, & the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover.

In trespass against B. & C. for seizing & converting the goods of A., B. alone justified the seizure & impounding of the goods as a distress for rent, within thirty days after they had been wrongfully removed from the demised premises. A. new-assigned, that he brought his action, not for the trespasses in the plea mentioned, but for that B. after the seizure, & after payment & acceptance of the rent & expenses, & after he ought to have restored to A. the goods so distrained, retained possession thereof, & sold & disposed of them:—*Seemle*: this was no departure. *Qu.*: whether departure may be taken advantage of on general demurrer.—WEST v. NIBBS (1847), 4 C. B. 172; 17 L. J. C. P. 150; 136 E. R. 470.

Annotation:—Consd. White v. Bayley (1861), 10 C. B. N. S. 227.

603. ———.]—*Effect of tender before sale.*—(1) In an action on the case for an excessive distress for

rent, the second count alleged that defts. having distrained pltf.'s goods for rent, pltf. tendered the rent in arrear & the costs of the distress, & requested defts. to re-deliver the goods, but that they wrongfully refused to do so or to accept the sum tendered:—*Held*: this was in form & substance a count in case, & was properly joined with others of a like description.

(2) A broker having distrained the goods of a tenant for rent in arrear, he signed an agreement, in writing, drawn up by the broker, that if he, the tenant, did not pay the rent on or before a given day, the broker might re-enter & distrain again:—*Held*: this did not estop pltf. from afterwards complaining of an excessive distress, made in consequence of the rent not being paid at the stipulated time.—HOLLAND v. BIRD (1833), 10 Bing. 15; 3 Moo. & S. 363; 2 L. J. C. P. 201; 131 E. R. 810.

Annotation:—As to (1) Refd. Nargett v. Nias (1859), 1 E. & E. 439.

604. ———.]—A tender of rent & costs of distress, after impounding is too late, & no action lies for selling the distress notwithstanding such tender.

Qu.: whether such action be maintainable on allegation & proof of malice.—ELLIS v. TAYLOR (1841), 8 M. & W. 415; 10 L. J. Ex. 462; 151 E. R. 1101.

Annotation:—Overd. Johnson v. Upham (1859), 2 E. & E. 250.

605. ———.]—(1) An action is maintainable, upon the equity of 2 Will. & Mar. c. 5, s. 2, for selling goods seized under a distress for rent, where a tender of the rent & expenses has been made before the sale, & within five days of the seizure, although after impounding.

Ellis v. Taylor, No. 604, *ante*, *overd.*

(2) *Seemle*: a distress is sufficiently impounded, in accordance with Distress for Rent Act, 1737 (c. 19), s. 10, where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant & leaves a man in possession on the premises, but does not disturb, lock up, or remove any of the goods.

(3) Replevin is in effect no remedy where the distress was originally lawful (LORD CAMPBELL, C.J.).—JOHNSON v. UPHAM (1859), 2 E. & E. 250; 28 L. J. Q. B. 252; 33 L. T. O. S. 327; 5 Jur. N. S. 681; 121 E. R. 95.

Annotations:—As to (1) Refd. Fell v. Whittaker (1871), L. R. 7 Q. B. 120. *Generally, Mentd.* Fenton v. Thorley, [1903] A. C. 443; *Re Vexatious Actions Act*, 1896, *Re Boulter*, [1915] 1 K. B. 21.

See, also, No. 1069, *post*.

C. To Whom made.

See LANDLORD & TENANT.

606. *Landlord*—*Though broker authorised to distrain.*—SMITH v. GOODWIN, No. 943, *post*.

607. *Bailiff authorised to distrain*—*Though instructed not to accept.*—Where a landlord gives a warrant to distrain for rent, he thereby authorises the bailiff to receive the rent & costs if tendered, & *Seemle*: (LORD CAMPBELL, C.J.) the landlord cannot prohibit the bailiff from accepting such tender.

At all events, where a warrant is delivered to the bailiff, directing him to distrain & to proceed for recovery of the rent as the law directs, the bailiff cannot refuse a tender on the ground that he was afterwards forbidden by the landlord's attorney to receive it; & if, on that ground though truly alleged, he proceeds to sell, he & the landlord are liable in trover.—HATCH v. HALL

PART II.—DISTRESS FOR RENT.

(1850), 15 Q. B. 10; 19 L. J. Q. B. 289; 15 L. T. O. S. 65; 14 Jur. 459; 117 E. R. 361.

608. Not to an agent of the person authorised to distrain.]—In replevin where a tender is pleaded, & a subsequent demand & refusal replied, the demand must be made by, & the refusal be to deft. if so made to one sent or authorised by him, the evidence does not support the issue.—*PIMM v. GREVILL* (1807), 6 Esp. 95, N. P.

609. — Man in possession.]—A man merely left in possession of a distress by the person who distrained, has no implied authority in law to receive from the tenant payment of the rent distrained for.

W., a broker, in pursuance of a warrant delivered to him by deft., the landlord, distrained for rent upon goods of pltf., the tenant, on the demised premises, & left R. in possession. Pltf., knowing that R. was not, & that W. was, authorised in fact by deft. to receive the rent, & that W. was within a reasonable & convenient distance of the premises, tendered the rent to R., who refused to receive it, but offered to send for W., which offer pltf. rejected:—*Held*: the tender to R. was not good as against deft.—*BOULTON v. REYNOLDS* (1859), 2 E. & E. 369; 29 L. J. Q. B. 11; 1 L. T. 166; 24 J. P. 53; 6 Jur. N. S. 46; 121 E. R. 139; *sub nom.* *BOLTON v. REYNOLDS*, 8 W. R. 62. *Annotation*:—*Refd.* *Toms v. Wilson* (1862), 32 L. J. Q. B. 33

SUB-SECT. 7.—BY EXPRESS OR IMPLIED AGREEMENT.

610. Implied agreement—Sale of grazing rights —With landlord's approval.]—The tenant of a farm being in arrear to his landlord at Michaelmas, 1833, executed in Nov. to a creditor a bill of sale of all his distrainable property, & also of certain grass or eddish growing on the farm. Just before the sale the landlord distrained, but his agent appeared at the sale, & suffered it to proceed on the terms of paying to the landlord, in discharge of the rent due, the proceeds as well of the eddish as of the other effects. The eddish being put up for sale as to be depastured till Apr. 5 next, he interposed, saying: "No, only till Mar. 25." The eddish was sold to pltf., who put in his cattle to consume it, but, the produce of the sale having left £40 rent in arrear, the landlord distrained them there in Feb.:—*Held*: a contract must be presumed by the landlord not to distrain the cattle thus put on the close to consume the eddish.—*HORSFORD v. WEBSTER* (1835), 1 Cr. M. & R. 696;

PART II. SECT. 9, SUB-SECT. 7.

a. Implied agreement—Question for jury.]—To an avowry for rent due on Feb. 1, pltf. pleaded that before the distress on Feb. 29, it was agreed between him & deft., that pltf. should deliver to H. certain goods to be sold on account of pltf., & should sign an order on H. to pay the proceeds as far as the amount of the rent to deft., & if the goods were not sold before May 1, then next, that H. should be under the direction of deft. in the sale; in consideration of which deft. agreed that he would not distrain for the rent in arrear before May 1. Averment of the delivery of the goods to, & the acceptance of the order by H. who held the proceeds of the sale to the amount of the rent for the use of deft. Replication, taking issue on the agreement not to distrain before May 1:—*Held*: it was a question for the jury whether the agreement of the parties was, that the right of distraining should be suspended.—

GREEN v. KEHOE (1847), 3 Kerr, 494.—*CAN.*

b. Express agreement—Payment of rent on altered basis—Alteration determined by arbitrator.]—Pltf. leased land to deft. at a yearly rent of 15s. & the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor; & it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent thereof, to be determined by arbitration in case of dispute. A railway co. required a portion of the land, which deft. conveyed to them after an arbitration as to price:—*Held*: after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the deduction.—*BICKLE v. BEATTY* (1859), 17 U. C. R. 465.—*CAN.*

c. — Agreement to desist until goods paid for.]—M. received from pltf. certain articles of furniture, under the following written memorandum signed by her: "Received

1 Gale, 1; 5 Tyr. 409; 4 L. J. Ex. 100; 149 E. R. 1260.

Annotation:—*Refd.* *Giles v. Spencer* (1857), 3 C. B. N. S. 244.

611. Express agreement.]—Order specifically to restore to a tenant the stock, etc., on the farm, seized by the landlord under a distress & bill of sale: the landlord not stating, whether the sum, under which, by the terms of the contract, he was not to enforce his remedies, was due.—*NUTBROWN v. THORNTON* (1804), 10 Ves. 159; 32 E. R. 805, L. C.

612. — To take interest on rent in arrear.]—An agreement to take interest on rent in arrear does not take away the right of distress.—*SKERRY v. PRESTON* (1813), 2 Chit. 245.

613. — Parol promise.]—*WELSH v. ROSE*, No. 410, *ante*.

614. Rent released.]—Cognisance that pltf. was tenant to J. at a certain rent, & that deft. distrained for the rent of half a year, ending Sept. 29, 1841. Plea, that after the rent became due, J., by indenture purporting to be made Feb. 1, 1841, but made after Sept. 29, 1841, released the rent. Defts. in their replication set out the indenture, dated Feb. 1, 1841, being a demise to pltf. of the premises in question, to hold from July 30, 1840, for fourteen years: the first payment of rent to be made on Mar. 25 then next:—*Held*: the indenture had not the effect of releasing the tenant from payment of rent, due under a parol contract before its execution.—*COOPER v. ROBINSON* (1842), 10 M. & W. 694; 12 L. J. Ex. 48; 152 E. R. 651.

615. — Fulfilment of condition precedent.]—*GILES v. SPENCER*, No. 39, *ante*.

616. — Payment of rent on altered basis—Breach of agreement—Revival of original right to distrain.]—Certain premises having been demised to a tenant, his assignees entered into an agreement with their landlord altering the terms on which the rent was to be paid under the demise. The rent was paid for a short period on the new basis when on the assignees becoming bkpt., the landlord distrained after the bkpcy. for the rent then due according to the demise, & not on the altered basis. The trustee paid the rent claimed under protest:—*Held*: the landlord was entitled to distrain after the bkpcy. for the rent due according to the terms of the demise, as the effect of the agreement was merely to postpone the landlord's rights under the demise so long as the rent was paid on the altered basis according to the agreement, & as the rent had not been so paid, the landlord's rights under the demise could be

from F. the following articles of furniture for which I am to pay, of The said furniture to remain the property of F. till paid for in full, in the event of non-payment the said F. can take the furniture back." Deft. who was M.'s landlord before the furniture was delivered, signed the following written memorandum: "The bearer M. being about to purchase some furniture from F., & my rent being guaranteed, I hereby agree not to take the furniture so to be provided for F. for any rent that may become due."—*Held*: that deft. was estopped from distraining on the furniture so supplied.—*WALLACE v. FRASER* (1877), 2 R. C. 337; 2 S. C. R. 522.—*CAN.*

d. — Agreement to postpone until after arbitration.]—If there is dispute between landlord & tenant to the amount of the rent due, & the landlord verbally agrees not to distrain till the amount due is settled by arbitration, he is liable in trespass if he distrains in violation of the

Sect. 9.—How the right to distrain may be lost: Sub-sects. 7, 8 & 9. Sect. 10: Sub-sect. 1.]

enforced.—*Re SMITH & HARTOGS, Ex p. OFFICIAL RECEIVER* (1895), 73 L. T. 221; 44 W. R. 79; 39 Sol. Jo. 672; 2 Mans. 400; 15 R. 641.

SUB-SECT. 8.—BY ESTOPPEL AND CONDUCT.

617. Consent of landlord—Agistment of cattle.]

—(1) A grazier driving a flock of sheep to London, is encouraged by an innkeeper to put his sheep into pasture grounds belonging to the inn. The landlord seeing the sheep, consents they shall stay there one night, & then distrains them for rent. Grazier relieved against this distress.

(2) If cattle escape into the next ground, & are distrained there for rent, equity will relieve against such distress.—*FOWKES v. JOYCE* (1689), 2 Vern. 129; Prec. Ch. 7; 23 E. R. 692; *previous proceedings* (1688), 3 Lev. 260.

Annotations:—As to (1) *Reid*. *Gillman v. Elton* (1821), 6 Moore, C. P. 243; *Horsford v. Webster* (1835), 1 Cr. M. & R. 696. *Generally*, *Mentd.* *Bill v. Richards* (1857), 2 H. & N. 311.

618. Unauthorised representation of attorneys—Acting on behalf of married women.]—*WHITE v. GREENISH*, No. 233, *ante*.

619. Statement—By landlord—That arrears of outgoing tenant settled—Distress on chattels of new tenant.]—*PAPE v. WESTACOTT*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18; 42 W. R. 131; 10 T. L. R. 51; 38 Sol. Jo. 39; 9 R. 55, C. A.

Annotations:—Mentd. *Hine v. Steamship Insurance Syndicate, The Netherholme, Glen Holme & Rydal Holme* (1895), 72 L. T. 79; *Bradford v. Price* (1923), 92 L. J. K. B. 871.

620. — By landlord's agent.]—Deft. J. was landlord of a farm the tenant of which was in arrear with his rent. On the farm pltf. had cattle grazing. J. instructed deft. D., a bailiff, to distrain for the rent due, & the fact that a distress was likely to be levied came to pltf.'s knowledge, who thereupon had a conversation with deft. D. & said he would move his cattle off the farm. D.

agreement.—*PRESTON v. APPLEBY* (1890), 30 N. B. R. 91.—CAN.

e. *Agreement need not be in writing.*]—An agreement not to distrain is not an agreement concerning an interest in land, & need not be in writing.—*AN CHIN v. THIEL* (1887), 13 V. L. R. 485.—AUS.

PART II. SECT. 9, SUB-SECT. 8.

1. *Abandonment of distress—Bidding at sale of goods.*]—The fact of a landlord having joined in a bond that the goods distrained should be forthcoming to be sold upon a *fi. fa.* will not prejudice his claim for rent, nor will his having distrained as landlord, & afterwards having abandoned the distress, nor even his bidding at the sale of the goods.—*BROWN v. RUTTAN* (1850), 7 U. C. R. 97.—CAN.

g. — *What amounts to.*]—When a landlord distrains on his tenant's interest in goods & subsequently the sheriff levies upon the same goods under an execution in respect to another interest therein, the fact that the landlord hands over the keys of the building to the sheriff does not amount to an abandonment of his seizure.—*THEATRE AMUSEMENT CO., LTD. v. SQUIRES*, [1918] 3 W. W. R. 831; 34 D. L. R. 496; 11 Sask. L. R. 411.—CAN.

h. *Goods removed under another claim.*]—Deft., with a view of securing \$50 rent due to him by one S., purchased a lot of furniture from the wife of S., in his absence, & removed it to

said, "Don't be such a fool. I can't touch your cattle, because you took the keep by auction." On that, pltf., believing the cattle to be safe, took no steps to remove them; but when a distress was levied four of pltf.'s cattle were seized. In an action for wrongful distress, the jury found that D. or J. led pltf. to believe he was not going to, & had no right to, levy distress on pltf.'s cattle:—*Held*: the statement by D. was either a misstatement of law or a declaration of intention to abandon a legal right to distrain, & in neither case could it create an estoppel.—*CRESSWELL v. JEFFREYS* (1912), 28 T. L. R. 413, D. C.; *on appeal*, 29 T. L. R. 90, C. A.

621. Misrepresentation as to conduct of business—Deposit of goods with landlord—Non-disclosure of tenancy.]—*MILES v. FURBER*, No. 281, *ante*.

By payment of rent.]—*See* Sub-sect. 5, *ante*.

SUB-SECT. 9.—BY LAPSE OF TIME.

See Real Property Limitation Act, 1833 (c. 27), s. 42; Real Property Limitation Act, 1874 (c. 57), & Civil Procedure Act, 1833, c. 42, s. 3.

622. Statute of Limitations—Annuity accruing by will.]—Since Real Property Limitation Act, 1833 (c. 27), a distress or action for an annuity accruing by will must be resorted to within twenty years from the death of testator.—*JAMES v. SALTER* (1837), 3 Bing. N. C. 544; 5 Dowl. 496; 3 Hodg. 70; 4 Scott, 168; 6 L. J. C. P. 171; 1 Jur. 135; 132 E. R. 520.

Annotations:—Apld. *Langton v. Langton* (1854), 18 Jur. 928. *Apprvd.* *Irish Land Commission v. Grant* (1884), 10 App. Cas. 14. *Consd.* *Howitt v. Harrington*, [1893] 2 Ch. 497. *Apld.* *Jones v. Withers* (1896), 74 L. T. 572. *Reid.* *Grant v. Ellis* (1841), 9 M. & W. 113; *Owen v. De Beauvoir* (1847), 16 M. & W. 547; *Magdalen Hospital v. Knotts* (1878), 8 Ch. D. 709; *Re Devon's S. E., White v. Devon, Re Steer, Steer v. Dobell*, [1896] 2 Ch. 562. *Mentd.* *Cannon v. Blumington* (1852), 12 C. B. 1.

623. — Quit-rent.]—The twenty years within which, since Real Property Limitation Act, 1833 (c. 27), s. 2, a distress for rent must be made by the person to whom the right to make it has accrued, begins to run from the last payment of

his own premises. Previous to this S. had given pltf's., from whom he had purchased the goods, a chattel mtge. on them as security for the price. Pltf's. having demanded the goods from deft., who refused to give them up except on payment of \$50, brought an action of trover to which deft. pleaded a distraint on the goods after their removal to his own house:—*Held*: the right to distrain ceased upon the removal of the goods from the demised premises to deft.'s house.—*FRASER v. McFATRIDGE* (1879), 1 R. & G. 28.—CAN.

k. *Expiry of original lease—Pudiation of sub-tenant's right to possession—Acceptance of rent by landlord.*]—M. verbally leased premises to a tenant who sub-let a portion. After the original tenancy expired, on Nov. 15, 1887, the sub-tenant remained in possession & in Mar. 1888, received notice to quit from M. In June, 1888, M. issued a distress warrant for rent due by the original tenant, & the sub-tenant paid the amount claimed as rent due, but not from herself to such original tenant. More than six months after the notice to quit was given proceedings were taken by M. to recover possession of the premises from the sub-tenant:—*Held*: the notice to quit given to the sub-tenant, & the distress during the latter's possession, on sufferance, did not work estoppel against the landlord as the tenancy had always been repudiated.—*GILMOUR v. MAGEE* (1890), 18 S. C. R. 579.—CAN.

1. *Breach of covenant by lessee—Failure of landlord to enforce remedy—Acceptance of rent.*]—A lease of land & buildings for three years dated in Aug. 1910, contained a covenant that the lessee "would not assign or sub-let without leave," with a proviso for re-entry by the lessor on non-performance of covenants. In Aug. 1911, the lessee assigned the lease to pltf's., the lessor having previously assigned the reversion to deft. Pltf's. paid deft. the rent up to Jan. 1912, but deft. did not know till then of the assignment to pltf's. On Jan. 26, 1912, he gave pltf's. notice to quit on Feb. 26, but accepted rent for Feb. & Mar., & on Mar. 5 gave pltf's. another notice to quit on Apr. 8, also notifying them that if they did not quit, the rent would be \$250 per month, instead of \$175. Pltf's. in Apr. tendered to deft. the rent at the original rate, but he refused to accept it, & issued his distress warrant against pltf's. on May 14, under which their goods were seized, whereupon they paid the amount under protest:—*Held*: there being no evidence of a re-entry for breach of covenant with the intention of terminating the lease, & a re-entry not having been pleaded, & deft. having accepted rent after he became aware of the assignment & distrained for rent, he had recognised the tenancy & waived the breach; & pltf's. were entitled to an injunction & damages.—*PIGEON v. PRESTON* (1912), 22 W. L. R. 894; 6 D. L. R. 399; 3 W. W. R. 694.—CAN.

the rent; & therefore where the lord of a manor entitled to an ancient quit rent, which had remained unnoticed since Jan. 1825 when all arrears were paid up, distrained in May, 1845, for six years' rent due at the preceding Michaelmas:—*Held*: the distress was unlawful, the rent having been extinguished at the expiration of twenty years from the last payment in Jan. 1825.

In an action of replevin, where deft. avows for rent in arrear, it is unnecessary for pltf. to plead in bar that the rent has become extinguished by efflux of time under Real Property Limitation Act, 1833 (c. 27), as that may be shown in evidence under a plea of *non-tenuit*, although not under a plea of *riens in arriere*.—*DE BEAUVOIR v. OWEN* (1850), 5 Exch. 166; 19 L. J. Ex. 177; 14 L. T. O. S. 490; 14 J. P. 174; 155 E. R. 72, Ex. Ch.; *affy. S. C. sub nom. OWEN v. DE BEAUVOIR* (1847), 16 M. & W. 547.

Annotations:—*Consd.* *Zouche v. Dalbiac* (1875), L. R. 10 Exch. 172. *Apprvd.* *Irish Land Commission v. Grant* (1884), 10 App. Cas. 14. *Apld.* *Howitt v. Harrington*, [1893] 2 Ch. 497; *Jones v. Withers* (1896), 74 L. T. 572. *Refd.* *Chichester v. Hall* (1851), 17 L. T. O. S. 121.

624. ———.]—A quit rent payable in respect of a copyhold tenement is not, like a rent reserved upon a lease, excepted from the operation of the Real Property Limitation Acts, 1833 (c. 27), & 1874 (c. 57).

Where, therefore, such a quit rent had remained unpaid for more than twelve years, & no acknowledgment had been given in respect thereof, the right to recover the same was held to be barred by the operation of those statutes.—*HOWITT v. HARRINGTON* (EARL), [1893] 2 Ch. 497; 62 L. J. Ch. 571; 68 L. T. 703; 41 W. R. 664; 37 Sol. Jo. 440; 3 R. 568.

Annotation:—*Refd.* *Jones v. Withers* (1896), 74 L. T. 572.

625. ——— *Rentcharge.*]—Where an old rentcharge had been received from the occupier of one part of the premises charged down to the present time, & then, for the first time, had been levied by distress on the occupier of another part, which, for more than twenty years had been in a separate ownership, & the owner or occupier of which had never paid the rent before:—*Held*: the right to distrain for the rent on that portion of the premises charged was not barred by Real Property Limitation Act, 1833 (c. 27).—*WOODCOCK v. TITERTON* (1861), 12 W. R. 865.

626. ———.]—(Certain lands which were subject to a fee farm rent were in 1812 conveyed upon a sale by the then owner to pltf.'s predecessor in title. From 1812 down to 1872 the rent was paid by the vendor & his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to & so received the rent, were ignorant of the conveyance of the lands to pltf.'s predecessor in title. In 1872 the successor in title of the vendor refused to continue the payments of rent & deft., as the owner of the rent, thereupon demanded payment of the rent from pltf., & on her refusal to pay it, distrained upon the land for the arrears. Pltf. thereupon replevied, claiming that deft.'s title to the rent was barred by discontinuance of the receipt of the rent under Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent

within that Act during such period:—*Held*: there was no discontinuance of receipt of the rent; (1) because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to deft. or his predecessors in title; & (2) because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, & the payments of rent from 1812 to 1872 were therefore made on behalf of pltf. & her predecessors in title; & deft.'s title was therefore not barred.—*ADNAM v. SANDWICH* (EARL) (1877), 2 Q. B. D. 485; 46 L. J. Q. B. 612; *sub nom. ADAM v. SANDWICH* (EARL), 41 J. P. 773, D. C.

Annotations:—*Generally, Mentd.* *Newbould v. Smith* (1885), 29 Ch. D. 882; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *A.-G. v. Simpson*, [1901] 2 Ch. 671.

627. ———.]—A rentcharge is a "rent" within Real Property Limitation Act, 1833 (c. 27), & the owner thereof is barred from the remedy of distress after the right to recover the rentcharge has become extinguished by non-payment during the period limited by the statute. The statute is not prevented from running by the fact that the land subject to the rentcharge is in the possession of a statutory corpn.—*JONES v. WITHERS* (1896), 74 L. T. 572, C. A.

Annotation:—*Refd.* *Shaw v. Crompton*, [1910] 2 K. B. 370.

628. ——— *Amount recoverable.*]—*ARCHBOLD v. SCULLY*, No. 517, *ante*.

See, further, LIMITATION OF ACTIONS.

T. 10.—LEVYING THE DISTRESS.

SUB-SECT. 1.—THE WARRANT.

629. Rights to perusal & copy—*Constables Protection Act, 1750* (c. 44), s. 6.]—Land was demised by four persons, whose original title did not appear, at one entire rent, to be divided, & paid separately, in equal portions; & one of the four distrained upon the tenant for her own share of the rent. While her bailiff was in possession, a churchwarden & overseer of the poor, having notice of the existing distress, distrained for a poor rate, carried away, & sold, within four days, part of the property, distrained upon, not leaving sufficient to satisfy the first distrainer's demand, under a warrant of magistrates commanding him to make a distress upon the goods of the tenant, & to sell the same, unless the rate & charges were paid within four days, & return the overplus on demand:—*Held*: (1) the first distress was regular, for whatever might have been the interests of the landlords as between themselves, as between them & the terre-tenant, they were tenants in common, & entitled, each, to a separate distress; (2) deft. was not within the protection of sect. 6 of above Act, which requires a previous demand of the perusal & copy of the warrant, for although the strict right of property of the terre-tenant, in the goods, had not been altered by the first distress, & therefore, the mere seizure of them was in obedience to the warrant, yet, that seizure should have been made, subject to the pre-existing

PART II. SECT. 10, SUB-SECT. 1.

m. Warrant by agent of landlord—*No warrant by landlord.*]—In replevin by H. against B. the latter under his avowry as agent of the landlord proved a warrant by himself to the bailiff

but did not prove any warrant by the landlord to himself:—*Held*: the seizure was valid & the avowry & the verdict good.—*HARKER v. BARWICK* (1864), 1 W. W. & A'B. 165.—*AUS.*

n. Warrant issued to several trustees

—*Signature by one.*]—One of several trustees of a building society, to which pltf. had mortgaged his property, issued a distress for rent reserved by the intge.:—*Held*: the distress warrant need not be signed by all the

Secl. 10.—Levying the distress: Sub-sects. 1 & 2, A., B. & C.]

burthen upon the goods; but not having been so made, all the overseer's subsequent acts, exceeded his authority; & therefore, an action on the case was maintainable by the landlady to recover from him the portion of rent left unsatisfied.—*WHITLEY v. ROBERTS* (1825), *M'Cle. & Yo.* 107; 148 *E. R.* 344.

630. Stamp unnecessary—Indemnity to bailiff.]

—An undertaking, whereby a party, describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp.—*COX v. BAILEY* (1843), 6 *Man. & G.* 193; 6 *Scott, N. R.* 798; 134 *E. R.* 861.

Annotations:—Mentd. Taylor v. Steele (1847), 16 *M. & W.* 665; *Semple v. Steinau* (1853), 8 *Exch.* 622.

631. —.]—The following document was given in evidence by a deft. in replevin, in support of his right to distrain as bailiff of W.: "I, W., of, etc., having, on Oct. 7, 1843, borrowed from P., [deft.], £300, did then pledge with him certain title-deeds of houses in T., in order to secure to him £300 with interest. I did then authorise P. to receive the rents of the said houses during my right & interest therein; & I hereby confirm & make valid all acts, distresses, etc., particularly a distress on P. [pltf.], tenant of one of the said houses, by the said P., & other proceedings made or taken, or to be made or taken, by the said P., to the end that the rents & profits of the said houses may be received & taken by the said P. during all my estate & interest. (Signed) W."—*Held*: this document did not require a stamp, either as an agreement accompanied with a deposit of title-deeds for making a mtge., or as an authority to distrain, or as an agreement.—*PLYE v. PARTRIDGE* (1846), 15 *M. & W.* 20; 15 *L. J. Ex.* 129; 153 *E. R.* 714.

See, now, Stamp Act, 1891 (c. 39), sched. I.

632. How far an indemnity to bailiff—Wrongful acts of bailiff's servants.]—A. gave B. authority to distrain on the goods of C., & gave him an indemnity against all costs & charges that he might be at "on that account." B. made the distress, & his men being told by the son of C. that a certain cask contained spent liquor, of no value, they took the cask to pieces, & let the liquor run off. It was, in fact, cochineal dye, belonging to D. For the wasting of it D. recovered damages against B. in an action of trover:—*Held*: B. could not recover the amount of those damages from A. in an action on the indemnity, & such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress.

It never could be intended, that deft. was to indemnify pltf. against the acts of his own servants; & I am of opinion that it only applies to cases where a distress was illegal, because the landlord had no right to put in such distress (*TINDAL, C.J.*).—*DRAPER v. THOMPSON* (1829), 4 *O. & P.* 84.

Annotation:—Refd. Ibbett v. De La Salle (1860), 30 *L. J. Ex.* 44.

633. — — Seizure of privileged goods.]—Deft., attorney of O., authorised pltf., as brokers, to distrain the goods on A.'s premises, for rent due to O.; whereupon the distress was made. Some

of the goods being privileged from distress, & claimed by the owners, pltf. required an indemnity, which deft. gave on the part of O., & afterwards said he would give a further guaranty. The owners of the privileged goods having sued & recovered against pltf.:—*Held*: deft. was liable to make good the loss they had sustained.—*TOPLIS v. GRANE* (1839), 5 *Bing. N. C.* 636; 2 *Arn.* 110; 7 *Scott*, 620; 9 *L. J. C. P.* 180; 132 *E. R.* 1245.

Annotations:—Consd. Ibbett v. De La Salle (1860), 6 *H. & N.* 233. *Refd. Dugdale v. Lovering* (1875), *L. R.* 10 *C. P.* 196; *Sheffield Corpn. v. Barclay*, [1905] *A. C.* 392; *Cory v. Lambton & Hetton Collieries* (1916), 86 *L. J. K. B.* 401.

634. — — Includes costs of action.]—A landlord signed a warrant of distress in the following form: "I hereby authorise I., or his agent, as my agent, to seize & distrain the goods on the premises, now in the possession of G., for £9, being the amount of rent due to me; & for your so doing this shall be your sufficient warrant, authority & indemnification against all costs & charges in respect to any law expenses, action or actions that may arise, as well as any other & all charges or expenses which you or your agent may be at or brought against you or your agent on this account." II., the servant of I., having distrained, an action of trover was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action pltf. was non-suited:—*Held*: assuming that II. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him.—*IBBETT v. DE LA SALLE* (1860), 6 *H. & N.* 233; 30 *L. J. Ex.* 44; 158 *E. R.* 96.

635. Authority by one of several joint-tenants.]—*ROBINSON v. HOFMAN*, No. 240, *ante*.

SUB-SECT. 2.—THE BAILIFF.

A. In General.

See Law of Distress Amendment Acts, 1888 (c. 21), s. 7, & 1895 (c. 24), s. 2.

636. Nature of office—Agent of his employer.]—*HYNDE v. WAINMAN* (1611), 1 *Brownl.* 176; 123 *E. R.* 739.

637. — — Responsible for custody & delivery of goods.]—(1) The sale of goods under a distress, after service of an irregular notice of replevy, without removing the goods off the premises, is not a conversion.

(2) Service of a notice of replevy, by an infant, is illegal & void. (3) *Semble*: an infant cannot be a bailiff or sheriff's officer.

(4) The bailiff who serves the warrant in a case of replevin is authorised to take possession of the goods, & is responsible for their safe delivery to the party who shall ultimately appear entitled to them. His office is one of responsibility & trust, unfit to be performed by an infant (*BAYLEY, J.*).—*CUCKSON v. WINTER* (1828), 2 *Man. & Ry. K. B.* 313; 6 *L. J. O. S. K. B.* 309.

638. Infant cannot be bailiff.]—*CUCKSON v. WINTER*, No. 637, *ante*.

639. Must show cause of distress—If required to do so.]—*BULLER'S CASE* (1587), 1 *Leon.* 50; 74 *E. R.* 47.

Annotations:—Refd. Britton v. Cole (1697), 12 *Mod. Rep.*

stees to whom the mtge. was gi
—*MOORE v. LEE* (1871), 2 *V. R. (Law)*
4.—**AUS.**

o. Signature by landlord.]—A warrant of distress is sufficient, if the landlord's name is written in the body

of it by an agent duly authorised.—*NICOL v. BRASHER* (1883), 9 *V. L. R.* 270.—**AUS.**

p. Warrant addressed to different bailiffs.]—A warrant of distress issued upon a judgment by a clerk of a

magistrate's ct. is valid though addressed to separate bailiffs at different cts., & a return of *nulla bona* to such warrant may be made to the clerk of one ct. only.—*Re PAWSON* (1910), 29 *N. Z. L. R.* 920.—**N.Z.**

175; *Trevillian v. Pine* (1708), 11 Mod. Rep. 112; *Trent v. Hunt* (1853), 9 Exch. 14. *Mentd.* *Durant v. Roberts & Kelghley, Maxsted*, [1900] 1 Q. B. 629.

640. Need not be sworn—Statute of Westminster II., 1285 (c. 37).—(1) In actions for irregular distresses, the correct practice is to make either the landlord alone, or the landlord & the broker defts., & not to join appraisers, etc.; & if a pltf. do join them, the judge will oblige him to make out his case by strict rule, & not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, etc.

(2) Above Act, which requires distresses to be made by brokers sworn & known, does not extend to distresses for rent.—*CHILD v. CHAMBERLAIN* (1834), 6 C. & P. 213, N. P.; *subsequent proceedings*, 5 B. & Ad. 1049.

Annotations:—Generally, Mentd. *White v. Hill* (1844), 6 Q. B. 487; *Wakeman v. Lindsey* (1850), 19 L. J. Q. B. 166.

641. ———.—Bailiffs employed to distrain for rent arrear need not be sworn bailiffs under Statute of Westminster II., 1285 (c. 37).—*BECBIE v. HAYNE* (1835), 2 Bing. N. C. 121; 1 Hodg. 266; 2 Scott, 193; 4 L. J. C. P. 308; 132 E. R. 49.

Indemnification of bailiff—Liability of landlord.—*See* Sect. 10, sub-sect. 1, *ante*.

B. Authority—Certificate.

642. Authority—General rule.—*TRENT v. HUNT*, No. 154, *ante*.

643. ——— Ratification—Subsequent to distress.—*ANON.* (1585), Godb. 109; 78 E. R. 67.

Annotation:—Consd. *Wilson v. Tummon* (1843), 12 L. J. C. P. 306.

644. ———.—*TREVILLIAN v. PINE* (1708), 11 Mod. Rep. 112; 1 Salk. 107; 88 E. R. 933.

Annotations:—Consd. *Chambers v. Donaldson* (1809), 11 East, 65; *Collier v. Clarke* (1845), 5 L. T. O. S. 475. *Refd.* *George v. Kinch* (1744), 7 Mod. Rep. 478. *Mentd.* *Bennett v. Neale* (1811), Wight. 324.

645. ——— Verbal assent by landlord.—A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorise him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress which he was authorised to make, as for selling the goods without notice of the distress, & without appraisal. A., who received the rents & generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, & after the goods had been distrained, informed B. thereof, who thereupon said that she should leave the matter in his hands:—*Held*: sufficient evidence that the distress was authorised or ratified & adopted by B.—*HASELER v. LEMOYNE* (1858), 5 C. B. N. S. 530; 28 L. J. C. P. 103; 22 J. P. 788; 4 Jur. N. S. 1279; 7 W. R. 14; 141 E. R. 214.

646. ——— By executor of landlord—Before probate granted.—*WHITEHEAD v. TAYLOR*, No. 197, *ante*.

647. ——— Authority by person with no power of distress—Cannot be ratified by person with power.—*COLLIER v. CLARKE*, No. 56, *ante*.

PART II. SECT. 10, SUB-SECT. 2.—B.

a. Authority—From mortgage—Liability of mortgagee.—Mortgages, by their warrant, authorised their bailiff to distrain the goods of the mtgor. upon the mortgaged premises for arrears due under the mtge. The mtgor. being dead, the bailiff seized the goods of a stranger upon the premises:—*Held*: he was acting

within the scope of his authority, as agent for a principal, in making the seizure upon the premises, & the mtgees. were liable for his act.—*McBRIDE v. HAMILTON PROVIDENT & LOAN SOCIETY* (1898), 29 O. R. 161.—*CAN.*

r. ——— From receiver.—An application on the part of a receiver to

648. ——— Bailiff of manor—Warrant of steward necessary.—Deft. avows for rentcharge as bailiff to A.: a plea in bar that avowant took the distress without the privity of A., & that A. having notice, disavowed it, is bad. Pltf. ought to traverse that deft. was bailiff. *Semble*: bailiff of a manor, as such, may distrain upon the tenants for rent-service without a particular command: *aliter*, of a rentcharge. Bailiff cannot distrain for amercements without a warrant from the steward.—*ROBSON v. DOUGLAS* (1681), 1 Freem. K. B. 535; 89 E. R. 400; *sub nom.* *DOBSON v. DOUGLAS*, 3 Lev. 20.

Annotation:—Refd. *Trevillian v. Pine* (1708), 11 Mod. Rep. 112.

649. ——— Distraint by co-heir in gavelkind—For himself & other co-heirs.—*LEIGH v. SHEPHERD*, No. 239, *ante*.

650. ——— Evidence of—Landlord employing solicitor to defend broker.—(1) In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him.

(2) In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the brokers' authority to distrain in the absence of any written warrant.—*DUNCAN v. MEKLEHAM* (1827), 3 C. & P. 172, N. P.

651. ——— Receipt of proceeds of seizure.—*SMITH v. BIRMINGHAM GAS CO.*, No. 138, *ante*.

652. ——— To receive rent & costs.—*HATCH v. HALE*, No. 607, *ante*.

653. ——— No authority to delegate to man in possession.—*BOULTON v. REYNOLDS*, No. 609, *ante*.

654. Statutory certificate—Effect of want of—Law of Distress Amendment Act, 1888 (c. 21), s. 7—Distress by managing director for rent due to company.—*HOGARTH v. JENNINGS*, No. 140, *ante*.

655. ——— Seizure of goods of third party.—If a person, not holding a certificate issued under s. 7 of the Law of Distress Amendment Act, 1888 (c. 21), s. 7, levy a distress for rent, & in so doing, seizes goods upon the demised premises which are not the property of the tenant but of a third party, the owner of the goods is entitled to recover damages in respect of the seizure of his goods from the landlord who has authorised the distress.—*PERRING & CO. v. EMERSON*, [1906] 1 K. B. 1; 75 L. J. K. B. 12; 93 L. T. 748; 54 W. R. 47; 22 T. L. R. 14; 50 Sol. Jo. 14, D. C.

656. Managing director acting as bailiff—Without certificate—Liability for trespass.—*HOGARTH v. JENNINGS*, No. 140, *ante*.

C. Appointment.

657. By corporation—Without deed or warrant.—*Held*: consuance as bailiff to a corpn. without showing how incorporate, or that he had a precept in writing, was good.—*MANBY v. LONG* (1683), 3 Lev. 107; 83 E. R. 600.

Annotations:—Refd. *East London Waterworks Co. v. Bailey* (1827), 4 Bing. 243; *Smith v. Birmingham Gas Co.* (1834), 1 Ad. & El. 526.

stay proceedings, in an action brought against his bailiff by a tenant for ill treating a distress, will be refused with costs, where there is no affidavit of distinct admission by the receiver, that he had authorised the bailiff to do the act complained of. *Semble*: a receiver can authorise a bailiff to make a distress.—*BIRCH v. OLDIS* (1837), 1 Sau. & So. 146.—*IR.*

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658. ———.]—*CARY v. MATTHEWS* (1888), cited, 1 Salk. at p. 191; 91 E. R. 173.

*Annotations:—*Refd. Anon. (1700), 1 Salk. 191; *Smith v. Birmingham Gas Co.* (1834), 1 Ad. & El. 526; *Wells v. Kingston-upon-Hull Corpn.* (1875), 44 L. J. C. P. 257.

659. ———.]—*SMITH v. BIRMINGHAM GAS CO.*, No. 138, *ante*.

660. By county court judge of any district.]—Under Agricultural Holdings Act, 1883 (c. 61), ss. 52, 61, if the distress bailiff has the authority of a county ct. judge, though not the judge of the district where the holding is situated, it is sufficient compliance with the Act.—*Re SANDERS, Ex p. SERGEANT* (1885), 54 L. J. Q. B. 331; 52 L. T. 516; 49 J. P. 582, D. C.

———.]—*See, now, Law of Distress Amendment Act, 1888 (c. 21), s. 7.*

D. Liability to Landlord.

661. For loss sustained by landlord—Damages for excessive distress.]—*MEGSON v. MAPLETON*, No. 673, *post*.

662. — *Goods lost through negligence.]—**WHITE v. HEYWOOD* (1888), 5 T. L. R. 115.

E. Liability of Landlord for Acts of Bailiff.

663. General rule — Effect of disclaimer.]—A landlord distraining is *prima facie* liable for the act of his bailiff in taking goods privileged from distress, though they never come to his hands. But if, when he knows the circumstances, he disclaims & repudiates the act, he is not bound by it.—*HURRY v. RICKMAN & SUTCLIFFE* (1831), 1 Mood. & R. 126, N. P.

*Annotations:—*Dttd. *Newnham v. Stevenson* (1850), 16 L. T. O. S. 469. Distd. *Carter v. St. Mary Abbots, Kensington, Vestry* (1899), 63 J. P. 487. Refd. *Freeman v. Roshier* (1849), 13 Jur. 881.

664. ——— *Effect of knowledge or ratification.]—*A landlord authorised bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised

premises. The bailiffs distrained cattle of another person, supposing them to be the tenant's, beyond the boundary of the farm; the cattle were sold, & the landlord received the proceeds:—*Held*: the landlord was not liable in trover for the value of the cattle, unless it were found by the jury that he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, & to adopt the whole of their acts.—*LEWIS v. READ* (1845), 13 M. & W. 834; 14 L. J. Ex. 295; 4 L. T. O. S. 419; 153 E. R. 350.

*Annotations:—*Apld. *Freeman v. Roshier* (1849), 13 Q. B. 780. Consd. *Haseler v. Lemoyne* (1858), 28 L. J. C. P. 103. Foll. *Carter v. St. Mary Abbots, Kensington, Vestry* (1899), 63 J. P. 487. Refd. *Lowe v. Dorling*, [1906] 2 K. B. 772.

665. ———.]—A principal is not liable in trespass for the act of his agent unless he authorises it beforehand or subsequently assented to it with knowledge of what had been done. Therefore, where, in an action of trespass against a landlord it appeared that he gave a broker a warrant to distrain for rent, & the broker took away & sold a fixture, & paid the proceeds to deft. who received them without inquiry, but without knowledge that anything irregular had been done:—*Held*: no such authority or assent appeared as would sustain the action.—*FREEMAN v. ROSHER* (1849), 13 Q. B. 780; 18 L. J. Q. B. 340; 13 L. T. O. S. 138, 188; 13 Jur. 881; 116 E. R. 1462.

*Annotations:—*Apld. *Carter v. St. Mary Abbots, Kensington, Vestry* (1899), 63 J. P. 487. Refd. *Collett v. Foster* (1857), 2 H. & N. 356; *Pidgeon v. Legge* (1857), 21 J. P. 743; *Becker v. Riebold* (1913), 30 T. L. R. 142. Mentd. *Newnham v. Stevenson* (1850), 16 L. T. O. S. 469.

666. ———.]—*HASELER v. LEMOYNE*, No. 645, *ante*.

667. For what acts landlord may be liable.]—A landlord authorising a broker to distrain is liable for his misconduct in distraining excessively, not selling for the best price, making extortionate charges, & not depositing the overplus with the sheriff or constable for the tenant's use.—*DAWE v. CLOUD & DUNNING* (1849), 14 L. T. O. S. 155.

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664 i. General rule—Effect of knowledge or ratification.]—Distress was made more than six months after, but under a warrant given to the bailiff four weeks before, the expiration of the tenancy, & there was no direct evidence that the landlord was aware of the illegal act of his bailiff in seizing at the time he did; but he learned of the fact of seizure after it had been made & before the sale, which he allowed to go on without making any inquiry so far as the evidence showed, & afterwards accepted the proceeds of the sale:—*Held*: the proper finding of fact was that the landlord either ratified the bailiff's illegal act with knowledge of the circumstances or meant to take upon himself without inquiry the risk of any irregularity the bailiff might have committed & to adopt all the bailiff's acts, & the landlord was liable for the damages suffered by the tenant.—*DICK v. WINKLER* (1899), 12 Man. L. R. 624.—CAN.

664 ii. ———.]—An action for illegal distress should be brought against the bailiff who committed the act complained of & not against the person whose bailiff he is, unless it is shown that the said person authorised the wrongful act or sanctioned & ratified it after it came to his knowledge or unless he chose to take upon himself without inquiry the risk of any irregularity which the bailiff may have committed & to adopt all his acts.—*ZARR v. CONFEDERATION LIFE ASSOCN.* (1915), 31 W. L. R. 18; 8 W. W. R. 8 Sask. L. R. 159.—CAN.

s. For what acts landlord may be liable—Seizing goods of stranger.]—Where there has been any irregularity in a distress, & the chattels of a third person have, by the mistake of the agent selling, been sold, though they had not been seized, the landlord is not liable to such third person, unless he authorised such sale, or accepted the proceeds, with full knowledge of what had been done.—*PECK v. SMITH* (1878), 4 V. L. R. 16.—AUS.

t. — Seizure of goods removed from demised premises.]—When a bailiff, authorised to distrain upon goods on the demised premises, seizes these goods after their removal to other premises, the landlord is not liable for such seizure unless facts are proved showing that he authorised or ratified it. It is not sufficient to show that the landlord could have done so.—*RUSSELL v. LAIDLEY* (1895), 21 V. L. R. 179.—AUS.

a. — Extortionate charges by bailiff.]—A count charging the landlord with selling the goods for extortionate & illegal charges, cannot be sustained, for the charge of extortion lies only against the bailiff who received the fee.—*NICHOLS v. MOONEY* (1844), 1 U. C. R. 199.—CAN.

b. — Seizing privileged goods.]—In trover against a landlord for goods alleged to have been taken by his bailiff under a distress for rent, some of which were not distrainable & were not included in the inventory, a verdict was found for pltf., though the bailiff swore that the goods claimed were not taken:—*Held*: as the only ques-

tion at the trial was whether such goods were taken, the landlord was liable for the act of his bailiff.—*MYERS v. SMITH* (1858), 4 All. 203.—CAN.

c. — —.]—Under a landlord's distress warrant the county ct. bailiff purported to seize a tenant's crops. The bailiff had previously seized the crops under execution & at the time of the distress was already in possession on behalf of the execution creditors. From the grain there was realized & paid the landlord's claim for rent & other preferential claims, there being nothing left to apply on the executions. In an action by the tenant against the landlords for alleged illegal & excessive distress:—*Held*: as goods in the custody of the law are not distrainable for rent, & as at the time of the purported distress the grain was legally in the bailiff's custody as county ct. bailiff, & as in the distress warrant the bailiff was "prohibited from distraining on any property not legally liable to distress for rent," the landlords would not be responsible for the bailiff's act of distress unless with knowledge they ratified what he had done.—*McCLOY v. COX*, [1921] 2 W. W. R. 790.—CAN.

d. — —.]—Deft., landlord, issued his warrant to his bailiff to distrain the goods & chattels of his tenants; the bailiff seized goods upon the demised premises which pltf. had sold to the tenants by a conditional sale under the Conditional Sales Act. The bailiff declined to give up the goods & deft. did not direct him to do so. Pltf. sued in detinue & trover:—

668. —.] — COOLING v. FEARON (1854), 23 L. T. O. S. 158.

669. — Seizing privileged goods.] — HURRY v. RICKMAN & SUTCLIFFE, No. 663, *ante*.

670. — Seizing cattle of stranger—Not on demised premises.] — LEWIS v. READ, No. *ante*.

671. — Seizing fixture.] — FREEMAN v. ROSHER, No. 665, *ante*.

672. — Failure to give copy of charges & costs—Distress Costs Act, 1817 (c. 93).] — By sect. 6 of the above Act, it is enacted that "every broker, or other person, who shall make & levy any distress whatsoever, shall give a copy of his charges, & of all the costs, etc., of any distress, to the person on whose goods & chattels any distress is levied":—*Held*: a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him to make a distress, in not delivering a copy of the charges of the distress.—HART v. LEACH (1836), 1 M. & W. 560; 2 Gale, 172; Tyr. & Gr. 1010; 5 L. J. Ex. 244; 150 E. R. 558.

673. — Excessive distress — Unauthorised costs & charges.] — Deft. was employed by pltf. to levy a distress for rent on the goods of pltf.'s tenant for £15. Deft. realised £20 11s. & deducted £6 1s. for the costs & charges of the distress, which was more than is allowed by 57 Geo. 3, c. 93. The tenant claimed damages from pltf. for the excessive distress, & pltf. paid him £6 1s.:—*Held*: pltf. was entitled to recover from deft. the amount pltf. had paid the tenant in satisfaction of his claim for excessive distress.—MEGSON v. MAPLETON (1883), 49 L. T. 744; 32 W. R. 318, D. C.

674. Landlord a corporation — Appointment not under seal.] — SMITH v. BIRMINGHAM GAS CO., No. 138, *ante*.

675. Evidence of—Presence of landlord with broker — Wrongful entry & distress.] — MOORE v. DRINKWATER, No. 310, *ante*.

SUB-SECT. 3.—THE ENTRY.

676. General rule.] — (1) A bailiff in order to effect a distress for rent in a house, went through the next house, & into the yard at the back. He then climbed over the wall into the yard of the

Held: there being nothing to evidence or indicate any ratification of the seizure by deft. he was not liable.—MACK v. BRASS (1921), 67 D. L. R. 35; 51 O. L. R. 221.—CAN.

e. — Unlawful entry by bailiff.] — Pltf.'s & the adjoining house were under one roof, as were also the kitchens in the rear, over which there was a dark loft, which was undivided, & access to which was through a trap door in the ceiling of each kitchen. The bailiff, acting under a distress warrant, delivered to him by the landlord, entered the adjoining house, got through the trap door in that house into the loft, & then removing the trap door in pltf.'s house, descended into the kitchen, & distrained:—*Held*: the distress was illegal, the landlord was liable for the bailiff's act.—ANGLEHART v. RATHIER (1876), 27 C. P. 97.—CAN.

f. — Wilful & unauthorised acts.] — A landlord is not liable in trespass for the wilful & unauthorised acts of his bailiffs, committed in the conduct of a distress.—THYNNE v. RUSSELL (1838), 1 Jebb & S. 155.—IR.

g. Abandonment of distress — Subsequent seizure by bailiff.] — Where a

distress for rent was made upon the goods of pltf. R. by two of defts. in Dec.:—*Held*: they had no right to remove the goods in the following July, the distress having been abandoned, & deft. S. was not responsible for the removal of the goods in July, by the other defts., her bailiffs; her warrant did not authorise them to commit an illegal act.—RITCHIE v. SNIDER (1914), 28 W. L. R. 735; 17 D. L. R. 31.—CAN.

PART II. SECT. 10, SUB-SECT. 3.

676 i. General rule.] — Entry into a house or premises to distrain for rent must be made in the usual & customary manner in which persons go into such premises, & no force or unusual means must be employed. It is an illegal entry for a bailiff to climb over a back yard fence six feet high & then enter the house by an open door.—*Ex p.* WILLIAMS (1893), 14 N. S. W. L. R. 395.—AUS.

676 ii. —.] — Bailiff may use force necessary to ascertain if door is fastened.—MCKINNON v. MCKINLEY (1858), 1 P. E. I. 113.—CAN.

676 iii. —.] — An entry by a bailiff under a distress warrant for rent must

house in which he was directed to distrain, & entered & distrained:—*Held*: a lawful distress.

(2) The sole question is what limitations on the right of the landlord to go on the premises & distrain the law imposes on him. He cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door which is the most obvious way of entering, but, further, he can get in by a window if it is left open (LORD ESHER, M.R.).

(3) This law is applicable to any building into which the landlord wants to get for the purpose of distraining such as a warehouse, a stable, or a barn. Thus, supposing he enters a curtilage without breaking anything, still he cannot break into any stable or building within the curtilage which is locked (LORD ESHER, M.R.).

(4) A landlord may enter the demised premises to levy a distress & may commit in so doing an act which in any one else would be a trespass, provided that he does not break open any outer door (LOPES, L.J.).—LONG v. CLARKE, [1894] 1 Q. B. 119; 63 L. J. Q. B. 108; 69 L. T. 654; 58 J. P. 150; 42 W. R. 130; 10 T. L. R. 71; 38 Sol. Jo. 55; 9 R. 60, C. A.

677. Outer fences & walls—Must not be broken.] — A fence cannot be broken down to distrain for rent.—HARVY v. OLDFIELD (1673), 1 Freem. K. B. 339; 89 E. R. 252.

678. — Climbing over.] — ELDRIDGE v. STACEY, No. 941, *post*.

679. — —.] — A landlord in making a distress got over a fence or wall of from five to eight feet high at the back of the tenant's house, such being the only means of effecting an entrance, as the front door was locked:—*Held*: such a mode of entry was illegal.—SCOTT v. BUCKLEY (1867), 16 L. T. 573.

Annotation:—*Dbtd.* Long v. Clarke, [1894] 1 Q. B. 119.

680. — —.] — LONG v. CLARKE, No. 676, *ante*.

681. Through boarded floor—Without ceiling.] — A landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, took up the floor of his own apartment & entering through the aperture distrained for rent:—*Held*: trespass would not lie against him.—GOULD v. BRADSTOCK (1812), 4 Taunt. 562; 128 E. R. 450.

Annotation:—*Refd.* Nash v. Lucas (1867), 8 B. & S. 531.

be through the ordinary & natural means of ingress to the place where the distress is about to be made.—ANGLEHART v. RATHIER (1875), 27 C. P. 97.—CAN.

h. Through another person's premises.] — D. was tenant of one part of a building & B. of the other. The parts were separated by a partition in which was a door at one time used in common, but B. had fastened it with a hook on his side & fitted into it the frame of a second door against which he placed a case of type. A bailiff with a distress warrant against D. for rent could not obtain entrance to his premises by the ordinary mode. He went on the premises occupied by B. & induced him to remove or allow to be removed the case of type & the extra door, & then entered D.'s premises by lifting the hook on the door in the partition & opening that door. He levied the distress, & in an action by D. claiming damages for illegal distress & trespass:—*Held*: B., having the right to remove the obstruction to entrance into the other part of the building it was immaterial whether he did so himself or allowed the bailiff to do it; & that after such removal

Sect. 10.—Levying the distress: Sub-sects. 3 & 4.]

682. Outer door—May be entered if open.]—A landlord has a perfect right to enter a house through the outer door, if that door be open, for the purpose of making a distress; but he has no right to get through the window, or force open the outer door for that purpose, & if he does, he will be liable to the tenant for breaking & entering his house as any other trespasser.

Where the landlord gave a distress warrant to a bailiff, who went with it to the front door, & the landlord then with one of his servants went round to the back of the house & got into it through a window & ordered his servant to go to the front door, & let in the bailiff, but the tenant thereupon declared that he would blow out the brains of any man who opened the door, but that he would let in the bailiff himself, which he accordingly did, & the bailiff then entered, & made a distress, the trial judge expressed a strong opinion that the entry by the bailiff must be considered the commencement of the distress, & told the jury, that if they were of this opinion, the distress & subsequent proceedings were legal, & that pltf. would only be entitled to damages in respect of the illegal entry at the window.—*BUDD v. PYLE* (1816), 10 J. P. 203, N. P.

683. — May not be forced.]—*BUDD v. PYLE*, No. 682, *ante*.

684. — Stable door without curtilage.]—A landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent.—*BROWN v. GLENN* (1851), 16 Q. B. 254; 20 L. J. Q. B. 205; 16 L. T. O. S. 341; 15 Jur. 189; 117 E. R. 876.

*Annotations:—*Consd. *American Concentrated Must Corpn. v. Hendry* (1893), 62 L. J. Q. B. 388. *Refd.* *Hodder v. Williams*, [1895] 2 Q. B. 663.

685. — Warehouse door within courtyard.]—A landlord's broker entered upon demised premises to distrain for rent. Being already peaceably & lawfully in a courtyard which formed part of the demised premises, he then broke the main & outer door of a warehouse abutting on the courtyard, also part of the demised premises, & there distrained upon certain goods. In an action by pltf. who was the tenant & occupier of the courtyard & warehouse, for trespass for breaking the door of the warehouse:—*Held*: the door of the warehouse was an "outer door" within the meaning of the principle that outer doors may not be broken, & the fact that the broker was already lawfully within the demised premises did not give him the right to break open the door of the warehouse.—*AMERICAN CONCENTRATED MUST CORPN. v. HENDRY* (1893), 62 L. J. Q. B. 388; 68 L. T. 742; 57 J. P. 788; 9 T. L. R. 445; 37 Sol. Jo. 475; 5 R. 331, C. A.

*Annotations:—*Distd. *Long v. Clarke*, [1894] 1 Q. B. 119. *Refd.* *Hodder v. Williams*, [1895] 2 Q. B. 663.

686. —]—A bailiff, employed to levy a distress for rent in arrear, illegally broke in the front door; he then seized the furniture, but before selling it left the house, &, being refused

entrance to D.'s premises was made without a breaking, & the distress was legal.—*McKAY v. DOUGLAS* (1919), 57 S. C. R. 453; 44 D. L. R. 570.—CAN.

682 i. Outer door—May be entered if open.]—F. occupied rooms in a building owned by S. having absconded from the province, S. distrained for rent due. When the distress was made the rooms were vacant. The bailiff found the key in the hall outside, opened the door, made the distress, & sold the goods:—*Held*: the door so opened was the outer door of the premises

leased, the distress was void, & no title was conveyed by the sale.—*MILLER v. CURRAY* (1893), 25 N. S. R. 537.—CAN.

683 i. — May not be forced.]—Breaking open a tenant's building or house in order to distrain for rent, renders the distress illegal & not merely irregular.—*RUSSELL v. BUCKLEY* (1885), 25 N. B. R. 264.—CAN.

683 ii. —]—A door connecting a suite of rooms occupied exclusively by a tenant in an apartment house with a hall used in common by

admittance on his return, made no attempt to regain possession. Subsequently the landlord put in a fresh distress in respect of the same rent by a different bailiff acting under a fresh distress warrant who seized the furniture, which was replevied before sale by the owner:—*Held*: the proceeding under the first distress warrant was a trespass *ab initio* & void as a distress, & the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding, could lawfully distrain under the second warrant for the same rent.—*GRUNNELL v. WELCH*, [1906] 2 K. B. 555; 75 L. J. K. B. 657; 95 L. T. 238; 54 W. R. 581; 22 T. L. R. 688; 50 Sol. Jo. 632, C. A.

687. — Opened by third party—After illegal entry by window.]—*NASH v. LUCAS*, No. 693, *post*.

688. — How lawfully opened.]—A landlord, in order to distrain, may open the outer door by the usual means adopted by persons having access to the building, & therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt.

Qu.: where the outer door is broken open, whether the distress is void.—*RYAN v. SHILCOCK* (1851), 7 Exch. 72; 21 L. J. Ex. 55; 18 L. T. O. S. 157; 16 J. P. 213; 15 Jur. 1200; 155 E. R. 861.

*Annotations:—*Refd. *Sandon v. Jervis* (1859), E. B. & E. 942; *Nash v. Lucas* (1867), L. R. 2 Q. B. 590; *American Concentrated Must Corpn. v. Hendry* (1893), 62 L. J. Q. B. 388. *Mentd.* *Lewis v. Owen* (1893), 10 T. L. R. 39.

689. Inner door—May be forced.]—If the outer door of a house be open one may break an inner door to distrain.—*BROWNING v. DANN* (1735), *Lee temp. Hard.* 167; *Bull. N. P.* 7th ed., 81 c; 95 E. R. 107.

690. Closed window—May not be broken open.]—*BUDD v. PYLE*, No. 682, *ante*.

691. —]—*HANCOCK v. AUSTIN*, No. 75, *ante*.

692. — —]—A declaration alleged that deft. broke & entered a dwelling-house of pltf., seized divers goods & chattels, carried them away, & converted them to his own use. Plea, not guilty by Distress for Rent Act, 1737 (c. 19), s. 21. Deft., who was landlord to pltf., from whom rent was due to him, had, in order to make a distress, entered on pltf.'s premises by forcibly breaking in a window, & seized & sold his goods:—*Held*: (1) this mode of entry on the premises being unlawful in itself rendered deft. a trespasser *ab initio*; (2) pltf. was entitled to recover the full value of the goods, & not that value minus the sums due for rent.—*ATTACK v. BRAMWELL* (1863), 3 B. & S. 520; 1 New Rep. 315; 32 L. J. Q. B. 146; 7 L. T. 740; 27 J. P. 629; 9 Jur. N. S. 892; 11 W. R. 309; 122 E. R. 196.

*Annotation:—*Fold. *Grunnell v. Welch*, [1905] 2 K. B. 650. (*See* [1906] 2 K. B. 555.)

693. — — Shut but not fastened.]—An entry into a house, for the purpose of distraining, by opening a window which is shut but not fastened, is unlawful.

A broker went with a warrant of distress for

the tenants of different suites in the building & leading to the main entrance to the building is an "outer door," which may not be broken open by a landlord in making a distress for rent.—*WELCH v. KRACOVSKY*, [1919] 3 W. W. R. 361.—CAN.

683 iii. — —]—Breaking open the outer door of a dwelling-house to distrain for rent, does not render the distress void, & is no answer to an avowry for rent in arrear, in an action of replevin for the goods.—*MYERS v. SMITH* (1858), 4 All. 207.—CAN.

rent to the demised premises, the front door of which he found fastened. In the course of the day a man in the employ of the landlord was allowed by the tenant to enter at the front door, in order to get access to the area for the purpose of removing & repairing a grating over it which was in a dangerous state. While the repairs were going on the tenant left the house, having fastened both the front & area doors, & the man who had got into the area to refix the grating, having refixed it found himself unable to get out. The broker suggested to the man to try the window which opened into the area & was closed. The window was found to be unfastened, & the man pulled the sash down, got into the house, & unfastened the front door from the inside. On the front door being thus opened, the broker entered & distrained:—*Held*: the transaction must be taken as one, & as the entry was by opening a window, the distress was unlawful.

Qu.: whether, if the door had been unfastened & opened by an independent third person, the entry by the broker would have been lawful.—*NASH v. LUCAS* (1867), L. R. 2 Q. B. 590; 8 B. & S. 531; 32 J. P. 23.

Annotation:—*Refd.* *Crabtree v. Robinson* (1885), 15 Q. B. D. 312.

694. Open window—May be entered.—An entry to make a distress through an open window is lawful.—*TUTTON v. DARKE, NIXON v. FREEMAN* (1860), as reported in 5 H. & N. 647; 157 E. R. 1338.

Annotation:—*Refd.* *Nash v. Lucas* (1867), L. R. 2 Q. B. 590.

695. — Further opening to admit distrainer.—Entry into a house for the purpose of distraining may lawfully be made by further opening a window which is partly open.—*CRABTREE v. ROBINSON* (1885), 15 Q. B. D. 312; 54 L. J. Q. B. 544; 50 J. P. 70; 33 W. R. 936, D. C.

696. — Skylight.—When a bailiff effects an entrance by an open skylight & distrains the distress is not illegal.—*MILLER v. TEBB* (1893), 9 T. L. R. 515, C. A.

697. ——*LONG v. CLARKE*, No. 676, *ante*.

698. Re-entry—What amounts to—Previous forcible entry not a distress.—(1) The assistants of a sheriff's officer, for the purpose of executing a writ of *fi. fa.* illegally entered pltf.'s premises on a Sunday by breaking open a window. They afterwards by the officer's direction, abandoned possession on the Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant:—*Held*: he was not debarred by the act of his assistants from selling the goods when seized on the second occasion.

Qu.: whether the officer would have been liable if the illegal entry of his assistants on the Sunday had facilitated his own entry on the Thursday, & he had availed himself of such illegal entry.

(2) The declaration stated that deft. on Mar. 6, 1853, broke & entered the dwellinghouse & premises of pltf. & continued & remained therein a long space of time, to wit, eight days:—*Held*: evidence was admissible of an entry on the day first named, & also on a subsequent day, although deft. had, after the first entry, left the premises without intending to return.—*PERCIVAL v. STAMP*

(1853), 9 Exch. 167; 2 C. L. R. 282; 23 L. J. Ex. 25; 22 L. T. O. S. 90; 18 J. P. 105; 2 W. R. 14; 156 E. R. 71.

Annotation:—*Mentd.* *Hooper v. Lane* (1857), 6 H. L. Cas. 443.

699. Forcible re-entry — Justification of — Forcible expulsion.—*EAGLETON v. GUTTERIDGE*, No. 132, *ante*.

700. — Doors locked in temporary absence of bailiff —No abandonment of distress.—*BANNISTER v. HYDE*, No. 945 *post*.

701. — After long delay.—A broker's man having taken possession of property under a distress for rent, after remaining two days left the house in a state of excitement bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house & took away the goods, without any previous demand of admission:—*Held*: he had no right to enter again after so long a delay, & the owner of the goods might maintain trover for them.—*RUSSELL v. RIDER* (1834), 6 C. & P. 416, N. P.

Annotation:—*Refd.* *Bannister v. Hyde* (1860), 1 L. T. 438.

702. — What prior "possession" necessary.—Although in levying a distress, when a person has once obtained peaceable possession of the premises, & been forcibly put out of them, he may legally break open a door or window for the purpose of regaining possession; yet when a person has merely got his foot & arm between the door & the lintel, or by putting a pair of shears between the door & the lintel has prevented its being closed, this is not a "possession" such as will entitle him to break open a door or window for the purpose of gaining admission to the house, & therefore, a distress made under such circumstances is illegal *ab initio*.—*BOYD v. PROFAZE* (1867), 16 L. T. 431, N. P.

703. — Confusion of goods seized—Rights of owner.—A bailiff having distrained in a dwelling-house, & remained there in possession longer than five days, & being then expelled, & afterwards retaking the goods distrained upon, finding them off the premises, but along with others not included in the distress:—*Held*: the doctrine of confusion of property did not apply to preclude the owner from bringing trespass. *Qu.*: whether the distress was not at an end, & whether trespass would not lie for the retaking.—*SMITH v. TORR* (1862), 3 F. & F. 505.

704. Anticipated resistance — Presence of police officer.—(1) In making a distress for rent, circumstances may occur which may require the presence of a police officer, but to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance or the apprehension of violence, etc.

(2) If a landlord be lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser.—*SKIDMORE v. BOOTH* (1834), 6 C. & P. 777, N. P.

SUB-SECT. 4.—SEIZURE.

705. May be actual or constructive.—*CRAMER v. MOTT*, No. 252, *ante*.

PART II. SECT. 10, SUB-SECT. 4.

705 i. May be actual or constructive.—An actual seizure of the goods is not necessary to constitute a distress. Any act or word expressive of a present intention to assume control of the goods

is sufficient.—*DE GROUCHY v. SIVRET* (1890), 30 N. B. R. 104.—*CAN.*

705 ii. ——Where a landlord's agent presents a bill for arrears of rent, at the same time stating that the furniture will have to remain where it

is until the rent is paid, & the rent is never paid & the furniture is kept locked in the room, a legal distress is made.—*NATIONAL TRUST CO., LTD. v. LEWSON & LINEHAM'S EXECUTORS* (1916), 33 W. L. R. 587; 9 W. W. R. 1132; Alta. L. R. 245.—*CAN.*

Sect. 10.—Levy the distress: Sub-sects. 4 & 5, A.]

706. What amounts to a seizure—Laying hands on some goods in name of all.]—DOD *v.* MONGER, No. 1045, *post*.

707. — Written notice that distraint had been made.]—Where a landlord's agent went upon the tenant's premises, walked round them, & gave a written notice that he had distrained certain goods lying there for an arrear of rent, & that unless the rent was paid, or the goods replevied within five days, they would be appraised & sold, & then went away, not leaving any person in possession:—*Held*: this was a sufficient seizure to give the tenant a right of action for an excessive distress; & quitting the premises without leaving any one in possession was not an abandonment of the distress, Distress for Rent Act, 1738 (c. 19), s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear.

As between these parties there was an original seizure; & there was not an abandonment; for since Distress for Rent Act, 1738 (c. 19), the landlord may keep the goods on the premises. The case might have been different, had the question arisen between the landlord & an execution-creditor, or a purchaser for valuable consideration without notice, for the landlord might perhaps be considered to have lost his right as against third persons if he neglected to give reasonable notice of it (LITTLEDALE, J.).

Seemle: as between the landlord & the tenant, it is not necessary for a person to be left in possession of goods distrained for rent, & left on the premises. The tenant meddling with such goods would be liable to punishment for pound breach, provided the facts did not show any intention on the part of distrainer to abandon the distress.—SWANN *v.* FALMOUTH (EARL) (1828), 8 B. & C. 456; 2 Man. & Ry. K. B. 534; 6 L. J. O. S. K. B. 374; 108 E. R. 1112.

Annotations:—*Consd.* Thomas *v.* Harries (1840), 1 Man. & G. 695; Bannister *v.* Hyde (1860), 2 E. & E. 627; Lumsden *v.* Burnett, [1898] 2 Q. B. 177. *Refd.* Hartley *v.* Moxham (1842), 3 Q. B. 701; Balls *v.* Thick (1845), 9 Jur. 304; Kirby *v.* Harding (1850), 16 L. T. O. S. 504; Tennant *v.* Field (1857), 8 E. & B. 336; Gladstone *v.* Padwick (1871), L. R. 6 Exch. 203; Jones *v.* Belrustein (1899), 68 L. J. Q. B. 267.

708. — Preventing removal of goods.] —A landlord, to whom rent was in arrear, hearing his tenant & a stranger disputing about the pro-

perty of an article on the premises, early in the morning entered & said, "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent:—*Held*: the distress was sufficiently commenced by the landlord to entitle him to the article in question.—WOOD *v.* NUNN (1828), 5 Bing. 10; 2 Moo. & P. 27; 6 L. J. O. S. C. P. 198; 130 E. R. 962.

Annotations:—*Apld.* Knowles *v.* Blake (1829), 5 Bing. 499; Werth *v.* London & Westminster Loan Co. (1889), 5 T. L. R. 320. *Foll.* Cramer *v.* Mott (1870), L. R. 5 Q. B. 357.

709. — —.] —CRAMER *v.* MOTT, No. 252, *ante*.

Subsequent removal immaterial.]

—WERTH *v.* LONDON & WESTMINSTER LOAN & DISCOUNT CO. (1889), 5 T. L. R. 521, D. C.

Annotation:—*Refd.* Perring *v.* Emerson, [1906] 1 K. B. 1.

711. — Demand for payment — Payment under protest—Estoppel of tenant.]—A landlord's broker went to the tenant's house, & pressed for payment of rent alleged to be due, & £3 3s. for expenses of the levy, but touched nothing, & made no inventory. The tenant paid him the rent & expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress:—*Held*: deft. could not say there had been no actual distress.—HUTCHINS *v.* SCOTT (1837), 2 M. & W. 809; Murp. & H. 194; 6 L. J. Ex. 186; 150 E. R. 985.

712. What does not amount to a seizure — Commencement of inventory—Subsequent abandonment on ground of mistake.]—A. entered pltf.'s house, & said he had come to make a distress, & began taking an inventory; but finding out he had made a mistake, left the house without removing any of the goods:—*Held*: what A. had done did not amount to making a distress.—SPICE *v.* WEBB & MORRIS (1838), 2 Jur. 943.

Annotation:—*Consd.* Central Printing Works *v.* Walker & Nicholson (1907), 24 T. L. R. 88.

713. — Bailiff on premises a few hours — Pending collection of money for payment.]—A debenture issued by a co. contained a condition that the principal moneys should become payable if any of the property of the co. should be seized under a distress. A bailiff called at 10 a.m. at the co.'s shop with a warrant to collect a sum of £10 due for rent. The secretary of the co. tendered a cheque for £20, which was refused. The secretary then said that he would go & pay some

706 i. What amounts to seizure—Laying hands on some goods in name of all.]—A distress may be made by seizing one article in the name of the whole, but the whole must be in the power of the distrainer; he must know what articles are distrained & have power over them to take possession of them.—*Re* MERHAN (1879), 6 Nfld. L. R. 172.—NFLD.

k. — Goods left by bailiff in custody of distraintee.]—A bailiff, under a distress warrant, entered & made an inventory of "the several goods & chattels distrained by me, viz., in front shop, quantity of millinery," etc., "together with sundry articles on the premises." The tenant then gave to the bailiff the following receipt: "I acknowledge to have received from G., bailiff, all the goods & chattels in house No. 113," etc., "seized for rent," etc., "to be delivered to him, the said bailiff, when demanded," etc.:—*Held*: sufficient to constitute a distress executed.—BLACK *v.* COLEMAN (1878), 29 C. P. 507.—CAN.

l. —.]—Where goods subject to the landlord's hypothec are attached on the leased premises under a judg-

ment for rent, a sufficient arrest or *præclusio* of the goods is made to maintain the landlord's preference.—GOLDBERG *v.* LUBBER'S TRUSTEE (1911), T. P. D. 254.—S. AF.

m. —.]—The bailiff had gone to pltf.'s store, who told him to proceed & they would replevy, & they requested him to seize some barrels of spirits, which he did, & afterwards advertised them for sale in the usual manner; he did not touch the casks, or leave any one in possession, or take security for their production at the time of sale, relying, as he said, on pltf.'s assurance, & knowing that they intended to replevy:—*Held*: a sufficient seizure.—FINN *v.* MORRISON (1856), 13 U. C. R. 568.—CAN.

n. What does not amount to a seizure—Two visits by landlord—Necessity for inventory.]—Pltf. was mtgee. of certain goods of one F., a tenant of his father, deft. C. The landlord on Feb. 17, 1883, went to the house of the tenant, & declared that he seized everything for rent. He touched nothing & made no inventory. On Feb. 24, he went again & told the tenant's wife that the property had been seized for

rent, & to let no one take anything away, when she promised to do her best for him. On Mar. 5, pltf. took possession under his mtgo. & removed the goods. A bailiff went the next day for taxes in arrear, & the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, & on the tenant's waiving an inventory, advertising, etc., sold them within two days to a nephew of the landlord:—*Held*: the landlord's two visits of Feb. 17 & 24, did not amount to a distress.—WHIMSELL *v.* GIFFARD (1883), 3 O. R. 1.—CAN.

o. Necessity for seizure — Seizure may be in process of removal.]—To render the landlord's tacit hypothec effectual it is necessary that the goods should be attached, & the general rule is that the attachment must take place while the goods are on the leased premises. If, however, the goods have been taken away, they may still be attached while in the process of removal, unless they have been already delivered to a third person, who acquired them for value without notice of the landlord's claim.—

rates & thus obtain change. While he was gone the bailiff & his man remained in the shop. The secretary returned in a few minutes, saying that the collector would not take the cheque, & he left again to get it cashed at the bank. During his absence the bailiff went home, leaving his man in the shop. The bailiff returned at 2 p.m., & was paid the £10. He did not ask for any expenses :—*Held* : there had been no seizure under a distress, & therefore the principal moneys secured by the debentures had not become due.—(CENTRAL PRINTING WORKS, LTD. v. WALKER & NICHOLSON (1907), 24 T. L. R. 88.

714. Necessity for seizure—To give landlord right of action for removal.]—No action will lie at the suit of a landlord for removing a tenant's goods which have not actually been distrained.—POOL v. CRAWCOUR (1884), 1 T. L. R. 165, C. A.

Return of goods seized on promise to pay rent—Whether action lies for money had & received.]—See CONTRACT, Vol. XII., p. 547, No. 4541.

SUB-SECT. 5.—NOTICE OF DISTRESS.

A. In General.

See Distress Act, 1689 (c. 5); Distress (Costs) Act, 1817 (c. 93).

715. Necessity for—At common law.]—TANCRED v. LEYLAND, No. 731, *post*.

716. ——— Goods taken into private pound.]—KERBY v. HARDING, No. 732, *post*.

717. ——— By Distress Act, 1689 (c. 5), s. 1—Where sale intended.]—TRENT v. HUNT, No. 154, *ante*.

718. ——— Measure of damages.]—In case for selling goods distrained for rent, without complying with the provisions of above Act, the damages are, the value of the goods distrained, less the amount of rent due.—WHITWORTH v. MADEN (1847), 2 Car. & Kir. 517.

719. Service—Personal service sufficient.]—(1) If a distress be made of cattle for arrears of rent on land lying within different hundreds, the constable of the hundred where the distress was driven & impounded is the proper officer to swear the appraisers under Distress Act, 1689, c. 5; & a sale by the distrainer or his bailiff, though neither sheriff, under-sheriff, or constable be present at the sale, for the price at which they were appraised, is good; for it shall be intended

the best price unless the contrary appear; & if the goods distrained be not the proper goods of the tenant, the owner cannot bring an action of trover to recover them back, if the distrainer gave him notice of the distress five days before the sale, for he might have replevied them; but if the tenant had replevied them, notice to the owner would not have been sufficient.

(2) The intent of the Act was only, that the party should have notice, which is performed by this means [personal service], better than if it had been left at the house or other most notorious place (*per* CUR.).—WALTER v. RUMBALL (1695), 4 Mod. Rep. 385; 1 Ld. Raym. 53; Comb. 336; 1 Salk. 247; 87 E. R. 457; *sub nom.* WALKER v. RUMBALL, 12 Mod. Rep. 76.

Annotations :—As to (1) *Reid*. Lyon v. Tomkies (1836), 1 M. & W. 603; Cook v. Corbett (1875), 24 W. R. 181. As to (2) *Consd.* Wilson v. Nightingale (1846), 8 Q. B. 1034. *Folld.* Jarvis v. Hemmings, [1912] 1 Ch. 462. *Generally, Mentd.* Appelthwaite Town v. Hartsop & Batterdale Town (1729), 1 Barn. K. B. 250; Lock v. Furze (1865), 6 New Rep. 310.

Service of notice by landlord to undertenant or lodger as to future payments of rent, see Part II., Sect. 5, sub-sect. 12, B. (d).

720. Form—Must be in writing.]—Under Distress Act, 1689, c. 5, s. 2, the notice of distress for rent, to be given five days before sale, must be in writing.—WILSON v. NIGHTINGALE (1846), 8 Q. B. 1034; 15 L. J. Q. B. 309; 10 Jur. 917; 115 E. R. 1163.

721. Effect of error—Misdescription of name of landlord.]—A. demised certain premises to B., which B. demised to C. reserving rent; the interest of B. was afterwards sold to D., upon which D. obtained from A. a new lease, the lease to B. having been cancelled. B. & D. afterwards distrained for rent, in the name of D.; upon which occasion, D. declared that the premises belonged to him :—*Held* : in an action of trespass against B., D., & others, their servants, the cancellation & new lease did not operate as a surrender of the interest of B., & rent being due to B. by effluxion of time, debts. were justified in making the distress, though in the name of D.—WOOTLEY v. GREGORY (1828), 2 Y. & J. 536; 148 E. R. 1031.

Annotation :—*Folld.* Trent v. Hunt (1853), 9 Exch. 14.

722. ——— Omission of “limited” in name of company.]—A broker was employed by a joint-stock co., limited, to distrain the goods of a tenant of the co., & in his notice of distress he slightly misdescribed the co., & omitted the word “limited”

WEBSTER v. ELLISON (1911), App. D. 73.—S. AF.

p. Goods left in custody of distrainee—Not evidence of abandonment of seizure.]—Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce & keep & deliver the chattels & crops & not to remove or allow them to be removed from the premises & to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary.—ANDERSON v. HENRY (1898), 29 O. R. 719.—CAN.

q. Seizure off demised premises.]—When the bailiff went to distrain, the lessee's mare & yoke of oxen, the subject of the distress, had strayed off the demised premises to the lessor's land adjoining, & the bailiff then, & before making a seizure, served the lessee with a notice of distress, & taking a bridle from the lessor's stable, he, the lessor, & one L. went to the place where the mare & oxen were, off the demised premises, & the bailiff having put the bridle on the mare, L. mounted her, & they all drove the

oxen before them to the lessee's premises, where they put a yoke on them :—*Held* : there was evidence to go to the jury that the distress was made off the demised premises, & therefore illegal, & in an action for the seizure a nonsuit entered was set aside.—PEACEY v. OVAS (1876), 26 C. P. 464.—CAN.

r. Seizure on highway—When warranted.]—A landlord on the day of the removal of goods, rent being in arrear, forbade such removal until it was paid. Upon a seizure on the highway for such rent :—*Held* : a sufficient inception of distress had taken place to warrant such seizure.—PULVER v. YEREX (1860), 9 C. P. 270.—CAN.

PART II. SECT. 10, SUB-SECT. 5.—A.

717 i. Necessity for—By Distress Act, 1689 (c. 5)—Where sale intended.]—Under the above Act goods distrained cannot be sold until the expiration of five days after a written notice of distress, with the cause of the taking, shall have been given. In this case, the only notice was one given on

Feb. 8, & the sale took place on Feb. 12 :—*Held* : the sale was invalid.—SHULTZ v. REDDICK (1878), 43 U. C. R. 155.—CAN.

717 ii. ———.]—Deft. made a distress upon pltf. for rent lawfully due, but did not give him the five days' notice of the sale of the goods distrained prescribed by statute :—*Held* : he was a trespasser *ab initio*, & liable in damages.—CORNELIUS v. BURTON (1873), 9 N. S. R. 337.—CAN.

717 iii. ———.]—On a distress for rent no notice thereof in writing was given to the lessee; nor a legal appraisal made before sale; & the actual value of the goods sold was much greater than the amount due for rent :—*Held* : the distress was illegal.—HOWELL v. LISTOWEL RINK & PARK CO. (1886), 13 O. R. 476.—CAN.

s. ——— By 46 & 47 Vict. c. 45, s. 6.]—A count by tenant against landlord for seizing & selling as for distress without giving the notice required by the above sect., whereby the tenant lost the difference between the value of the goods & the amount realised by their sale :—*Held* : bad.—VAUGHAN

Sect. 10.—Levying the distress: Sub-sect. 5, A. & B. (a) & (b). Sect. 11: Sub-sect. 1, A.]

Held: this was not a notice or official publication of the co. requiring the word "limited" to be added to their name.—**MARKHAM v. HANROTT** (1870), 35 J. P. 7.

723. Sufficiency of.—A notice of distress for rent in arrear stated that the party given the notice had "distrained the goods, chattels & things mentioned in the inventory hereunder written." In the inventory referred to one article was named, & then followed the words "& any other goods & effects that may be found in & about the said premises," etc.:—*Held*: such notice, though very loose, could not be considered insufficient, as it appeared that all the goods upon the premises were intended to be, & were distrained upon.—**WAKEMAN v. LINDSEY** (1850), 14 Q. B. 625; 19 L. J. Q. B. 166; 14 L. T. O. S. 373; 15 Jur. 79; 117 E. R. 242.

Annotation:—**Distd.** **Korby v. Harding** (1851), 6 Exch.

724. **KERBY v. HARDING**, No. 732, *post*.

725. Distraint for one cause—Justification for another cause.—**BULLER'S CASE** (1587), 1 Leon. 50; 74 E. R. 47.

Annotations:—**Refd.** **Britton v. Cole** (1697), 12 Mod. Rep. 175; **Trevillian v. Pine** (1798), 11 Mod. Rep. 112; **Trent v. Hunt** (1853), 9 Exch. 11. **Mentd.** **Durant v. Roberts & Keighley, Maxsted**, [1900] 1 Q. B. 629.

726. ———.]—A man may distrain for one cause, & avow for another.—**BUTLER v. BAKER** (1591), 3 Co. Rep. 25 a; 1 And. 348; 3 Leon. 271; Poph. 87; 76 E. R. 684.

Annotations:—**Foldd.** **Crowther v. Ramsbottom** (1798), 7 Term Rep. 654. **Refd.** **Lucas v. Nockells** (1833), 10 Bing. 157. **Mentd.** **Menville's Case** (1585), 13 Co. Rep. 19; **Mountjoy's Case** (1589), 5 Co. Rep. 3 b; **Jennings v. Bragg** (1595), Cro. Eliz. 417; **Fitzwilliam's Case** (1604), 6 Co. Rep. 32 a; **Pexhall's Case** (1609), 8 Co. Rep. 83 b; **Lovies's Case** (1613), 10 Co. Rep. 78 a; **Court of Wards Case** (1626), Cro. Car. 33; **Sydowne v. Holme** (1635), Cro. Car. 422; **It. v. Hampden** (1637), 3 State Tr. 826; **Norrice & Norrice's Case** (1639), March, 23; **Berry v. White** (1662), O. Bridg. 82; **Geary v. Bearcroft** (1666), O. Bridg. 484; **Thompson v. Leach** (1690), 2 Vent. 198; **Wankford v. Wankford** (1699), 1 Salk. 299; **Arthur v. Bokenham** (1707), 11 Mod. Rep. 148; **Brunker v. Cook** (1707), 11 Mod. Rep. 121; **Atkin v. Berwick** (1719), 1 Stra. 165; **It. v. Westbeer** (1739), 1 Leach, 12; **Windham v. Chetwynd** (1757), 1 Burr. 414; **Buckinghamshire v. Drury** (1762), Wilm. 177; **Brydges v. Chandos** (1794), 2 Ves. 417; **Goodtitle v. Otway** (1796), 1 Bos. & P. 576; **Cave v. Holford** (1798), 3 Ves. 650; **Goodright v. Forrester** (1807), 8 East, 552; **Doe d. Tofield v. Tofield** (1809), 11 East, 246; **Doe d. Garnons v. Knight** (1826), 5 B. & C. 671; **Balme v. Hutton** (1831), 2 Tyr. 17; **Bramah v. Roberts** (1835), 1 Bing. N. C. 481; **Mills v. Oddy** (1835), 2 Cr. M. & R. 103; **Garland v. Carlisle** (1837), 4 Cl. & Fin. 693; **Doe d. Chidgey v. Harris** (1847), 16 M. & W. 517; **Siggers v. Evans** (1855), 5 E. & B. 367; **Xenos v. Wickham** (1867), L. R. 2 H. L. 296; **Standing v. Bowring** (1885), 31 Ch. D. 282; **London & County Banking Co. v. London & River Plate Bank** (1888), 21 Q. B. D. 535; *Re Arbib & Class's Contract*, [1891] 1 Ch. 601; **Mallott v. Wilson**, [1903] 2 Ch. 494.

727. ———.]—In trespass for breaking & entering pltf.'s close, & taking his goods, deft. may justify under sufficient legal process, if he has it in fact at the time, although he declared then that he entered for another cause.—**CROWTHER v. RAMSBOTTOM** (1798), 7 Term Rep. 654; 101 E. R. 1182.

Annotations:—**Refd.** **Lucas v. Nockells** (1833), 10 Bing. 157; **Lamont v. Southall** (1839), 3 J. P. 355; **Trent v. Hunt** (1853), 9 Exch. 11. **Mentd.** **Deane v. Clayton** (1817), 1 Moore, C. P. 203; **Baillie v. Kell** (1838), 4 Bing. N. C. 638; **Hooper v. Lane** (1847), 17 L. J. Q. B. 189.

v. BUILDING & LOAN ASSOCN. (1889), 6 Man. L. R. 289.—**CAN.**

t. Informal notice served—Effect of.—When an informal notice of distress was served at the time of the seizure of pltf.'s goods:—*Held*: he

was entitled to maintain an action of trespass *quare clausum fregit*.—**GREEN v. BROWN** (1849), 13 L. L. R. 329.—**IR.**

a. Name of landlord omitted—Distress unlawful.—A distress is ren-

728. ———.]—**ETHERTON v. POPPLEWELL**, No. 752, *post*.

729. ———.]—To a declaration for an excessive distress for rent, deft. pleaded that the whole sum distrained for was due & in arrear, concluding to the country, on which pltf. joined issue:—*Held*: on this issue, deft. was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due & had been distrained for; although, on the first distress, the warrant & notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; & although, on the second distress, deft. stated that it was for rent due since the last distress.—**GAMBRELL v. PALMOUTH (EARL)** (1835), 4 Ad. & El. 73; 111 E. R. 715.

730. ———.]—In replevin for taking the goods of pltf. in a house & close, deft. made separate avowries as to the house & close, avowing the taking in each as for rent in arrear in respect of each respectively; to which avowries pltf. pleaded in bar that deft. took one joint distress upon the house & close for & in respect of the several arrears of rent:—*Held*: the plea was bad.

There is no doubt as to the law, that a person having a right to distrain, & doing no more than he has a right to do, although he may have given a reason for distraining which, if the only ground for the distress, would not be a justification, yet, when he comes to avow he may avow his right to distrain according to the true ground on which he would have had a right to distrain (**COCKBURN, C.J.**).—**PHILLIPS v. WHITSED** (1860), 2 E. & E. 804; 29 L. J. Q. B. 164; 2 L. T. 278; 24 J. P. 694; 6 Jur. N. S. 727; 8 W. R. 494; 121 E. R. 301.

B. The Contents.

(a) Amount of Rent due.

See Distress Act, 1689 (c. 5).

731. General rule—At common law.—(1) Declaration in case alleged that pltf. held a messuage as tenant to deft. at a certain rent, but deft. took goods on the premises as a distress for arrears of rent alleged to be due, & afterwards sold the goods as such distress for the said alleged arrears, whereas a small part only of the pretended arrears was in arrear. There was no allegation that the amount taken or sold was unreasonable in respect of the arrears, actually due:—*Held*: the mere taking or selling on a claim of more than was due was not actionable.

(2) If a larger quantity of the goods so taken than was sufficient to raise the amount of the rent in arrear, & legal costs, had been subsequently sold, excessive sale would have been illegal & actionable (**PARKE, B.**).

(3) The only remaining question is, whether the simple fact of making a distress accompanied by an untrue claim or pretence that more was due than really was due is actionable. It is said that it was so at common law; & the argument is therefore founded on the supposition that the common law casts a duty on a landlord distraining to inform the tenant what is the arrear of rent for which he distrains. We think that the common law casts no such obligation on the distrainer. It has been expressly laid down that if the lord

dered unlawful by the omission to state in the notice of distraint the name of the person to whom the rent is payable, as authorizing the distress.—**CROGHAN v. MARFETT** (1890), 26 L. R. Ir. 664.—**IR.**

distrains for rent or services, he has no occasion to give notice to the tenant for what thing he distrains; for the tenant, by intendment, knows what things are in arrear for his lands (PARKE, B.). —TANCRED v. LEYLAND (1851), 16 Q. B. 669; 20 L. J. Q. B. 316; 17 L. T. O. S. 53; 15 J. P. 815; 15 Jur. 394; 117 E. R. 1036, Ex. Ch.

Annotations:—As to (1) *Apprvd.* Stevenson v. Newnham (1853), 13 C. B. 285. *Foll.* French v. Phillips (1856), 1 H. & N. 564. *Consd.* Glynn v. Thomas (1856), 11 Exch. 870. *Foll.* Thwaites v. Wilding (1883), 52 L. J. Q. B. 734. *Refd.* Fell v. Whittaker (1871), L. R. 7 Q. B. 120. As to (2) *Apprvd.* Glynn v. Thomas (1856), 11 Exch. 870. *Refd.* French v. Phillips (1856), 1 H. & N. 564. *Generally, Mentd.* Schregor v. Carden (1852), 11 C. B. 851; Perren v. Monmouthshire Ry. (1853), 11 C. B. 855; Churchill v. Siggers (1854), 3 E. & B. 929.

732. By statute.—(1) A notice of distress stated that the landlord had distrained the several goods, chattels & effects specified in the schedule. The schedule, after enumerating certain goods, concluded, "all other goods, chattels, & effects on the premises, that may be required in order to satisfy the above rent, together with all necessary expenses":—*Held*: the notice was too vague & uncertain to justify the sale of goods of a stranger, which he had deposited on the premises.

(2) After the seizure of the goods, no notice thereof having been given to the party depositing them, the distrainer permitted him to take them off the premises for a temporary purpose, with the intention, on the part of the distrainer, that they should be returned, which was done:—*Held*: there was not any abandonment of the distress.

The statute [Distress Act, 1689 (c. 5)] requires some notice of the taking, & according to the reasonable construction of the statute the notice ought to inform the tenant or person whose effects are taken by expressing what are the goods taken & also what is the amount of rent in arrear (PARKE, B.). —KERBY v. HARDING (1851), 6 Exch. 234; 20 L. J. Ex. 163; 15 Jur. 953; *sub nom.* KIRBY v. HARDING, 16 L. T. O. S. 504; 15 J. P. 294.

733. When rent due.—MOSS v. GALLIMORE, No. 182, *ante*.

734. Certainty of amount due—Whether material.]—GAMBRELL v. FALMOUTH (EARL), No. 729, *ante*.

735. — Malice alleged.—A count in case for distraining for more rent than was due, is bad, though it alleges it to have been done maliciously—for, an act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent.—STEVENSON v. NEWNHAM (1853), 13 C. B. 285; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.

Annotations:—*Mentd.* Jeffries v. G. W. Ry. (1856), 5 E. & B. 802; Monk v. Sharp (1857), 2 H. & N. 540; Young v. Billiter (1860), 8 H. L. Cas. 682; Hardman v. Booth (1863), 32 L. J. Ex. 105; Paull v. Best (1863), 3 B. & S. 537; Topping v. Keysell (1864), 16 C. B. N. S. 258; Marks v. Feldham (1869), 10 B. & S. 371; Clough v. L. & N. W. Ry. (1871), L. R. 7 Exch. 26; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* Moldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595; London & County Banking Co. v. London & River Plate Bank (1887), 4 T. L. R. 179; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393; Allen v. Flood, [1898] A. C. 1; Quinn v. Leathem, [1901] A. C. 495; Fitzroy v. Cave, [1905] 2 K. B. 364; Valentine v. Hyde, [1919] 2 Ch. 129.

(b) Inventory of Goods.

736. Sufficiency of inventory—Specific goods & general description.]—WAKEMAN v. LINDSEY, No. 723, *ante*.

737. — — — — —] —KERBY v. HARDING, No. 732, *ante*.

738. Goods not included—Distress made illegal—By sale.—Where A., the tenant of B., had paid all his rent, & got his landlord's receipt for it, but, fearing that his goods would be taken on legal process, agreed with his landlord to destroy the receipt, & that the latter should put in a distress for rent to protect the goods, & the landlord did so, & sold the goods, & kept the proceeds:—*Held*: (1) the distress was good as between A. & B., though void as against a third person, & A. could maintain no action against B. for it; (2) if B. sold some articles not included in the inventory of the distress, A. could maintain an action in respect of these articles.—SIMS v. TUFFS (1834), 6 O. & P. 207, N. P.

Annotations:—As to (1) *Distd.* Bowes v. Foster (1858), 2 H. & N. 779. *Refd.* Hale v. Bates (1858), 28 L. J. Q. B. 14. As to (2) *Expld.* Bowes v. Foster (1858), 2 H. & N. 779.

739. — — — — — By removal.—(1) *Semble*: it is necessary that goods seized under a distress for rent should be appraised by two sworn appraisers, under Distress Act, 1689 (c. 5), s. 2, notwithstanding the schedule of Distress (Costs) Act, 1817 (c. 93), directs that for an appraisement under £20, whether "by one broker or more," shall be charged only 6d. in the pound on the value of the goods.

(2) If the tenant, to save expense, requests that appraisers may not be called in, & in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity.

(3) If goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them.—BISHOP v. BRYANT (1834), 6 O. & P. 484, N. P.

740. — — — — — By seizure.—KERBY v. HARDING, No. 732, *ante*.

SECT. 11.—PROCEEDINGS BETWEEN SEIZURE AND SALE.

SUB-SECT. 1.—IMPOUNDING.

A. Nature and Effect.

741. Property impounded—In custody of the law—Cannot be attached at common law.]—HUMPHREY v. BARNS (1600), Cro. Eliz. 691; 78 E. R. 927.

742. — — — — — Not in possession of party impounding.—In trespass for taking three cows, a plea that the cows were the property of A.; that pltf. impounded them; that A. made replevin thereof in the Hundred Ct.; & that deft. took them by virtue of a precept granted by the said ct., & delivered them to the said A. & so justifying under a prescriptive right in the Hundred Ct. to hold pleas in replevin, is bad, as amounting to the general issue; for being by way of justification, it ought to confess & avoid the cause of action; but so far from even giving colour to pltf., it does not show that he had any possession in the cows at the time of the taking; but on the contrary, by saying they were impounded, shows they were in the custody of the law, & not in possession of the party.—HALLETT v. BYRT (1697), Carth. 380; 1 Ld. Raym. 218; 5 Mod. Rep. 248; 12 Mod.

PART II. SECT. 11, SUB-SECT. 1.—A.

b. Property impounded—Cannot be recovered from purchaser at public

auction.—The owner of an animal wrongfully impounded cannot recover against the purchaser at a sale by public auction, where the sale has been

regularly & properly conducted. DODGE v. BAKER (1892), 24 N. S. R. 552.—CAN.

Sect. 11.—Proceedings between seizure and sale : Sub-sect. 1, A. & B. (a) & (b), C., D. (a) & (b), E. & F.; sub-sect. 2.]

Rep. 120 ; 3 Salk. 272 ; Skin. 674 ; 90 E. R. 82 ; *sub nom.* HOLLER v. BUSH, 1 Salk. 394.

Annotations :—Mentd. Wilson v. Hobday (1815), 4 M. & S. 120 ; Thompson v. Farden 1840, 1 Man. & G. 535

B. On the Premises.

(a) What Constitutes Impounding.

See Distress Act, 1689 (c. 5) ; Distress for Rent Act, 1737 (c. 19).

743. Goods—May be left undisturbed—With consent of tenant.]—WASHBORN v. BLACK (1774), 11 East, 405, n. ; 103 E. R. 1060, N. P.

Annotations :—Consd. Tennant v. Field (1857), 27 L. J. Q. B. 33. *Refd.* Thomas v. Harries (1840), 1 Man. & G. 695 ; Woods v. Durrant (1846), 16 M. & W. 149.

744. ———.]—TENNANT v. FIELD, No. 601, *ante.*

745. ———.]—JOHNSON v. UPHAM, No. 605, *ante.*

746. ——— Locking up not necessary—Distress for Rent Act, 1737 (c. 19), s. 10.]—JOHNSON v. UPHAM, No. 605, *ante.*

747. ——— Man in possession not necessary—Constructive possession.]—SWANN v. FALMOUTH (EARL), No. 707, *ante.*

748. ———.]—JONES v. BIERNSTEIN, No. 1065, *post.*

749. ——— Distress for Rates—Goods not removed within reasonable time.]—A constable having entered the house of D. & there distrained the goods of a lodger, placed a person in possession of the goods in the room in which they were, saying that, unless the money were paid, he should remain there five days ; he remained in possession eight hours, until the lodger paid the amount to redeem the goods :—*Held* : this was not an impounding, but it was a question for the jury whether he had remained an unreasonable time for the removal of the goods under the warrant.—PEPPERCORN v. HOFMAN (1842), 9 M. & W. 618 ; 12 L. J. Ex. 270 ; 6 J. P. 137 ; 152 E. R. 261.

Annotation :—Distd. Tennant v. Field (1857), 6 W. R. 11.

750. Cattle—Open field sufficient—Locking of gate not necessary—Notice to tenant.]—THOMAS v. HARRIES, No. 599, *ante.*

751. ———.]—Pltf. impounded the cattle of S. for rent arrear. Deft. had before claimed the cattle as his own, denying the title of S. Two days after the distress the cattle were missing, & were found in deft.'s barn. Pltf. brought his action for pound-breach under Distress Act, 1689 (c. 5), & deft. pleaded not guilty, with " by statute " in the margin of the plea :—*Held* : the statute was not a penal enactment under 21 Ja. 1, c. 4, so as to let deft. into any matters of defence on the issue of " not guilty " ; the rent due was admitted, & the distraint of the cattle under it, & their impounding, & the legal sufficiency of the pound ; & the only questions for the jury under the issue " Not guilty " were, whether the pound was broken by any other than the cattle themselves, & whether, if so, deft. broke it. *Semle* : an open field is a pound sufficient at law in which to distrain cattle for rent arrears.—CASTLEMAN v. HICKS (1842), Car. & M. 266 ; 2 Mood. & R. 422, N. P.

PART II. SECT. 11, SUB-SECT. 1.— **B. (a).**

c. Goods—In custody of wife of distressee.]—A piano, hired by deft. M. to A. was seized by A.'s landlord for rent due him, & was placed in the

custody of A.'s wife, with instructions not to allow it to be removed :—*Held* : this was a sufficient compliance with the requirements of the law.

There was evidence that, after the seizure & impounding, & while the piano was in the custody of A.'s wife,

(b) Tenant's Right of Occupancy.

752. Expulsion from premises—Not permissible.]—Trespass lies against a landlord who on making a distress for rent turned pltf.'s family out of possession & kept the premises on which he had impounded the distress.

If the question had depended merely on the extent for which the distress was declared to be taken at the time, it might have admitted of a different consideration ; for certainly the party would not have been concluded by that declaration ; for a person may distrain for one thing & justify for another (LORD KENYON, C.J.).—*ETHERTON v. POPPLEWELL* (1800), 1 East, 139 ; 102 E. R. 55.

Annotations :—Distd. Hartley v. Moxham (1842), 12 L. J. Q. B. 41. *Refd.* Smith v. Goodwin (1833), 4 B. & Ad. 413.

753. ———.]—A tenant being in arrear for rent of a cottage, his landlord distrained the goods there, & locked up the cottage ; & after selling the goods, kept possession, the tenant saying he would " have done with it " :—*Held* : the landlord was justified in impounding the distress on the premises, & in locking up the cottage to secure the distress, but that he could not avail himself of the tenant's license to take possession, unless he specially pleaded it.—*COX v. PAINTER* (1837), 7 C. & P. 767, N. P. ; *subsequent proceedings*, 6 Ad. & El. 491.

Annotation :—Mentd. Farwig v. Cockerton (1838), 3 M. & W. 169.

754. ———.]—WALKER v. WOOLCOTT (1838), 8 C. & P. 352 ; 2 J. P. 56.

755. ——— Unless necessary for securing distress.]—Trespass for breaking & entering pltf.'s dwelling-house, locking the doors, & expelling pltf. Plea justifying all trespasses except the expulsion under a distress for rent, alleging that deft. kept & impounded it in the dwelling-house, etc., & in order safely to impound & keep it, necessarily locked & fastened the doors of the dwelling-house, & afterwards caused the goods duly to be appraised & duly sold in satisfaction of the rent & costs of distress & sale :—*Held* : the plea should have shown that the house, or that part of it of which the doors were locked, was the most fit & convenient place for securing the distress, or the tenant might be improperly kept out of possession.—*WOODS v. DURRANT* (1846), 16 M. & W. 149 ; 16 L. J. Ex. 313 ; 153 E. R. 1137.

Annotations :—Refd. Tennant v. Field (1857), 27 L. J. Q. B. 33. *Mentd.* Scott v. Denton (1906), 71 J. P. 66.

756. ———.]—(1) An action may lie for an excessive distress, although the sale, less the expenses, does not realise the rent due.

(2) *Semle* : the distrainer cannot lock up the whole of the premises distrained upon so as to exclude the tenant.

(3) Where the landlord of a warehouse, let with heavy weaving machines, had distrained property to an excessive amount & locked up the warehouse as to keep the tenant excluded, & the proceeds of the sale, less the expenses, did not equal the amount of the rent due, but there was strong evidence that the value was ten times the amount, & the tenant sued both in trespass & for an excessive distress :—*Held* : pltf., on both counts, was entitled to damages.—*SMITH v. ASHFORTH* (1860), 29 L. J. Ex. 259.

Annotation :—Refd. Lehain v. Philpot (1875), 39 J. P. 584.

A.'s family continued the use of it as before :—*Held* : this was not such a misuse of the property seized as to avoid the distress, or to entitle M. to resume possession.—*DIMOCK v. MILLER* (1897), 30 N. S. R. 74.—**CAN.**

2 *Premises.*

See 1 & 2 Ph. & M. c. 12.

757. Distance cattle may be driven.]—BERDSLEY v. PILKINGTON (1588), Gouldsb. 100; 75 E. R. 1023.

Annotation :—**Apprvd.** Coaker v. Willcocks, [1911] 2 K. B. 124.

758. ———.]—By sect. 1 of 1 & 2 Ph. & M., c. 12, it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is taken, except it be to a pound overt within the said shire not above three miles distant from the place where the distress is taken:—*Held*: the words “not above three miles,” etc., do not qualify the distrainer’s right to drive the distress to any pound within the hundred, rape, etc.—**COAKER v. WILLCOCKS**, [1911] 2 K. B. 124; 80 L. J. K. B. 1026; 104 L. T. 769; 27 T. L. R. 357, C. A.

759. Liability of persons removing cattle.]—**PARTRIDGE v. NAYLOR** (1601), Gouldsb. 145; Cro. Eliz. 480; Moore, K. B. 453; 75 E. R. 1054; *sub nom.* **PATRIDGE v. EMSON**, Noy, 62.

Annotations :—**Mentd.** Child v. Sands (1693), 1 Salk. 31; R. v. King (1711), 1 Salk. 182; Hardyman v. Whitaker (1748), 2 East, 573, n.

760. Postponement of Payments Act, 1914 (c. 11)—Effect of.]—Though a landlord who had levied a distress for rent before the date of the proclamation of a moratorium under above Act, but who had not sold the goods before that date, was not entitled to sell the goods during the currency of the moratorium, yet he was entitled to remove the goods from the demised premises for the purpose of securing his possession of the goods.—**SHOTTLAND v. CABINS, LTD.** (1915), 31 T. L. R. 297.

D. Duties and Liabilities of Person Impounding.

(a) *Injury or Death of Distress.*

761. Whether distrainer liable — For death of distress.]—**HILL v. PRIDEAUX** (1595), Cro. Eliz. 384; 78 E. R. 630.

Annotation :—**Mentd.** Lodie v. Arnold (1697), 2 Salk. 458.

—**Cruelty to impounded animal.]**—See **ANIMALS**, Vol. II., p. 288, No. 589.

(b) *Use of Distress.*

762. Milking cows.]—**CHAMBERLAYN’S CASE** (1590), 1 Leon. 220; 74 E. R. 202.

Annotation :—**Refd.** Dargan v. Davies (1877), 2 Q. B. D. 118.

763. ———.]—**BAGSHAWE v. GOWARD** (1607), Cro. Jac. 147; Noy, 119; Yelv. 96; 79 E. R. 129.

Annotations :—**Refd.** Lawton v. Ward (1696), 1 Ld. Raym. 75; Vaspor v. Edwards (1701), 12 Mod. Rep. 658; R. v. Cotton (1751), Park. 112; Gates v. Bayley (1766), 2 Wils. 313; Dye v. Leatherdale & Simpson (1769), 3 Wils. 20; Atkinson v. Teasdale (1772), 2 Wm. Bl. 817; Sayre v. Rochford (1777), 2 Wm. Bl. 1165; Clark v. Gilbert (1835), 2 Scott, 520.

764. Working horses.]—**CHAMBERLAYN’S CASE** (1590), 1 Leon. 220; 74 E. R. 202.

Annotation :—**Mentd.** Dargan v. Davies (1877), 2 Q. B. D. 118.

765. ———.]—**BAGSHAWE v. GOWARD** (1607), Cro. Jac. 147; Yelv. 96; Noy, 119; 79 E. R. 129.

Annotations :—**Refd.** Sayre v. Rochford, (1777), 2 Wm. Bl. 1165; Clark v. Gilbert (1835), 2 Scott, 520. **Mentd.** Lawton v. Ward (1696), 1 Ld. Raym. 75; Vaspor v.

Edwards (1701), 12 Mod. Rep. 658; R. v. Cotton (1751), Park. 112; Gates v. Bayley (1766), 2 Wils. 313; Dye v. Leatherdale & Simpson (1769), 3 Wils. 20; Atkinson v. Teasdale (1772), 2 Wm. Bl. 817.

766. ——— Owner may prevent.]—**SMITH v. WRIGHT**, No. 2, *ante*.

767. For owner’s benefit only—Tanning hides.]—If deft. justifies distraining a hide upon a prescription for the toll of it, & it is replied that he tanned the hide after the distress, a rejoinder that it was to prevent its rotting, is a departure; & such a prescription is void.

One may in some cases meddle with & use a distress, where it is for the owner’s benefit . . . but here this tanning is not for his benefit (*per* CUR.).—**DUNCOMB v. REEVE & GREEN** (1600), Cro. Eliz. 783; 78 E. R. 1013.

Annotations :—**Refd.** Vaspor v. Edwards (1701), 12 Mod. Rep. 658; R. v. Cotton (1751), Park. 112.

768. ——— Beer drawn from barrels.]—**DOD v. MONGER**, No. 1045, *post*.

E. Tender of Rent, etc.

Effect of—Before & after impounding.] See Sect. 9, sub-sect. 6, *ante*.

F. Abandonment of the Distress.

See Sect. 15, *post*.

SUB-SECT. 2.—APPRAISEMENT.

See Law of Distress Amendment Act, 1888 (c. 21), s. 5.

769. Primâ facie evidence of value.]—The appraisement of goods distrained made by two sworn appraisers under 2 Will. & Mar., sess. 1, c. 5, is only *primâ facie* evidence of the value of the goods.—**COOK v. CORBERT** (1875), 24 W. R. 181, C. A.

770. Appraisers—Who may act as—Not distrainer.]—**ANDREWS v. RUSSEL** (1786), Bull. N. P. 7th ed. 81 d.

771. ———.]—An appraisement of a distress by the person who makes it is irregular.—**WESTWOOD v. COWNE** (1816), 1 Stark. 172, N. P. *Annotation* :—**Mentd.** Ratcliffe v. Evans, [1892] 2 Q. B. 524.

772. ———.]—(1) A party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover.

(2) Distress Act, 1689 (c. 5), to protect persons distrained on from an improvident or corrupt sale of goods, has provided that the person making the distress shall cause the goods to be appraised by two sworn brokers. That person must not appoint himself one of these brokers, for by so doing he defeats the object of the legislature, which was, that these brokers should be a check on him (**BEST, C.J.**).—**LYON v. WELDON** (1824), 2 Bing. 334; 9 Moore, C. P. 629; 3 L. J. O. S. C. P. 27; 130 E. R. 334.

Annotations :—**As to** (1) **Refd.** King v. England (1864), 4 B. & S. 782. **Mentd.** Fawcett v. Fearne (1844), 6 Q. B. 20; Load v. Green (1846), 15 M. & W. 216; *Re* Atkinson (1851), Fonbl. 271; The Ruby (1900), 83 L. T. 438.

773. ——— Agent of landlord—Effect on sale.]—If a person who has acted as the agent of a landlord in the matter of a distress is one of the appraisers, a sale of the goods distrained is

PART II. SECT. 11, SUB-SECT. 2.

d. Appraisers—By whom sworn.]—2 Will. & Mary, sess. 1, c. 5, s. 2, is not in force in the colony, not because its provisions are in their nature inapplicable, but because machinery for its application is wanting. But the statute may be applicable to the

colony so far as to legalise the sale of goods distrained for rent, in the absence of a valuation by an appraiser sworn by one of the officers named in the statute, notwithstanding that it is inoperative as regards the disposal of the surplus; which by sect. 2 is to be handed to “the sheriff or under-sheriff of the county, or constable of

the hundred, parish, or place, when such distress shall be taken.”—**RYAN v. HOWELL** (1848), 1 Legge, 470.—**AUS.**

e. ——— Sheriff’s return referring to swearing of appraisers—Sufficiency of.]—When the appraisement shows that the appraisers were sworn, & the sheriff’s return refers to the appraisers’ warrant, the swearing of the

Sect. 11.—Proceedings between seizure and sale:
Sub-sect. 2. Sect. 12: Sub-sects. 1, 2 & 3, A., B. & C. (a).]

irregular; & in an action for such sale the measure of damages is the full value of the goods to the tenant at the time of the distress, less the amount due for rent.—*ROCKE v. HILLS* (1887), 3 T. L. R. 298.

774. ———— *By consent of tenant.*—*BISHOP v. BRYANT*, No. 739, *ante*.

775. ———— *Necessity for two persons to act as—Distress Act, 1689 (c. 5), s. 2—Distress (Costs) Act, 1817 (c. 93).*—*BISHOP v. BRYANT*, No. 739, *ante*.

776. ———— *Although the rent, for which goods are distrained, does not exceed £20, they must be appraised by two appraisers, under Distress Act, 1689 (c. 5), s. 2, notwithstanding Distress (Costs) Act, 1817 (c. 93), the schedule to which prescribes the sum to be for appraisement, "whether by one broker or more."*—*ALLEN v. FLICKER* (1839), 10 Ad. & El. 639; 4 Per. & Dav. 735; 113 E. R. 243; *sub nom.* *ALLEN v. TRICKER*, 9 L. J. Q. B. 42; 3 Jur. 1029.

Annotation:—Mentd. Panagotis v. S.S. Pontiac, [1912] 1 K. B. 74.

777. ———— *Qualifications of—Must be reasonably competent—Not necessarily professional.*—(1) A rick of wheat of the value of £62 was seized as a distress for £39, arrears of a rentcharge under Tithe Act, 1836 (c. 71). It being doubtful, in point of law, whether the straw could be sold, inasmuch as the tenant was under covenant with his landlord to consume it on the farm, the tithe rentcharge owner sold the wheat only, the buyer to thresh it on the premises, & leave the straw; the value of the wheat was £42, & that of the straw £20:—*Held*: the tithe rentcharge owner was justified in seizing the entire rick, &, although there was other property on the premises, the distress was not excessive.

(2) The "sworn appraisers" by whom the distress is valued, must be persons reasonably competent, but need not be professional appraisers.—*RODEN v. EYTON* (1848), 6 C. B. 427; 18 L. J. C. P. 1; 12 L. T. O. S. 125; 12 J. P. 761; 12 Jur. 921; 136 E. R. 1315.

Annotation:—As to (1) Refd. Ridgway v. Stafford (1851), 6 Exch. 404.

778. ———— *By whom sworn.*—*WALTER v. RUMBALL*, No. 719, *ante*.

Sale without appraisement.—*See* Nos. 1291–1293, *post*.

appraisers sufficiently appears.—*MERCHANTS BANK v. STEEL CO. OF CANADA, LTD.* (1884), 5 R. & G. 258.—*CAN.*

f. ———— *Want of swearing—Irregular.*—Under 11 Geo. 2, c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., sess. 1, c. 5, is only an irregularity, & the tenant can only recover such special damage as he can show to have resulted from it.—*MCDONALD v. FRASER* (1904), 14 Man. L. R. 582.—*CAN.*

g. ———— *Illegal.*—A sale of goods upon a distress for non-payment of rent is illegal under 2 Will. & Mar. c. 5, s. 2, if there has not been an appraisement of the goods by two sworn appraisers, & the tenant will be entitled to recover the real value of the goods: i.e. their full value to him, less the rent & expenses.—*DEWAR v. CLEMENTS* (1910), 20 Man. L. R. —*CAN.*

PART II. SECT. 12, SUB-SECT. 3.—A.

779 i. *Whether goods distrained can be taken in execution.*—A landlord cannot distrain goods held under execution & in custody of the law.—

GRANT v. GRANT (1883), 10 P. R. 40.—*CAN.*

779 ii. ———— *There is nothing in Assessment Act, R. S. O. 1897 (c. 224), to warrant a municipal tax collector seizing for arrears of taxes, goods, which being under distraint by a landlord, are in custodia legis; & in this case subsequent rent having accrued due during the joint possession of the landlord & the collector, the landlord was also held to have priority in respect to another distress made by him for such subsequent rent.*—*KINGSTON CITY v. ROGERS* (1899), 31 O. R. 119.—*CAN.*

779 iii. ———— *Where the landlord distrained for six months' rent while the goods were in the tenant's possession, & afterwards, the goods being in the hands of the bailiff, an attachment in insolvency issued against the tenant:—Held: the assignee was not entitled to the goods without paying or tendering the rent, & that not having done so, the landlord was entitled to proceed & sell.*—*MCEDWARDS v. MCLEAN* (1878), 43 U. C. R. 454.—*CAN.*

782 i. *Goods taken in execution can-*

SECT. 12.—EFFECT OF BANKRUPTCY, WINDING UP, ETC.

SUB-SECT. 1.—BANKRUPT TENANT.

As to priority of payments in bankruptcy.—*See* *BANKRUPTCY*, Vol. IV., pp. 480–81, Nos. 4329–4334.

As to effect of order of discharge.—*See* *BANKRUPTCY*, Vol. IV., p. 588, Nos. 5380, 5381.

As to property available for distribution amongst creditors.—*See* *BANKRUPTCY*, Vol. V., p. 750, No. 6470; p. 766, Nos. 6585–7.

As to effect of bankruptcy on landlord's right to distrain.—*See* *BANKRUPTCY*, Vol. V., pp. 956–964, Nos. 7838–7893.

As to effect of subsequent bankruptcy on previous seizure.—*See* *BANKRUPTCY*, Vol. V., p. 1094, No. 8939.

As to whether distress levied before commencement of bankruptcy.—*See* *BANKRUPTCY*, Vol. V., p. 646, No. 5794.

As to right of landlord on succeeding in an action of replevin to recover proceeds of goods sold by assignees.—*See* *BANKRUPTCY*, Vol. V., p. 992, No. 8107.

SUB-SECT. 2.—COMPANY IN LIQUIDATION.

See *COMPANIES*, Vol. X., pp. 967, 968, 1014, Nos. 6642–6667, 7040–7043.

SUB-SECT. 3.—EXECUTION AGAINST TENANT.

A. In General.

See *Landlord & Tenant Act, 1709 (c. 14); County Courts Act, 1888 (c. 43), s. 160; Bankruptcy Act, 1914 (c. 59), s. 35 (2).*

779. *Whether goods distrained can be taken in execution.*—*ANON.* (1542), Bro. N. C. 149; 73 E. R. 912.

780. ———— *No person left in possession.*—*SWANN v. FALMOUTH (EARL)*, No. 707, *ante*.

781. ———— *Proof of legality of distress.*—Where an execution is put in on goods already seized under a warrant of distress for rent. *Qu.*: whether in an interpleader issue to try the question whether such goods were liable to be taken in execution, the landlord may rest his case simply on the proof of a distress *de facto*, or is bound to show one *de jure*.—*JONES v. SIMMONS* (1848), 10 L. T. O. S. 89, 396; 12 J. P. 198.

782. *Goods taken in execution cannot be distrained.*—*EATON v. SOUTHEY*, No. 466, *ante*.

not be distrained.—Under a landlord's distress warrant the county ct. bailiff purported to seize a tenant's crops. The bailiff had previously seized the crops under execution & at the time of the distress was already in possession on behalf of the execution creditors. From the grain there was realised & paid the landlord's claim for rent & other preferential claims, there being nothing left to apply on the executions. In an action by the tenant against the landlords for alleged illegal & excessive distress:—*Held*: as goods in the custody of the law are not distrainable for rent, & as at the time of the purported distress the grain was legally in the bailiffs' custody as county ct. bailiff, & as in the distress warrant the bailiff was "prohibited from distraining on any property not legally liable to distress for rent," the landlords would not be responsible for the bailiff's act of distress unless with knowledge they ratified what he had done; the subsequent receipt of the rent did not amount to ratification, as under the County Cts. Act it is the duty of the bailiff to seize under executions in his hands not only sufficient to cover the amount men-

783. — .] — *LANE v. CROCKETT*, No. 824, *post*.

784. — .] — *TAYLOR v. LANYON*, No. 793, *post*.

785. — .] — Landlord & Tenant Act, 1709 (c. 14), makes it unlawful to remove goods taken in execution without paying one year's arrears of rent to the landlord; but it does not invalidate the execution itself.

Goods so taken are *in custodia legis* & cannot be distrained on by the landlord for the year's rent. They are equally *in custodia legis* for this purpose whether they are in the hands of the sheriff or of his vendee.—*WHARTON v. NAYLOR* (1848), 6 Dow. & L. 136; 12 Q. B. 673; 17 L. J. Q. B. 278; 12 L. T. O. S. 43; 12 Jur. 894; 116 E. R. 1023.

Annotations:—*Refd.* *Re Davis, Ex p. Pollen's Trustees* (1885), 55 L. J. Q. B. 217; *Re Driver, Ex p. Official Receiver* (1899), 80 L. T. 840; *Re Mackenzie, Ex p. Hertfordshire Sheriff*, [1899] 2 Q. B. 566.

786. — .]—*Re MACKENZIE, Ex p. HERTFORDSHIRE (SHERIFF)*, No. 796, *post*.

— **Goods not immediately removable—Growing crops.**—*See* Nos. 864, 866, *post*.

Execution of county court judgments.—*See* COUNTY COURTS, Vol. XIII., pp. 515, 516, 517, Nos. 647, 662–665.

B. Priority of Crown.

787. Extent or otherwise for Crown debts.] — *BRISTOW'S (BP.) CASE* (1584), 3 Leon. 113; 74 E. R. 575.

Annotation:—*Refd.* *Lloyd v. Davies* (1848), 2 Exch. 103.

788. Priority if goods unsold—Extent.]—Extent comes after a distress for rent, but before a sale of the goods.—*R. v. DALE* (1719), Bunb. 42; 145 E. R. 589.

Annotations:—*Appld.* *R. v. Cotton* (1751), Park. 112. *Consd.* *Giles v. Grover* (1832), 9 Bing. 128.

789. — .]—(1) An immediate extent issued against the King's debtor, tested after a distress for rent justly due to the landlord, with notice to the tenant being the King's debtor, & appraisal of the goods & chattels, but before sale, shall prevail against the distress.

(2) Distrainer neither gains a general nor special property, nor even a possession, in the things distrained; cannot maintain trover or trespass; for they are in custody of law by act of distrainer (*PARKER, C.B.*).—*R. v. COTTON* (1751), Park. 112; 2 Ves. Sen. 288; 145 E. R. 729.

Annotations:—*As to* (1) *Consd.* *Farr v. Newman* (1792), 4 Term Rep. 621; *R. v. Wells* (1807), 16 East. 278. *Appld.* *Giles v. Grover* (1832), 9 Bing. 128. *Refd.* *Cooper v. Chitty & Blackiston* (1756), 1 Burr. 20; *Uppom v. Sumner* (1779), 2 Wm. Bl. 1294; *Bradyll v. Ball* (1785), 1 Bro. C. C. 427; *Rorke v. Dayrell* (1791), 4 Term Rep.

tioned therein, but also to discharge any claim for rent & thereafter to sell & apply the proceeds first in payment of the landlord & next in satisfaction of the executions; & it should be assumed that in realising & paying the landlords' claim the bailiff was acting in his public capacity as county ct. bailiff; & therefore the tenant's claim against the landlords failed.—*McCLOY v. COX*, [1921] 2 W. W. R. 790.—**CAN.**

782 ii. — .]—Under a lease from Feb. 1 to Dec. 1 at a rental for the term payable on Dec. 1, the rent is not in arrears & there is no right to distrain therefor before the morning of Dec. 2. 8 Anne, c. 14, s. 1, which provides that a sheriff who has seized a tenant's goods under execution must pay the landlord arrears of rent not exceeding one year's rent cannot be invoked unless there is an actual subsisting tenancy. Where a tenant's goods are seized under execution prior to any rent becoming due the landlord has no

claim under 8 Anne, c. 14, s. 1. Where a landlord had an execution against his tenant & by virtue thereof had taken proceedings for sale of goods of the tenant which had been seized under execution:—*Held*: he had elected to pursue his remedy as an execution creditor & under Creditors' Relief Act had done so on behalf of all execution creditors & therefore had assented to the sheriff's holding the goods under writs of execution & that it was not open to him to claim a right of distress under Ordinance Respecting Distress for Rent, s. 4, even should the effect of that sect. be to alter the common law in regard to the right of distress when goods are *in custodia legis*. In an interpleader issue between a landlord & execution creditors of the tenant the landlord was held not entitled to claim both for priority for rent & to share as an execution creditor under Creditors' Relief Act.—*HONENS v. INTERNATIONAL HARVESTER CO.*, [1921] 1

402; *R. v. Leo* (1819), 6 Price, 369; *Swain v. Morland* (1819), 1 Brod. & Bing. 370; *R. v. Edwards* (1853), 9 Exch. 32; *Lehain v. Philpott* (1875), L. R. 10 Exch. 212; *Secretary of State for War v. Wynne* (1905), 75 L. J. K. B. 25. *As to* (2) *Consd.* *Giles v. Grover* (1832), 9 Bing. 128. *Refd.* *Whitley v. Roberts* (1825), M'Cle. & Yo. 107. *Generally, Mentd.* *Carlisle v. Whaley* (1867), L. R. 2 H. L. 391.

790. — .]—**Distress.**—Where claims of the Crown & of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completely executed by actual sale.—*A.-G. v. LEONARD* (1888), 38 Ch. D. 622; 57 L. J. Ch. 860; 59 L. T. 624; 37 W. R. 24; 4 T. L. R. 479.

Annotations:—*Refd.* *Secretary of State for War v. Wynne* (1905), 93 L. T. 797. *Mentd.* *A.-G. v. Albany Hotel Co.*, [1896] 2 Ch. 696.

Priority of Crown debts.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 581, Nos. 830 *et seq.*

Priority of extents.]—*See* CROWN PRACTICE, Vol. XVI., p. 225, Nos. 164 *et seq.*

C. Restrictions on Removal of Goods by Sheriff.

(a) In General.

See Landlord & Tenant Act, 1709 (c. 14).

791. General rule.]—Where a landlord claims rent, upon an execution against his tenant's goods, the ct. will not relieve him upon motion, unless he makes out a full & clear case.—*COOK v. COOK* (1738), Andr. 217; 95 E. R. 369.

792. — .]—**Restrictions applicable to sequestration.]**—Under a sequestration, the landlord is entitled to be paid arrears of rent.—*DIXON v. SMITH* (1818), 1 Swan. 457; 36 E. R. 464, L. C.

Annotations:—*Refd.* *Brandling v. Barrington* (1827), 6 B. & C. 467; *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 125.

793. — .]—A landlord who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 Geo. 4, c. 57, s. 34, cannot retain against the assignees the amount of a year's rent under Landlord & Tenant Act, 1709 (c. 14).

Landlord & Tenant Act, 1709 (c. 14), was passed to protect the landlord against frauds which might be committed by his tenants, particularly by these colluding with creditors to issue writs of execution: for property so in the custody of the law could not be distrained, & the judgment creditor by keeping possession for a length of time, might seriously affect the interests of the landlord (*TINDAL, C.J.*).

W. W. R. 820.—**CAN.**

782 iii. — .]—Goods seized under a warrant issued under Absconding Debtors Act, Consol. Stat. c. 44, against the tenant, cannot be distrained for rent.—*MATHER v. HARDING* (1892), 31 N. B. R. 640.—**CAN.**

782 iv. — .]—Pltf. caused an attachment to be issued under Absent or Absconding Debtors Act, to recover a balance due by deft. for goods sold & delivered, & for rent & interest. Subsequent to the issue of the attachment he distrained on deft.'s furniture for the rent. A motion made at chambers to set aside the attachment, at the instance of a subsequent attachor, was refused, & the whole of the order dismissing the application having been appealed from:—*Held*: by making the distress, pltf. had lost his right of action for the rent, & for that part of the claim, could not hold his attachment.—*GRAY v. CURRY* (1890), 22 N. S. R. 262.—**CAN.**

Sect. 12.—Effect of bankruptcy, winding up, etc. : Sub-sect. 3, C. (a), (b) & (c).]

—TAYLOR v. LANYON (1830), 6 Bing. 536 ; 4 Moo. & P. 316 ; 8 L. J. O. S. C. P. 180 ; 130 E. R. 1387.

794. ——.]—WHARTON v. NAYLOR, No. 785, *ante*.

795. ——.]—(1) In an action under Landlord & Tenant Act, 1709 (c. 14), against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is *prima facie* the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due.

(2) The law appears to stand thus. When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now, of course, the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord & proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, & may either return "*nulla bona*" & withdraw from possession, or may himself pay the rent, looking to the execution creditor for reimbursement, & proceed to sell. This is the position of the sheriff under the Act (LORD ESHER, M.R.). —THOMAS v. MIREHOUSE (1887), 19 Q. B. D. 563 ; 56 L. J. Q. B. 653 ; 36 W. R. 104 ; 3 T. L. R. 804, D. C.

Annotation :—As to (1) & (2) Rejd. Re Mackenzie, Ex p. Hertfordshire Sheriff, [1899] 2 Q. B. 566.

796. ——.]—(1) A tenant's goods, seized by a sheriff under a writ of execution, could not be distrained for rent. They were said to be *in custodia legis* & protected from seizure by the landlord : nor could he, before Landlord & Tenant Act, 1709 (c. 14), by giving the sheriff notice or otherwise, obtain payment by the sheriff out of the moneys realised by him by the sale of the goods seized (*per CUR.*).

(2) The law in this respect was, however, altered by sect. 1 of above Act. This statute did not give the landlord a right to distrain, but it prohibited the removal of the goods seized by the sheriff until the landlord's rent in arrear, not exceeding one year's rent, had been paid by the execution creditor (*per CUR.*).

(3) The Act was so worded as to raise the question whether it imposed upon the sheriff the duty of ascertaining whether any rent was in arrear or not before allowing the goods seized to be removed ; but it was early decided that it was not the sheriff's duty to inquire, & that he was under no liability to the landlord for not keeping the goods unless informed that rent was due (*per CUR.*).

(4) But unless the execution creditor or the tenant paid the landlord his rent in arrear, not exceeding one year's arrears, the Act might produce a deadlock. If the sheriff sold the goods & they were removed, he was liable to an action by the landlord. So long as the landlord was unpaid, the sheriff could not be compelled to sell the goods ; & an action by an execution creditor for

not selling could not be sustained against him. The sheriff might retain possession ; but when it becomes plain that no one would pay the landlord, the sheriff could withdraw & return *nulla bona* to the writ (*per CUR.*).

(5) As soon as he withdrew the landlord could distrain for his whole rent in arrear (*per CUR.*).—*Re MACKENZIE, Ex p. HERTFORDSHIRE (SHERIFF)*, [1899] 2 Q. B. 566 ; 68 L. J. Q. B. 1003 ; 81 L. T. 214 ; 15 T. L. R. 526 ; 43 Sol. Jo. 704 ; 6 Mans. 413, C. A.

Annotations :—As to (1) Rejd. Re Driver, Ex p. Official Receiver (1899), 80 L. T. 840. As to (2) Consd. Re Craig, Ex p. Hinchcliffe, [1916] 2 K. B. 497. Rejd. Re British Salicylates, [1919] 2 Ch. 155. As to (4) Consd. Re British Salicylates, [1919] 2 Ch. 155.

797. No right of removal—Before payment of year's rent.]—The sheriff is not bound to take the goods in execution unless the party at whose suit the execution is sued out shall, before the removal of such goods, pay the landlord a year's rent. When the year's rent is paid, the sheriff is authorised to remove the goods, but not before. By removing the goods before the payment of such rent, he subjects himself to an action by the landlord (LORD TENTERDEN, C.J.).—CALVERT v. JOLIFFE (1831), 2 B. & Ad. 418 ; 9 L. J. O. S. K. B. 240 ; 109 E. R. 1198.

Annotation :—Consd. Cocker v. Musgrove (1846), 9 Q. B. 223.

798. No right of sale—Sheriff in possession.]—The true construction of Landlord & Tenant Act, 1709 (c. 14), s. 1, is, that where the sheriff in possession under a *fi. fa.* receives notice, as well as the execution creditor, of rent being due, not exceeding one year, it is not his duty to proceed to a sale, unless the execution creditor first of all pays the rent to the landlord, whatever may be the supposed value of the goods seized.—(COCKER v. MUSGROVE (1846), 9 Q. B. 223 ; 1 New Pract. Cas. 419 ; 15 L. J. Q. B. 365 ; 7 L. T. O. S. 254 ; 10 Jur. 922.

Annotations :—Rejd. White v. Binstead (1853), 13 C. B. 304 ; Levy v. Hale (1859), 6 Jur. N. S. 702 ; Re Driver, Ex p. Official Receiver (1899), 80 L. T. 840 ; Re Mackenzie, Ex p. Hertfordshire Sheriff, [1899] 2 Q. B. 566.

799. Goods sold by sheriff—Duty to refund unsatisfied arrears to landlord.]—DUCK v. BRADDYLL, No. 317, *ante*.

800. —. Landlord's right to distrain not affected.]—SMALIMAN v. POLLARD, No. 852, *post*.

801. Effect of Interpleader Act, 1831 (c. 58) — Order made after seizure — Before removal.]—Where the sheriff seizes goods under a writ of *fi. fa.*, & before removal of the goods an interpleader order is obtained, for the purpose of ascertaining the ownership of the goods, the sheriff ought not to pay the rent due to the landlord.

Landlord & Tenant Act, 1709 (c. 14), s. 1, was intended to apply to cases only where the landlord has lost his chances of distraining upon goods by their removal ; & Interpleader Act, 1831 (c. 58), does not affect this.—ANON. (1853), 20 L. T. O. S. 238.

See, generally, INTERPLEADER.

802. Applicable to what goods — Only those taken in execution judgment.]—Where certain goods upon a farm were seized by virtue of a writ of *pone per vadios* against the occupier, issued out of the Court of Pleas at Durham, & were afterwards, upon his default, forfeited to the bishop, who, by writ to the sheriff, ordered them to be assigned to the party at whose suit the *pone* issued, in satisfaction of his damages :—*Held* : the sheriff was not bound to pay the landlord half a year's rent then due, before he removed the goods.

Landlord & Tenant Act, 1709 (c. 14), speaks only of goods taken by virtue of any execution

& the plain sense of the words is confined to execution on judgments (LORD TENTERDEN, C.J.).—**BRANDLING v. BARRINGTON** (1827), 6 B. & C. 467; 9 Dow. & Ry. K. B. 609; 5 L. J. O. S. K. B. 181; 108 E. R. 523.

Annotations:—**Mentd.** *Hudson v. Parker* (1844), 1 Rob. Eccl. 14; *Floyer v. Bankes* (1863), 32 L. J. Ch. 610.

(b) *Tenancy must be Subsisting.*

See Landlord & Tenant Act, 1709 (c. 14).

803. General rule.—The sheriff had no right to allow to the landlord a year's rent under Landlord & Tenant Act, 1709 (c. 14), that statute contemplating an existing tenancy which in this case must be taken to have ceased.—**HODGSON v. GASCOIGNE** (1821), 5 B. & Ald. 88; 106 E. R. 1126.

Annotations:—**Refd.** *Cox v. Leigh* (1874), 43 L. J. Q. B. 123. **Mentd.** *Mills v. Oddy* (1835), 5 Tyr. 571; *Re Medley, Ex p. Barnes* (1838), 3 Deac. 223; *Newport v. Harley* (1845), 14 L. J. Q. B. 242; *Kelly v. Webber* (1860), 3 L. T. 124.

804. — Effect of seizure after tenancy determined.—The provision in Landlord & Tenant Act, 1709 (c. 14), s. 1, applies only to a case where there is a subsisting tenancy; & therefore where the sheriff seized goods after the tenancy had been determined he was held not liable to an action for selling the goods upon the land without paying over a year's arrears of rent to the landlord.—**COX v. LEIGH** (1874), L. R. 9 Q. B. 333; 43 L. J. Q. B. 123; 30 L. T. 491; 38 J. P. 455; 22 W. R. 730.

Annotation:—**Apprvd.** *Lewis v. Davies*, [1914] 2 K. B. 469.

805. — County Courts Act, 1888 (c. 43), s. 160.—Landlord & Tenant Act, 1709 (c. 14), ss. 6 & 7, enabling a landlord to distrain upon the goods of a tenant, still in possession, for rent in arrear upon a lease ended or determined, within six months after the determination of the same, are confined to cases between landlord & tenant & have no application to a case where goods of a tenant under a subsisting tenancy are taken in execution at the suit of an execution creditor, so as to introduce into the operation of those sects., in favour of the person entitled to distrain thereunder, the advantages given by sect. 1 to a landlord in the event of an execution on the goods of his tenant.

Sect 160 of County Courts Act, 1888 (c. 43), applies solely to sect. 1 of Landlord & Tenant Act, 1709, & does not extend in its operation to sects. 6 & 7.—**LEWIS v. DAVIES**, [1914] 2 K. B. 469; 83 L. J. K. B. 598; 110 L. T. 461; 30 T. L. R. 301, C. A.

Annotation:—**Refd.** *Re British Saliculates*, [1919] 2 Ch. 155.

806. Tenancy created by attornment clause in mortgage.—(1) Goods having been taken in execution, the landlord after the sale, but before the removal of the goods, gave notice to the sheriff that rent was due to him:—**Held**: an order on the sheriff to pay the rent out of the proceeds in his hands was properly made.

(2) A., being indebted to B., & C. being his surety, A. conveyed certain premises by way of mtge. to C. to indemnify him, & attorned as tenant to C. at a rent of £50 *per annum*. The goods of A. having been seized under a writ of execution:—**Held**: by Landlord & Tenant Act, 1709 (c. 14), C. was entitled to payment of this rent as against the execution creditor.—**YATES v. RATLEDGE** (1860), 5 H. & N. 249; 29 L. J. Ex. 117.

Annotation:—**Refd.** *Re Mackenzie, Ex p. Hertfordshire Sheriff*, [1899] 2 Q. B. 566.

(c) *Who entitled to enforce.*

See Landlord & Tenant Act, 1709 (c. 14).

807. "Landlord"—Or administrator.—Case lies by an administrator against the bailiff of a

liberty for executing a *fi. fa.* & removing the goods off the premises before the landlord was paid a year's rent.—**PALGRAVE v. WINDHAM** (1719), 1 Stra. 212; 93 E. R. 478.

Annotations:—**Refd.** *Lane v. Crockett* (1819), 7 Price, 566; *Risely v. Ryle* (1843), 11 M. & W. 16; *Re Mackenzie, Ex p. Hertfordshire Sheriff*, [1899] 2 Q. B. 566.

808. — Not against under tenant.—Ground landlord cannot come in for rent on execution against an underlessee.—**BENNET'S CASE** (1727), 2 Stra. 787; 93 E. R. 848.

809. — Or his executor.—An exor. of a landlord shall have the same benefit of the Act, against an execution, as testator might have had if living.—**CHACE v. CHACE** (1730), Fortes. Rep. 359; 92 E. R. 890.

810. — Receiver appointed by court.—In May, 1902, B. agreed to let a public-house to I. at a yearly rental of £150. On Mar. 8, 1907, B. obtained judgment against I. On Mar. 12, 1909, a receiver of the premises was appointed by the ct. at the instance of a first mtgee. On the same day B. levied execution in respect of their judgment:—**Held**: the effect of the order of Mar. 12, 1909, was that the receiver became the landlord of the premises within Landlord & Tenant Act, 1709 (c. 14), s. 1, & was, therefore, entitled to be paid the arrears of rent, not exceeding one year's rent, due at the time of the execution.—**COX v. HARPER**, [1910] 1 Ch. 480; 79 L. J. Ch. 78; 101 L. T. 669; 26 T. L. R. 105.

Annotation:—**Mentd.** *Wood v. Wallace* (1920), 90 L. J. K. B. 319.

811. — Though tenant bankrupt.—**DUCK v. BRADDYLL**, No. 317, *ante*.

812. — After agreement for sale & assignment—Yearly allowance to landlord by intended purchaser—Until completion.—Where, in an agreement for the sale & assignment of certain premises, there was a stipulation "that in the mean time, & until the assignment was made, the intended purchaser should pay & allow to the seller at the rate of £100 *per annum* from the time of taking possession of the premises until the completion of the purchase;" the intended purchaser having taken possession, & one half-yearly payment having become due before the completion of the purchase:—**Held**: it was due as rent, & the sheriff levying on the goods of the occupier under a *fi. fa.*, was bound by Landlord & Tenant Act, 1709 (c. 14), to pay it over to the seller, as landlord.—**SAUNDERS v. MUSGRAVE** (1827), 6 B. & C. 524; 9 Dow. & Ry. K. B. 529; 5 L. J. O. S. K. B. 192; 108 E. R. 545.

Annotations:—**Refd.** *Anderson v. Mid. Ry.* (1861), 3 E. & E. 614. **Mentd.** *Doe d. Tomes v. Chamberlaine* (1839), 5 M. & W. 14.

813. — Not if himself execution creditor.—**TAYLOR v. LANYON**, No. 793, *ante*.

814. — Though sub-lessor.—(1) A landlord who sued a sheriff for not reserving a year's rent on an execution against a tenant, released the rent after the jury were sworn, to make the tenant a witness:—**Held**: he was not thereby precluded from recovering against the sheriff the amount of the rent.

(2) Landlord & Tenant Act, 1709 (c. 14), s. 1, is not to be limited to the case of an original demise of entire premises, but applies to a sub-lessee & to goods taken in execution in apartments being parcel of a messuage. It would be a very narrow construction of the Act, if we were to confine it to the case of an original demise of entire premises (LINDAL, C.J.).—**THURGOOD v. RICHARDSON** (1831), 7 Bing. 428; 5 Moo. & P. 270; 9 L. J. O. S. C. P. 121; 131 E. R. 165.

Annotation:—*As to* (1) **Refd.** *Read v. Thoyts* (1840), 9 C. & P. 515.

Sect. 12.—Effect of bankruptcy, winding up, etc. : Sub-sect. 3, C. (c), (d) & (e) i., ii., iii., iv. & v.]

815. — Rent released — After action commenced.]—THURGOOD *v.* RICHARDSON, No. 814, *ante*.

816. — Not where execution unlawful — Goods of stranger seized.]—If the bailiff seizes, under a warrant of a county ct., goods belonging to a stranger, he cannot, under County Cts. Act, 1856 (c. 108), s. 75, distrain such goods for the rent of the landlord; & if he does so, the true owner is entitled to have his goods back.—BEARD *v.* KNIGHT (1858), 8 E. & B. 865; 27 L. J. Q. B. 359; 4 Jur. N. S. 782; 6 W. R. 226; 120 E. R. 323.

*Annotations:—*Folld. Foulger *v.* Taylor (1860), 5 H. & N. Distd. Hughes *v.* Smallwood (1890), 25 Q. B. D. 306.

— — — — —.] — Under County Cts. Act, 1856 (c. 108), s. 75, a landlord cannot claim his rent where a bailiff takes in execution upon the demised premises the goods of a stranger; for that enactment only applies where the levy is made on the goods of the tenant.—FOULGER *v.* TAYLOR (1860), 5 H. & N. 202; 1 L. T. 481; 24 J. P. 167; 8 W. R. 279; 157 E. R. 1157; *sub nom.* WILCOXON *v.* SEARBY, FOULGER *v.* TAYLOR, L. J. Ex. 154

— *Expld. & Distd.* Hughes *v.* Smallwood (1890), 25 Q. B. D. 306.

818. — Against execution debtor — Although not tenant of landlord.]—Execution having issued upon a judgment in a county ct. against deft., goods belonging to him were taken in execution in a house of which the wife of deft. was the lessee. The landlords gave to the bailiff making the levy a notice under County Cts. Act, 1888 (c. 43), s. 160, claiming arrears of rent due from the wife:—*Held*: as deft.'s goods were rightfully taken in execution, the claim of the landlords was good.—HUGHES *v.* SMALLWOOD (1890), 25 Q. B. D. 306; 59 L. J. Q. B. 503; 63 L. T. 198; 55 J. P. 182, D. C.

819. Trustees—Of outstanding satisfied term—In trust to attend the inheritance.]—(1) The trustees of an outstanding satisfied term assigned in trust to attend the inheritance, may sue the sheriff for not retaining, after notice to do so, in an execution against the tenant, a year's rent due to the landlord.

(2) A notice to the sheriff in such case, stating that the rent was due to W. & the mtgees. of his estate, & signed by a person who was not the receiver appointed by the mtge. deed, was held sufficient.

(3) The sheriff is liable, in such case, if he remove any of the tenant's goods without retaining the year's rent.—COLYER *v.* SPEER (1820), 2 Brod. & Bing. 67; 4 Moo. C. P. 473; 129 E. R. 882.

*Annotations:—*As to (3) *Consd.* Thomas *v.* Mirehouse (1887), 3 T. L. R. 804. *Refd.* *Re* Mackenzie, *Ex p.* Hertfordshire Sheriff, [1899] 2 Q. B. 566.

820. Mortgagee—Under attornment clause.]—YATES *v.* RATLEDGE, No. 806, *ante*.

(d) *Who liable for Wrongful Removal.*

See Landlord & Tenant Act, 1709 (c. 14).

821. Sheriff—Not execution creditor.]—DUCK *v.* BRADDYLL, No. 317, *ante*.

PART II. SECT. 12, SUB-SECT. 3.— C. (e) i.

h. Sufficiency of.]—The sheriff having seized goods under a *fi. fa.*, received a written notice from pltf. that there was then due to him "one-half year's rent" for the premises, not stating when the rent fell due, nor for what period it was claimed. Pltf.

afterwards went to the sheriff, & being asked when his rent fell due, said that he thought it would be on the following Monday or Tuesday. The sheriff thereupon ordered the goods to be removed & sold:—*Held*: pltf. was bound by his own declaration, & could recover no damages from the sheriff, although it appeared that the

rent was in fact payable quarterly, & that one quarter was due at the time of seizure.—TOMLINSON *v.* JARVIS (1853), 11 U. C. R. 60.—CAN.

k. Time for — Before removal.]—Judgments were obtained against a debtor by an ordinary creditor for a debt, & a lessor for arrear rent. The messenger, acting for the creditor,

822. *post.*

823. Not in action for money had & received.]—An action for money had & received cannot be maintained by a landlord to recover the amount of a year's rent against the sheriff who has sold his tenant's goods under an execution.—GREEN *v.* AUSTIN (1812), 3 Camp. 260, N. P.

*Annotation:—**Refd.* *Re* Mackenzie, *Ex p.* Hertfordshire Sheriff, [1899] 2 Q. B. 566.

824. — Although goods subsequently returned.]—In an action against a sheriff, for removing goods seized under a *fi. fa.*, without paying the landlord a year's rent, under Landlord & Tenant Act, 1709 (c. 14), wherein pltf. recovered a verdict, the ct. refused a new trial, on the ground that the goods having been afterwards returned, pltf. had not been damnified, because while they were in the custody of the law, the landlord could not distrain them.—LANE *v.* CROCKETT (1819), 7 Price, 566; 146 E. R. 1063, Ex. Ch.

*Annotations:—**Mentd.* Weston *v.* Foster (1836), 2 Hodg. 59; Thomas *v.* Jones (1838), 4 M. & W. 28.

825. — Measure of damages.]—THOMAS *v.* MIREHOUSE, No. 795, *ante*.

(c) *Arrears of Rent.*

i. *Notice to Sheriff.*

See Landlord & Tenant Act, 1709 (c. 14).

826. Necessity for.]—On Landlord & Tenant Act, 1709 (c. 14), the landlord must demand or the sheriff is not bound to secure the rent. He [the sheriff] cannot take notice what arrears there are but if the landlord comes & acquaints him with it, then, & not till then, is he obliged to see a year's rent satisfied before removal of the goods (*per* CUR.).—WARING *v.* DEWBERRY (1718), 1 Stra. 97; Fortes. Rep. 360; 93 E. R. 408.

*Annotations:—**Refd.* Risely *v.* Ryle (1842), 7 J. P. 147; *Re* Mackenzie, *Ex p.* Hertfordshire Sheriff, [1899] 2 Q. B. 566.

827. —.]—SMITH *v.* RUSSELL, No. 863,

828. —.]—Under Landlord & Tenant Act, 1709 (c. 14), the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; & the ct., upon motion, ordered the same to be paid to the landlord even where the notice was given after the removal of the goods from the premises.—ARNITT *v.* GARNETT (1820), 3 B. & Ald. 440; 106 E. R. 724.

*Annotations:—**Folld.* Yates *v.* Ratledge (1860), 5 H. & N. 249. *Refd.* Colyer *v.* Speer (1820), 4 Moore, C. P. 473; *Re* Davis, *Ex p.* Pollen's Trustees (1885), 55 L. J. Q. B. 217; *Re* Mackenzie, *Ex p.* Hertfordshire Sheriff, [1899] 2 Q. B. 566.

829. Sufficiency of — Constructive notice.]—Where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of *fi. fa.* without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord.—ANDREWS *v.* DIXON (1820), 3 B. & Ald. 645; 160 E. R. 797.

*Annotations:—**Refd.* Risely *v.* Ryle (1843), 11 M. & W. 16;

Re Davis, Ex p. Pollen's Trustees (1885), 55 L. J. Q. B. 217; *Re Mackenzie, Ex p. Hertfordshire Sheriff*, [1899] 2 Q. B. 566.

830. — By mortgagees—Signature of notice.]—*COLYER v. SPEER*, No. 819, *ante*.

831. Time for—After removal.]—*ARNITT v. GARNETT*, No. 828, *ante*.

832. — Before removal—After sale.]—*YATES v. RATLEDGE*, No. 806, *ante*.

833. Effect of—Prohibits sale by sheriff.]—*THOMAS v. MIREHOUSE*, No. 795, *ante*.

ii. Inquiry by Sheriff.

834. Whether duty to inquire—In absence of notice.]—*WARING v. DEWBERRY*, No. 826, *ante*.

835. — —.]—*SMITH v. RUSSELL*, No. 863, *post*.

836. — —.]—*Re MACKENZIE, Ex p. Hertfordshire (Sheriff)*, No. 796, *ante*.

837. — Notice received.]—In an action against the sheriff for an improper return to a *fi. fa.* which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, it is not enough for him to prove that he paid the money to the landlord but he should adduce some evidence that the rent was due.—*KEIGHTLEY v. BIRCH* (1814), 3 Camp. 521, N. P.

Annotation:—Mentd. Mullett v. Challis (1851), 16 L. T. O. S. 340.

838. — —.]—In an action against a sheriff for negligence in not levying under a writ of *fi. fa.* the defence was that the sheriff had withdrawn on notice from the landlord that rent was due. At the trial, the landlord stated that rent was due, but in cross-examination it appeared that the execution debtor held under a lease which was not produced:—*Held*: the fact of rent being due could not be proved without the production of the lease & pltf. was entitled to a verdict.—*AUGUSTIEN v. CHALLIS* (1847), 1 Exch. 279; 2 New Pract. Cas. 486; 17 L. J. Ex. 73; 10 L. T. O. S. 115; 154 E. R. 118.

839. — —.]—*FROST v. BARCLAY* (1887), 3 T. L. R. 617, D. C.

iii. To Whom payable.

See Landlord & Tenant Act, 1709 (c. 14), s. 1 & Part II., Sect. 12, sub-sect. 3, C. (c).

Persons entitled to enforce restrictions.]—See Sub-sect. 3, C. (c), *ante*.

iv. Amount payable.

See Landlord & Tenant Act, 1709 (c. 14).

Rent due at time of seizure.]—See Sect. 12, sub-sect. 3, C. (c) (v.), *post*.

840. Year's rent.]—Outlawry, & *capias utlagatum*, the landlord relieved as to one year's rent on Landlord & Tenant Act, 1709 (c. 14).—*GREAVES v. D'ACASTRO* (1725), Bunb. 194; 145 E. R. 614.

Annotations:—Reid. St. John's College v. Murcott (1797), 7 Term Rep. 259; *Graham v. Grill* (1814), 2 M. & S. 294; *Brandling v. Barrington* (1827), 6 B. & C. 467. *Mentd. Re Helsby* (1832), 1 L. J. Bcy. 5.

841. — Distress withdrawn on false assurance of tenant—As to satisfaction of debt.]—A landlord, having distrained for rent, was induced to withdraw the distress, by the tenant's assurance, which was false, that a particular debt had been satisfied. The creditor having proceeded to judgment & execution, the tenant's goods were seized by the sheriff:—*Held*: the landlord was entitled to a year's rent under Landlord & Tenant

before he received notice of any rights on the part of the lessor, in process of execution, removed certain goods from the debtor's premises, & subsequently sold them to satisfy the

amount of the judgment. Before the sale notice of his lien was given to the messenger by the lessor:—*Held*: upon attachment & removal of the goods by the messenger, the lessor had lost his

Act, 1709 (c. 14).—*WOLLASTON v. STAFFORD* (1854), 15 C. B. 278; 139 E. R. 429.

842. — Onus of proof as to—Action against sheriff.]—*HARRISON v. BARRY*, No. 445, *ante*.

843. — More than one execution.]—there are two executions, the landlord cannot have a year's rent on each.—*DOD v. SAXBY* (1735), 2 Stra. 1024; 93 E. R. 1010.

844. — Portion remitted to tenant.]—As against an execution creditor a landlord is entitled to a full year's rent although he has been used to remit some portion of it to his tenant.—*WILLIAMS v. LEWSEY* (1831), 8 Bing. 28; 1 Moo. & S. 92; 1 L. J. C. P. 13; 131 E. R. 310.

845. No deduction of poundage—For sheriff.]—On execution the landlord's rent shall be paid without deduction of poundage for the sheriff.—*GORE v. GOSTON* (1725), 1 Stra. 613; 93 E. R. 754.

v. Due at Time of Seizure.

See Landlord & Tenant Act, 1709 (c. 14).

846. Limitation of right of landlord.]—The landlord of premises upon which the goods of his tenants are taken in execution can only claim from the party suing the execution the rent due at the time of taking the goods & not that which accrues after the taking & during the continuance of the sheriff in possession.—*HOSKINS v. KNIGHT* (1813), 1 M. & S. 245; 105 E. R. 91.

Annotations:—Apld. Re Davis, Ex p. Pollen Trustees (1885), 55 L. J. Q. B. 217. *Reid. Benjamin v. Scrimshaw* (1849), 13 L. T. O. S. 260.

847. — —.]—(1) Sheriff taking corn in the blade under a *fi. fa.* & selling it before rent due is not liable to account to the landlord of debt, under Landlord & Tenant Act, 1709 (c. 14), for rent accruing subsequently to the levy & sale, although he is given notice & though the corn be not removed from the premises until long afterwards, when a consideration of rent has become due.

(2) The landlord's remedy in such case is by distress.—*GWILLIAM v. BARKER* (1815), 1 Price, 274; 145 E. R. 1401.

Annotations:—As to (2) Dbtd. Peacock v. Purvis (1820), 2 Brod. & Bing. 362. *Reid. Wright v. Dewes* (1834), 1 Ad. & J. 611.

848. — —.]—Under Landlord & Tenant Act, 1709 (c. 14), s. 1, the landlord is entitled as against the execution-creditor, only to rent due at the time of the seizure. But if the sheriff returns that he has paid so much "for rent due for the premises," the ct. will intend that the payment was for rent due at the time of the seizure; & it is no objection to the return that it does not expressly state that the rent was due at the time of the seizure.

Where the sheriff returns that he has retained a sum for possession-money, it is no ground for quashing the return, that pltf. is charged with more possession-money than the amount payable by him for keeping possession.—*REYNOLDS v. BARFORD* (1844), 7 Man. & G. 449; 2 Dow. & L. 327; 8 Scott, N. R. 233; 13 L. J. C. P. 177; 3 L. T. O. S. 162; 8 Jur. 961; 135 E. R. 180.

Annotation:—Apld. Re Davis, Ex p. Pollen Trustees (1885), 55 L. J. Q. B. 217.

849. — —.]—*BENJAMIN v. SCRIMSHAW* (1849), 13 L. T. O. S. 260.

850. Whether notice by landlord sufficient—To withdraw execution.]—*AUGUSTIEN v. CHALLIS*, No. 838, *ante*.

lien, & the execution creditor was entitled to the proceeds of the sale thereof in satisfaction of his judgment.—*ALEXANDER v. BURGER* (1905), T. S. 80.—S. AF

Sect. 12.—Effect of bankruptcy, winding up, etc. : Sub-sect. 3, C. (e) vi. & (f), D. (a) & (b) & E.]
vi. *Rent Certain.*

See Landlord & Tenant Act, 1709 (c. 14).

851. Premises must be held at.]—Where a sheriff seized goods under a *fi. fa.*, & after notice that rent was due to the landlord of debt., removed the goods without the rent having been paid:—*Held*: (1) the sheriff was liable for the removal on Landlord & Tenant Act, 1709 (c. 14), s. 1, to an action on the case, at the suit of the landlord; (2) it was unnecessary to aver notice to the execution creditor; (3) no averment was necessary that the goods removed were by law distrainable; (4) in order to maintain the action, it must appear that the premises were held at a rent certain.

Where a tenant entered into possession in Jan. 1829 under an agreement made in Oct. 1828, whereby a lease was to be granted to him from Nov. 20, 1828, but none was ever granted; & the tenant occupied until Feb. 1842, the time of execution, but there was no evidence of any payment of rent:—*Held*: it did not sufficiently appear that he held as tenant at a rent certain.

Qu.: Whether an action lies by the landlord against the execution creditor.—*RISELEY v. RYLE* (1843), 11 M. & W. 16; 12 L. J. Ex. 322; 152 E. R. 697.

Annotations:—*As to* (1) *Distd.* *Smallman v. Pollard* (1844), 6 Man. & G. 1001. *Apld.* *Cocker v. Musgrave* (1846), 9 Q. B. 223. *Consd.* *Wharton v. Naylor* (1848), 12 Q. B. 673. *Refd.* *Re Mackenzie, Ex p. Hertfordshire Sheriff*, [1899] 1 Q. B. 566. *As to* (4) *Refd.* *Cox v. Leigh* (1874), 43 L. J. Q. B. 123. *Generally, Mentd.* *St. Marylebone Vestry v. London County, Sheriff* (1900), 69 L. J. Q. B. 818.

(f) *For what Removals Sheriff Liable.*

See Landlord & Tenant Act, 1709 (c. 14).

852. Actual removal—Mere execution of bill of sale insufficient.]—(1) A sheriff is not liable to the landlord in an action under Landlord & Tenant Act, 1709 (c. 14), s. 1, unless there be an actual removal of the goods from the premises, the mere execution of a bill of sale not being equivalent to a removal.

(2) *Semble*: the landlord is entitled to distrain for a year's rent, while the goods remain on the premises, although the goods have been sold by the sheriff.—*SMALLMAN v. POLLARD* (1844), 6 Man. & G. 1001; 1 Dow. & L. 901; 7 Scott, N. R. 911; 13 L. J. C. P. 116; 2 L. T. O. S. 402; 8 Jur. 246; 8 J. P. Jo. 121; 134 E. R. 1197.

Annotations:—*As to* (1) *Refd.* *White v. Binstead* (1853), 13 C. B. 304. *As to* (2) *Dbtd.* *Wharton v. Naylor* (1848), 12 Q. B. 673.

853. —.]—Landlord & Tenant Act, 1709 (c. 14), s. 1, which prohibits the taking in execution of goods without satisfying the landlord's claim for rent does not apply unless the goods are actually removed.

Under a *fi. fa.* against A., the sheriff seized the goods of B., B. claiming them, the sheriff obtained

an order under Interpleader Act, 1831 (c. 58), & C., the landlord, claimed £25, for a quarter's rent. The goods were sold under the order, & the amount, after deducting the £25, was paid by the sheriff into ct. On the trial of the issue, B. established his claim:—*Held*: the sheriff was not justified in paying the rent.—*WHITE v. BINSTED* (1853), 13 C. B. 304; 22 L. J. C. P. 115; 17 Jur. 394; 138 E. R. 1216.

Annotation:—*Refd.* *Re Davis, Ex p. Pollen Trustees* (1885), 55 L. J. Q. B. 217.

854. Removal by consent—Undertaking for year's rent by sheriff's officers.]—If upon the goods of a tenant being taken in execution, an agent of the landlord takes from the sheriff's officers an undertaking for a year's rent, & then consents to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff on Landlord & Tenant Act, 1709 (c. 14), s. 1, for not paying a year's rent on making the levy; although the rent is not paid according to the undertaking, & although the undertaking should be void under Stat. Frauds for not stating any consideration.—*ROTHERY v. WOOD* (1811), 3 Camp. 24, N. P.

Annotation:—*Refd.* *Cocker v. Musgrave* (1846), 9 Q. B. 223.

855. Removal of goods of stranger—Payment of whole proceeds to owner.]—If the sheriff, under a *fi. fa.*, levies on & removes goods which are not the property of the judgment debtor, & has notice of rent due before removal, he is liable to the landlord under Landlord & Tenant Act, 1709 (c. 14), s. 1, although he has paid over the whole proceeds of the levy to the owner of the goods.—*FORSTER v. COOKSON* (1841), 1 Q. B. 419; 1 Gal. & Dav. 58; 10 L. J. Q. B. 167; 5 Jur. 1083; 113 E. R. 1193.

Annotations:—*Distd.* *White v. Binstead* (1853), 13 C. B. 304. *Refd.* *Foulger v. Taylor* (1860), 5 H. & N. 202.

D. Withdrawal from Possession by Sheriff.

(a) *In General.*

See Landlord & Tenant Act, 1709 (c. 14).

856. Withdrawal obligatory—Goods insufficient to satisfy year's rent.]—Where the sheriff executes a *fi. fa.*, & he receives notice of a year's rent being due, & the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; & if he sells the ct. will not stay proceedings in an action against him on Landlord & Tenant Act, 1709 (c. 14), s. 1, on paying over the proceeds of sale.—*FOSTER v. HILTON* (1831), 1 Dowl. 35.

857. Withdrawal permissible—Execution creditor not providing rent.]—*THOMAS v. MIREHOUSE* No. 795, *ante*.

858. — No payment of landlord forthcoming.]—*Re MACKENZIE, Ex p. HERTFORDSHIRE (SHERIFF)*, No. 796, *ante*.

859. What amounts to—Execution warrant let in house—No person in possession.]—Where sheriff's officer executed a writ of *fi. fa.* by going to the house & informing the debtor he came to

but put no bailiff in possession of debt, promising not to remove them. Debt. subsequently removed the goods whereupon the landlord seized them for rent, on the ground that the removal was fraudulent. The sheriff then made a second seizure under the execution:—*Held*: the first seizure by the sheriff had been abandoned, & he could not retake them while under seizure for rent, as they were *custodia legis*.—*CRAIG v. CRAIG* (1877), 7 P. R. 209.—*CAN.*

o. Right of sheriff to interplead Where claim for rent made.]—T express statutory provision gives sheriffs the right to interplead where

PART II. SECT. 12, SUB-SECT. 3.—
C. (f).

1. Removal of cattle exceeding in value one year's rent—Without paying year's rent—Subsequent return on satisfaction of claim.]—Where cattle exceeding in value one year's rent, were seized in execution by a special bailiff, who, after notice for a claim for rent by the landlord removed them from the land without paying a year's rent, & after five days, returned them to the land, on the amount of the claim being satisfied:—*Held*: the landlord was entitled to damages, as in an action of tort, which were measured at the

[1902] 1 I. R. 167.—*IR.*

PART II. SECT. 12, SUB-SECT. 3.—
D. (a).

m. What amounts to—Goods left in possession of tenant—To be delivered up on request.]—A sheriff seized goods under execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested:—*Held*: the sheriff had not such possession of the goods as precluded the landlord from distraining.—*MCINTYRE v. STATA* (1854), 4 C. P. 248.—*CAN.*

levy on his goods, & laying his hand on a table & saying "I take this table," & then locked up his warrant in the table drawer, took the key, & went away, without leaving any person in possession, & after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent:—*Held*: the sheriff could not maintain trespass against him.—**BLADES v. ARUNDALE** (1813), 1 M. & S. 711; 105 E. R. 265.

Annotations:—**Refd.** *Ackland v. Paynter* (1820), 8 Price, 95; *Doker v. Hasler* (1825), 2 Bing. 479; *Re Davis, Ex p. Pollen Trustees* (1885), 55 L. J. Q. B. 217; *Bagshawes v. Deacon*, [1898] 2 Q. B. 173. **Mentd.** *Hartley v. Moxham* (1842), 12 L. J. Q. B. 41; *Balls v. Pink* (1845), 4 L. T. O. S. 356; *Gladstone v. Padwick* (1871), L. R. 6 Exch. 203.

(b) *Right to distrain after Withdrawal.*

See *Landlord & Tenant Act*, 1709 (c. 18); *Sale of Farming Stock Act*, 1816 (c. 50); *Landlord & Tenant Act*, 1851 (c. 25).

860. General rule.—When it became plain that no one would pay the landlord, the sheriff could withdraw & return *nulla bona* to the writ. As soon as he withdrew, the landlord could distrain for his whole rent in arrear (*per CUR.*).—*Re MACKENZIE, Ex p. HERTFORDSHIRE (SHERIFF)*, No. 796, *ante*.

861. Execution discontinued.—A landlord's right to distrain revives, execution being waived.—*SEVEN v. MIHILL* (1756), 1 Keny. 370; 96 E. R. 1025.

Annotation:—**Refd.** *Re Emmett* (1850), 4 New Mag. Cas. 161.

862. —.] — **BLADES v. ARUNDALE**, No. 859, *ante*.

863. After sale by sheriff — Fictitious bill of sale.—(1) *Seemle*: a sheriff is not bound to find out what rent is due to a landlord & pay it him under 8 Ann., c. 14, unless the landlord gives him notice.

(2) If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before.—*SMITH v. RUSSELL* (1811), 3 Taunt. 400; 128 E. R. 159.

Annotation:—*As to* (1) **Refd.** *Re Davis, Ex p. Pollen Trustees* (1885), 55 L. J. Q. B. 217.

864. — Goods not immediately removable — **Growing crops — Time for removal after ripening.** — *PARSLOW v. CRIPPS* (1712), 1 Com. 204; 92 E. R. 1035.

Annotation:—**Refd.** *Wright v. Dewes* (1834), 1 Ad. & El. 641.

865. —.] — **OCK**
PURVIS, No. 387, *ante*.

866. — — — —.] — A tenant's growing crops, taken in execution & sold, & remaining on the premises a reasonable time for the purpose of being reaped, are not distrainable by the landlord for rent become due after the taking in execution.

Such crops having been so taken, sold, & left on the premises, & the arrears of rent paid, pursuant to stat. 8 Ann. c. 14, s. 1, the landlord cannot distrain them for rent subsequently due, on the ground, that the purchaser has not entered into the agreement with the sheriff (to use & expend the produce in a proper manner), directed by *Sale of Farming Stock Act*, 1816 (c. 50), s. 3.—*WRIGHT v. DEWES* (1834), 1 Ad. & El. 641; 3 Nev. & M. K. B. 790; 3 L. J. K. B. 181; 110 E. R. 1352.

Annotation:—**Refd.** *Hutt v. Morrell* (1848), 11 Q. B. 425.

867. — **Sale of farming stock — Agreement under Sale of Farming Stock Act, 1816 (c. 50) — How far applicable.**—*WRIGHT v. DEWES*, No. 866, *ante*.

— — — —.] — *See, now*, *Landlord & Tenant Act*, 1851 (c. 25), s. 2.

868. — — — —.] — Though growing crops seized under a *fi. fa.* are protected from distress at common law, yet if the execution creditor by reason of his claiming some things distrainable at common law is driven to rely on *Sale of Farming Stock Act*, 1816 (c. 50), he is bound to bring himself in his pleading within the Act. In an action for trover for pigs, swine, wheat, straw, & other goods, etc., deft. (the landlord of a farm) justified under a distress for rent, & pltf., in his replication, set out a *fi. fa.* on a judgment recovered against M., the tenant, & an assignment to him (ptf.) by the sheriff of all the crops, under an agreement by which the sheriff agreed to use & expend the produce on the farm according to the custom of the country, & alleged that the wheat, straw, etc., seized was the produce of the crops, & the pigs & swine were kept to consume the straw & produce under the Act, & the agreement:—*Held*: ill, for not showing there was no covenant or written agreement between landlord & tenant within sect. 3.—*HUTT v. MORRELL* (1848), 11 Q. B. 425; 12 Jur. 352; 116 E. R. 536, Ex. Ch.

869. — **Goods immediately removable — Chattels — Removal within reasonable time.**—On Mar. 11, the sheriff seized under a *fi. fa.*, for an amount exceeding £20, the goods & chattels of a tenant upon premises held upon lease, the rent of which accrued due on the usual quarter-days. On Mar. 17, the goods were sold by the sheriff by private sale, & the sheriff went out of possession. On Mar. 23, a bkpcy. petition founded on the seizure & sale was presented against the tenant, upon which he was on May 5, adjudicated bkpt. On Apr. 10, the purchaser from the sheriff removed the goods. On Apr. 15, the landlord gave notice to the sheriff requiring payment, under 8 Ann. c. 14, of two quarters' rent, due on Dec. 25, & Mar. 25, preceding. The sheriff paid the proceeds of the sale to the trustee of the bkpt.'s estate:—*Held*: the landlord was not entitled to payment by the trustee in bkpcy. of the rents, as he might have distrained between Mar. 17 & Apr. 10.

The purchaser from the sheriff is bound to remove the goods within a reasonable time. If he leaves the goods on the demised premises for his own convenience the landlord can distrain on them.—*Re DAVIS, Ex p. POLLEN'S TRUSTEES* (1885), 55 L. J. Q. B. 217; 54 L. T. 304; 34 W. R. 442; 2 T. L. R. 229; 3 Morr. 27.

870. Temporary withdrawal.—Where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor & the claimant, temporarily withdrew from possession:—*Held*: the goods were no longer *in custodia legis* & the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending.—*CROPPER v. WARNER* (1883), Cab. & El. 152.

E. Execution followed by Bankruptcy.

See *BANKRUPTCY*, Vol. V., pp. 820, 829, 861, Nos. 6966–6968, 7041, 7875, 7876.

by a landlord for rent, was omitted in R. S. 1887, it being stated in the appendix thereto that it was superseded by con. rule 1141, which provides that the sheriff, etc., may interplead

where a claim is made, etc., to any money, goods, or chattels, etc., taken in execution, etc., by any person other than the person against whom the process issued:—*Held*: the right

to interplead where a claim for rent is made, still exists.—*MCLAUGHLIN v. HAMMILL* (1892), 22 O. R. 493.—**CAN.**

Sect. 12.—Effect of bankruptcy, winding up, etc.: Sub-sect. 4. Sect. 13:

4.—RECEIVER IN POSSESSION.

See, generally,

Effect of appointment—On right to distrain Of landlord.]—*See Sect. 4, sub-sect. 4, ante.*

Of mortgagor.]—*See Sect. 4, sub-sect. 7, A., ante.*

Right to distrain.]—*See Sect. 4, sub-sect. 9,*

SECT. 13.—SALE OF DISTRESS.

SUB-SECT. 1.—RIGHT OF SALE.

See Distress Act, 1689 (c. 5); Landlord & Tenant Act, 1730 (c. 28); Distress for Rent Act, 1737 (c. 19).

871. At common law.]—GOMERSALL *v.* MEDGATE (1610), Yelv. 194; 80 E. R. 128; *sub nom.* GOMERSALE *v.* WAYTS, Cro. Jac. 255.

Annotation:—Mentd. Clark *v.* Gilbert, (1835), 2 Scott, 520.

872. —.]—The number & description of persons, declared eligible to an office by the Royal Charter of a corpⁿ. cannot be changed by a bye-law, nor the sale of a distress directed.

As to the sale of the goods distrained. At common law, no distress could be sold; but distresses were made with a view that the party, by the inconvenience he suffered for want of his goods, might be obliged to pay the money, & Distress Act, 1689 (c. 5), which empowers landlords to sell, can never be construed to extend to give liberty to sell all distresses (*per CUR.*).—LEE *v.* WALLIS (1756), 1 Keny. 292; Say. 262; 96 E. R. 997.

Annotations:—Mentd. R. *v.* Tunwell (1783), 3 Doug. K. B. 207; R. *v.* Westwood (1830), 7 Bing. 1.

873. —.]—A lease of a farm contained a covenant by the tenant not to remove hay, unthreshed corn, etc., from the demised premises, but to use them for the improvement of the land. The landlord, having distrained hay & unthreshed corn for rent in arrear, sold the distress under a condition that the purchaser should consume the matters sold on the premises, & consequently the best price was not obtained in accordance with Distress Act, 1689 (c. 5):—*Held*: (1) the landlord could not legally sell under such a condition; (2) Sale of Farming Stock Act, 1816 (c. 50), s. 11, does not apply to a sale by a landlord of a distress.

If the landlord chooses to distrain & to sell he cannot escape from the statutory obligation to sell at the best price, because he could have prevented the tenant from disposing of the subject-matter of the sale. If he chooses to exercise that statutory power, he in effect waives the condition (LINDLEY, J.).

The power of sale did not exist at common law, but is a statutory power & must be exercised subject to the conditions imposed by the statute creating it (LORD COLERIDGE, C.J.).—HAWKINS *v.* WALROND (1876), 1 C. P. D. 280; 45 L. J. Q. B. 772; 35 L. T. 210; 40 J. P. 824; 24 W. R. 824.

874. By statute—Right to sell permissive—Not compulsory.]—(1) In replevin, plea of a former dis-

tress for the same rent, without adding that the rent was satisfied, is bad.

(2) Distress Act, 1689 (c. 5), is a remedial law, & it was never meant, that the landlord must necessarily sell, because he has the power to do so (PARK, J.).—HUDD *v.* RAVENOR (1821), 2 Brod. & Bing. 662; 5 Moore, C. P. 542; 129 E. R. 1121.

Annotations:—As to (1) *Reid.* Dawson *v.* Cropp (1845), 1 C. B. 961; Bagge *v.* Mawby (1853), 1 C. L. R. 285; Lehain *v.* Philpott (1875), L. R. 10 Exch. 242. *As to* (2) *Consd.* Philpott *v.* Lehain (1876), 35 L. T. 855. *Generally, Mentd.* Owens *v.* Wynne (1855), 4 E. & B. 579.

875. —.]—(1) Where goods have been sold under a distress, & the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counterclaim for the balance.

(2) Distress Act, 1689 (c. 5), s. 2, by which the landlord after five days "shall & may lawfully sell the goods distrained," is permissive, not compulsory, & therefore, no action lies for not selling.

(3) Costs payable under a judge's order can be recovered by action or counterclaim.—PHILPOTT *v.* LEHAIN (1876), 35 L. T. 855.

Annotations:—As to (3) *Reid.* Norton *v.* Gregory (1895), 73 L. T. 10; Godfrey *v.* George, [1896] 1 Q. B. 48.

Suspension of right—Postponement of Act, 1914 (c. 11)—Removal to secure on.]—SHOTTLAND *v.* CABINS, LTD., No. 760, *ante*.

877. —.]—By agreement—Breach of agreement by tenant—Rights of landlord.]—A landlord having taken some unthreshed barley as a distress for rent, agreed with the tenant that he would not proceed to sell it, but that the tenant should thresh it out, & deliver it to a person to whom it was sold, & that the landlord should receive the money. The tenant threshed out a small quantity & then left off:—*Held*: after a reasonable time for threshing out such barley had elapsed, of which it was the province of the jury to decide, it was not a trespass for the landlord to enter the barn of the tenant & thresh out the same.—HUDDLESTONE *v.* PEARSON (1824), 3 L. J. O. S. K. B. 43.

Effect of tender of rent.]—*See* Nos. 603–605, *ante*.

SUB-SECT. 2.—GOODS HELD UNSOLD.

878. Bar to action for rent.]—If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shows that the debt was for the time suspended (HOLROYD, J.).—EDWARDS *v.* KELLY (1817), 6 M. & S. 204; 105 E. R. 1219.

Annotations:—Consd. Lehain *v.* Philpott (1875), L. R. 10 Exch. 242. *Reid.* Thomas *v.* Williams (1830), 10 B. & C. 661. *Mentd.* Rounce *v.* Woodyard (1846), 8 L. T. O. S. 186; Fitzgerald *v.* Dressler (1859), 7 C. B. N. S. 374; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778.

879. —.]—Action for use & occupation. Plea, that pltf., before action, took & detained, as a distress for the rent, goods of value sufficient to satisfy same. On special demurrer:—*Held*: this plea was bad, for not showing that the rent was

PART II. SECT. 13, SUB-SECT. 1.

871 l. At common law.]—The right to sell goods distrained for rent did not exist at common law.—DEWAR *v.* CLEMENTS (1910), 15 W. L. R. 341; 20 Man. L. R. 212.—CAN.

p. By statute—Must be exercised on terms of statute.]—The right to sell goods distrained for rent was given by 2 Will. & Ma., c. 5, s. 2, & it must be

exercised, if at all, upon the terms the statute imposes.—DEWAR *v.* CLEMENTS (1910), 15 W. L. R. 341; 20 Man. L. R. 212.—CAN.

q. Ample distress available—Validity of sale.]—Where there was ample distress on the premises between the receipt of the warrant & the day of sale:—*Held*: the sale was invalid.—DORRIS *v.* TULLY (1861), 10 C. P. 432.—CAN.

PART II. SECT. 13, SUB-SECT. 2.

r. Lodger's goods nominally sold—& returned to owner—Debt not affected.]—A., the landlord of B. distrained on C., an undertenant, for B.'s rent. After the formalities of a sale by auction had been gone through, & the goods of C. had been knocked down to a purchaser, A., by consent of the latter, restored them to C., without receiving any portion of the price:—

satisfied.—*LEAR v. EDMONDS* (1817), 1 B. & Ald. 157; 106 E. R. 58.

Annotations:—*Folld. Lingham v. Warren* (1820), 2 Brod. & Bing. 36; *Hudd v. Ravenor* (1821), 2 Brod. & Bing. 662. *Consd. Dawson v. Cropp* (1845), 1 C. B. 961. *Expld. Bagge v. Mawby* (1853), 8 Exch. 641. *Consd. Lohain v. Philpott* (1875), L. R. 10 Exch. 242. *Refd. Philpott v. Lohain* (1876), 35 L. T. 855.

880. — Goods insufficient to satisfy rent.]—When a landlord distrains for rent & does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent.—*LEHAIN v. PHILPOTT* (1875), L. R. 10 Exch. 242; 44 L. J. Ex. 225; 33 L. T. 98; 39 J. P. 584; 23 W. R. 876.

Annotation:—*Refd. Philpott v. Lohain* (1877), 35 L. T. 855.

881. Tenant's property in goods not divided.]—*IREDALE v. KENDALL*, No. 1048, *post*.

882. Part unsold — With landlord's consent—Residue retained by bailiff—Detinue by landlord.]—A broker distrained the goods of A. & sold part, but with the consent of the landlord he withheld the residue from the sale, on condition that A. should give up possession of the house. A. did not give up possession. The broker kept the goods & was threatened by A. with an action if he parted with them:—*Held*: the landlord could not maintain detinue against the broker for such goods.—*GUBBINS v. ROYER* (1850), 16 L. T. O. S. 65.

Second distress.]—*See Sect. 16, post*.

Right to replevy.]—*See Sect. 19, sub-sect. 4, post*.

SUB-SECT. 3.—NOTICE OF SALE.

See Distress Act, 1689 (c. 5), s. 1, & Sect. 10, sub-sect. 5, A., ante.

SUB-SECT. 4.—TIME FOR SALE.

See Distress Act, 1689 (c. 5); Landlord & Tenant Act, 1730 (c. 28); Distress for Rent Act, 1737 (c. 19); Law of Distress Amendment Act, 1888 (c. 21).

883. After expiry of five whole days.]—If goods be distrained for rent, the landlord must wait five whole days, *i.e.*, five times 24 hours, before he sells, & if he does not, he is liable to an action.

Where a distress was made on Friday at 2 p.m., & the sale was on the following Wednesday at 11 a.m.:—*Held*: the sale was wrongful.—*HARPER v. TASWELL* (1833), 6 C. & P. 166.

884. — How computed — Whether inclusive of day of sale.]—*WALLACE v. KING*, No. 1359, *post*.

885. — —.]—In construing Distress Act, 1689 (c. 5), s. 2, which authorises the sale of goods distrained within five days next after the taking, the days must be calculated, as the rule now is in other cases, inclusively of the last, & exclusively of the day of taking.—*ROBINSON v. WADDINGTON* (1849), 13 Q. B. 753; 18 L. J. Q. B. 250; 13 L. T. O. S. 281; 13 Jur. 537; 116 E. R. 1451.

Held: B. was not entitled, as against A., to credit for what the goods nominally realised.—*KEOUGH v. POWER* (1850), 2 Ir. Jur. 230.—*IR*.

PART. II. SECT. 13, SUB-SECT. 4.

a. Detention beyond five days—Whether delay unreasonable—Question for jury.]—In the case of distress for rent, there must be five clear days between the day of distress & the sale, at the expiration of which the landlord

is at liberty to sell; but he has a reasonable time after the five days so to do, & what is a reasonable time is a question for the jury. Where the judge directed the jury that the landlord was bound to proceed to sell on the sixth day:—*Held*: the direction was improper, & the right direction would have been, after having told the jury the time when the goods could first have been sold, for them to find whether under all the facts deft. had remained an unreasonable time

886. Detention beyond five days—By agreement—Effect on rights of third party.]—*HARRISON v. BARRY*, No. 445, *ante*.

887. — At request of tenant — Goods of lodger & tenant indistinguishable.]—A lodger may maintain an action, if his goods are taken on an excessive distress by the landlord of the party under whom he occupies.

The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, & which those of his tenant.—*FISHER v. ALGAR* (1826), 2 C. & P. 374, N. P.

888. — Unreasonable delay — Trespass.]—*GRIFFIN v. SCOTT*, No. 380, *ante*.

889. — — —.]—Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress:—*Held*: he was liable in trespass *quare clausum fregit* for continuing on the premises & disturbing pltf. in the possession of his house, after the time allowed by law.

I should have had great doubt in this case, whether upon the construction of Distress for Rent Act, 1737 (c. 19), the action of trespass were well founded, if one of the trespasses charged & proved had not been the making & removing of the goods from the premises, & the disturbance of pltf.'s possession of his house after the time when by law they ought to have been removed; & the case had only rested upon the mere personal remaining of the party on the premises without any act done by him after the time allowed by law. . . . In this case, however, the act of removing the goods after such time appears to me to be a substantive trespass (*LORD ELLENBOROUGH, C.J.*).—*WINTERBOURNE v. MORGAN* (1809), 11 East, 395; 103 E. R. 1056.

Annotations:—*Refd. Atkinhead v. Blades* (1813), 1 Marsh. 17; *Smith v. Goodwin* (1833), 4 B. & Ad. 413; *Ladd v. Thomas* (1840), 12 Ad. & El. 117; *Woods v. Durrant* (1846), 16 M. & W. 149; *Smith v. Wright* (1861), 6 H. & N. 821. *Mentd. Tennant v. Field* (1857), 6 W. R. 11.

890. — Reasonable delay — Allowed.]—*PITT v. SHEW*, No. 309, *ante*.

891. — Licence of tenant's wife.]—*STRONG v. HUDSON* (1850), 16 L. T. O. S. 149.

Before expiry of statutory period.]—*See No. 433, ante, No. 922, post*.

892. Growing crops — Cannot be sold before they are ripe.]—*OWEN v. LEGH*, No. 1295, *post*.

893. — —.]—Where a landlord seized & sold under a distress for rent, growing crops, which were afterwards taken away by the purchaser, & it appeared that the crops were sold for the full value which they would have fetched if sold at the proper time, & the surplus was paid over to the tenant, & the jury found that he sustained no damage:—*Held*: the tenant was not entitled to nominal damages either in a special action on the case, or in an action of trover.—*RODGERS v. PARKER* (1856), 18 C. B. 112; 27 L. T. O. S. 157; 20 J. P. 358; 2 Jur. N. S. 406; 4 W. R. 545;

in possession after the five days before selling.—*LYNCH v. BICKLE* (1867), 17 C. P. 549.—*CAN*.

t. Sale by constable under distress warrant—After return day of warrant.]—A constable seized a horse under a warrant of distress & endeavoured to sell the same before the return day of the warrant, but was prevented from doing so, chiefly by the party from whom the horse was taken. Subsequently to the return day the

Sect. 13.—Sale of distress: Sub-sects. 4, 5, 6, 7, 8 & 9.]

139 E. R. 1308; *sub nom.* ROGERS *v.* PARKER, 25 L. J. C. P. 220.

*Annotations:—*Refd. Lucas *v.* Tarleton (1858), 3 H. & N. 116. *Mentd.* King *v.* England (1864), 28 J. P. 230; Chandler *v.* Doulton (1865), 3 H. & C. 553.

894. Corn—Loose or in sheaves.]—PIGGOTT *v.* BIRTLES, No. 355, *ante*.

895. Hay.]—PIGGOTT *v.* BIRTLES, No. 355, *ante*.

SUB-SECT. 5.—PLACE OF SALE.

See Law of Distress Amendment Act, 1888 (c. 21), s. 5.

896. Territorial limits.]—A distress was taken by the bailiff of the hundred of A. in the hundred of A. & B. & was sold by the bailiff of A., in the hundred of B., having given personal notice:—*Held*: it was good, as being an entire distress.

Personal notice is more than Distress Act, 1689 (c. 5), requires, & answers the intent of it.—WALKER *v.* RUMBALD (1695), 12 Mod. Rep. 76; 88 E. R. 1175.

897. Premises where impounded -- Entry for removal of goods after sale.]—Where a sale of pltf.'s goods had taken place under a distress, it was part of the conditions of sale, to which pltf. assented, that the purchasers might leave the articles, purchased by them on the premises until a certain day, & enter in the meantime to remove them when they thought proper. Deft., having purchased goods, & left them accordingly:—*Held*: this amounted to an irrevocable licence from pltf., & was a justification, on the plea of leave & licence, to trespass for breaking & entering a close to carry them away.—WOOD *v.* MANLEY (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L. J. Q. B. 27; 3 Jur. 1028; 113 E. R. 325.

Annotations:— *Mentd.* Salter *v.* Woollams (1811), 2 Man. & G. 650; Williams *v.* Morris (1841), 8 M. & W. 488; Wood *v.* Leadbitter (1845), 13 M. & W. 838; Taplin *v.* Florence (1851), 10 C. B. 744; Cornish *v.* Stubbs (1870), L. R. 5 C. P. 334; Mellor *v.* Watkins (1874), L. R. 9 Q. B. 400; Vaughan *v.* Hampson (1875), 33 L. T. 15; James Jones *v.* Tankerville, [1909] 2 Ch. 410.

SUB-SECT. 6.—MODE OF SALE.

898. What constitutes a sale—Not purchase or retention of goods by landlord.]—Goods of pltf.'s mother were assigned to deft. by bill of sale, but, remaining in her possession, were distrained for rent due from her, & duly appraised, & the landlord, instead of selling them, took them at the condemned price in satisfaction of the rent & charges, & then gave them to pltf., who removed them. Deft. having followed & seized them:—*Held*: there was no sale by the landlord under Distress Act, 1689 (c. 5), s. 2, & therefore the property in the goods remained in pltf., notwithstanding Distress for Rent Act, 1738 (c. 19), s. 18.—KING *v.* ENGLAND (1864), 4 B. & S. 782; 3 New Rep. 376; 33 L. J. Q. B. 145; 9 L. T. 645;

constable sold the horse:—*Held*: the sale was valid.—WHEATON *v.* FRANCHVILLE (1871), 8 N. S. R. 288.—CAN.

PART II. SECT. 13, SUB-SECT. 5.

a. Removal not actionable—Unnecessary, unreasonable or malicious.]—Pltf. having remained in possession & paid rent after the expiry of his term, defts. levied a distress upon pltf.'s goods in the premises, situate six miles from T., for two months' arrears of rent, & removed the

to T. to impound & sell. Pltf. brought an action of trespass:—*Held*: the removal to T., unless unnecessary & unreasonable, or malicious, was not a good ground of action.—MACGREGOR *v.* DEFOE (1887), 14 O. R. 87.—CAN.

PART II. SECT. 13, SUB-SECT. 7.

b. Whether landlord may purchase goods of tenant at sale under distress for rent.]—Under a distress for rent, goods were seized, put up for sale by auction, & purchased by an agent for the land

28 J. P. 230; 10 Jur. N. S. 634; 12 W. R. 308; 122 E. R. 654.

Annotations:— *Folld.* Moore, Nettlefold *v.* Singer Manufacturing Co., [1904] 1 K. B. 820; Plasycoed Collieries Co. *v.* Partridge, Jones, [1912] 2 K. B. 345.

899. ———.]—A sale in pursuance of Distress Act, 1689 (c. 5), s. 2, of goods distrained must be a sale to a third party, & if the landlord purchase the goods himself no property passes.—MOORE, NETTLEFOLD & CO. *v.* SINGER MANUFACTURING CO., [1904] 1 K. B. 820; 73 L. J. K. B. 457; 90 L. T. 469; 68 J. P. 369; 52 W. R. 385; 20 T. L. R. 366; 48 Sol. Jo. 328, C. A.

Annotation:— *Folld.* Plasycoed Collieries Co. *v.* Partridge, Jones, [1912] 2 K. B. 345.

900. ———.]—Defts., who were the owners of a seam of coal, let it to a tenant with the right to work & get the coal on payment of a royalty for each ton of coal worked, & there was a power of distress, if the royalties were unpaid. Subsequently the lessee sold to pltf. the right to get the coal under the lease held by him on payment to him of all such sums as should become due in respect of the royalties. After pltf. had taken possession, the royalties payable by the lessee to defts. fell into arrear, & defts. distrained certain ponies, the property of pltf., & certain wagons which pltf. had hired from a wagon co. Defts. had the ponies & wagons appraised & purported to buy them for themselves at the appraised value, & they then worked the ponies for their own purposes, & delivered up the wagons to the wagon co. on demand, though no sum was due for the hire of the wagons. In an action by pltf. for conversion of the ponies & wagons, the sale to defts. being invalid, defts. contended that by reason of Distress for Rent Act, 1737 (c. 19), s. 19, they were not liable for conversion, but only for the special damage sustained by pltf.:—*Held*: as the acts complained of were not done by defts. in their capacity of distrainers nor in the course of the distress, but in their supposed capacity as owners of the goods by purchase & after the completion of the distress, sect. 19 did not apply, & defts. were liable for conversion.—PLASYCOED COLLIERIES CO., LTD. *v.* PARTRIDGE, JONES & CO., LTD., [1912] 2 K. B. 345; 81 L. J. K. B. 723; 106 L. T. 426; 56 Sol. Jo. 327, D. C.

Irregularity in sale.]—See Sub-sect. 11,

SUB-SECT. 7.—CONDITIONS OF SALE.

See Distress Act, 1689 (c. 5).

901. Sale subject to conditions—Farm produce to be consumed on the premises.]—JONES *v.* HAMP (1840), cited 10 M. & W. 710; 152 E. R. 658.

Annotations:— *Consd.* Frusher *v.* Lee (1842), 10 M. & W. 709. *Refd.* Ridgway *v.* Stafford (1851), 6 Exch. 404; Hawkins *v.* Walrond (1876), 45 L. J. Q. B. 772.

902. ———.]—Where a farm tenant is under covenant not to carry off the premises the hay & straw made on the farm, the landlord, who has seized the hay & straw under a distress, may sell it subject to a condition that the purchaser shall consume it on the premises.—ABBEY *v.*

lord who had distrained. Immediately afterwards the estate of the tenant was sequestrated; after a further interval, the landlord resold the goods. In an action for trover by the official assignee of the insolvent tenant against the landlord:—*Held*: the first sale was void, because a landlord cannot purchase for himself goods sold under a distress made by him, & the sale after sequestration was a conversion for which the measure of damages was the full value of the goods.—DAVEY *v.*

PETCH (1841), 8 M. & W. 419; 10 L. J. Ex. 455; 151 E. R. 1102.

Annotations:—*N.F. Ridgway v. Stafford* (1851), 6 Exch. 404; *Hawkins v. Walrond* (1876), 1 C. P. D. 280. *Refd.* *Frusher v. Lee* (1842), 10 M. & W. 709.

903. ———.] — *Qu.*: whether a landlord who has seized his tenant's hay & straw under a distress for rent may sell it subject to a condition that the purchaser shall consume it on the premises, according to the custom of the country.—*FRUSHER v. LEE* (1842), 10 M. & W. 709; 12 L. J. Ex. 321; 152 E. R. 658.

Annotations:—*Consd. Ridgway v. Stafford* (1851), 6 Exch. 404. *Refd.* *Hawkins v. Walrond* (1876), 1 C. P. D. 280.

904. ———.] — Though, by the custom of the country, corn must be threshed on a farm, & the straw consumed thereon, it is not competent to impose that custom as a condition of a purchase on a sale of stacks under a distress for rent, for then the "best price" cannot be said to have been gotten for them.—*NIX v. FITZWILLIAM (EARL)* (1845), 1 New Pract. Cas. 168; 5 L. T. O. S. 3; 9 J. P. 212.

905. ———.] — **Best price not realised.** — Where a farm tenant is under covenant to expend upon the premises the hay, etc., made thereon, the landlord who has seized the hay under a distress, & sells it, subject to a condition that it shall be expended upon the premises, whereby the hay fetches a smaller price than it would have done if the sale had been absolute, is liable in an action by the tenant for not selling at the best price.—*RIDGWAY v. STAFFORD (LORD)* (1851), 6 Exch. 404; 20 L. J. Ex. 226; 17 L. T. O. S. 80; 16 J. P. 25; 155 E. R. 600.

Annotations:—*Fold. Hawkins v. Walrond* (1876), 1 C. P. D. 280. *Refd.* *Wilnot v. Rose* (1854), 3 E. & B. 563. *Mentd.* *Lybbe v. Hart* (1885), 29 Ch. D. 8.

906. ———.] — **Covenant by tenant not to remove produce.**—*HAWKINS v. WALROND*, No. 873, *ante*.

SUB-SECT. 8.—INSUFFICIENT PROCEEDS.

907. Remedy of landlord. — *PHILPOTT v. LEHAIN*, No. 875, *ante*.

OF NEW SOUTH WALES (1883), 9 V. L. R. 252.—AUS.

c. ———.] — On a sale under distress the landlord cannot buy the goods distrained on.—*Ex p. KEARNEY* (1901), 1 S. R. N. S. W. 157.—AUS.

d. ———.] — Pltf. distrained upon his tenant, & at the sale, with the latter's consent, purchased a portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, & partly by the delivery of the tenant to him:—*Held*: though as a general principle no one can sustain the double character of seller & buyer, yet where, as in this case, the tenant consents to the purchase by the landlord, the sale can be supported; & therefore the property sold passed to pltf., & he could hold it against deft.'s execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual & continued change of possession, under C. S. U. C., c. 45, s. 4.—*WOODS v. RANKIN* (1868), 18 C. P. 41.—CAN.

e. ———.] — Pltf., a musical instrument maker at T., rented a piano to J., at \$6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at \$450; & several months afterwards, when J. had paid three months' rent, a written contract was signed by J. Deft., J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold

by the bailiff for \$75, deft. being the purchaser, & deft. afterwards allowed J. \$125 extra in settlement with him, making \$200 in all:—*Held*: the sale to deft. passed nothing, for as landlord he could not himself purchase goods sold by his bailiff, under 2 Will. & Mar. sess. 1, c. 5, s. 2; & although, as between J. & deft., deft.'s claim might be complete by the subsequent arrangement with J., yet pltf., the owner, was not bound by it.—*WILLIAMS v. GREY* (1874), 23 C. P. 561.—CAN.

f. ———.] — Pltf. caused the goods in question to be distrained for rent in arrear of a farm, & after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenants' consent to pltf., & one P. was put in charge, who, however, allowed the tenants to remain in possession as before. Subsequently, the goods were seized & sold by the sheriff under executions against the tenants, whereupon pltf. brought trover:—*Held*: he could not, as landlord, claim as purchaser at the bailiff's sale.—*BURNHAM v. WADDELL* (1880), 3 A. R. 288.—CAN.

g. ———.] — H., who was president of defts., an incorporated co. & also a member of an incorporated gas co., purchased the goods at the sale for the gas co. The judge charged to jury that H. was both seller & buyer, & that the sale was void:—*Held*: a misdirection; but, as it appeared that no substantial wrong

SUB-SECT. 9.—OVERPLUS.

908. What is overplus—Balance after payment of rent & charges—Reasonableness of charges.—The overplus, which by 2 Will. & Mar. sess. 1, c. 5, sect. s, is directed to be left in the hands of the sheriff, under-sheriff, or constable on a distress, for the owner's use, means the overplus after payment of the rent & of the reasonable charges. Therefore, in an action on the case for not leaving the overplus in the hands of the sheriff, etc., for pltf.'s use, pltf. may question the reasonableness of the charges. Where pltf. herself received from the broker the balance remaining after payment of the rent & the actual charges, making no objection as to their reasonableness:—*Held*: it was a question for the jury whether she accepted such balance in satisfaction, & if not, whether it was sufficient to satisfy the real balance; but it was not correct to lay it down as matter of law, that such payment & receipt substantially satisfied the requisitions of the statute.—*LYON v. TOMKIES* (1836), 1 M. & W. 603; 2 Gale, 144; Tyr. & Gr. 810; 5 L. J. Ex. 260; 150 E. R. 576.

909. ———.] — *WILKINSON v. IBBETT*, No. 1326, *post*.

910. To whom payable—Tenant or sheriff. — Being unable to find the tenant, is a sufficient excuse for not paying over the surplus to the tenant, after a levy & sale of his goods under distress. Notwithstanding the words in 2 Will. & Mar. c. 5, sect. 2, it is the practice to pay over such surplus to the tenant & not to the sheriff.—*STUBBS v. MAY* (1823), 1 L. J. O. S. C. P. 12.

911. ———.] — **Execution creditor.** — In an action against a landlord, for an excessive distress, it appeared that two several distresses for rent, & an intervening execution for a debt, were levied; a sale was afterwards effected, when deft. having retained what was due for rent, paid the remainder to the execution creditor:—*Held*: (1) he was justified in so doing; the sum, therefore, so paid over, could not be recovered in this action; (2) deft. & his broker were in the same situation as the sheriff's officer; the production of the writ & warrant,

or miscarriage was occasioned thereby, the ct., under O. J. A., r. 311, could not interfere.—*HOWELL v. LISTOWEL LINK & PARK CO.* (1886), 13 O. R. 476.—CAN.

h. ———.] — Deft. was pltf.'s landlord in respect to certain premises distrained for a year's rent. At the sale the landlord bid for some of the goods offered, & he became the purchaser:—*Held*: a man cannot sell to himself either in his own person or in the person of another, & judgment was given for pltf.—*TINGLEY v. SHARPE* (1906), 3 W. L. R. 159.—CAN.

k. ———.] — A landlord who proceeds to sell the goods of his tenant distrained upon for rent is bound to endeavour to secure the best price obtainable for them. Where it appeared from the evidence that the distress was excessive; that the goods, taken at cost price, were worth \$500; & they were disposed of for a sum which below their actual value, & that the landlord himself was a purchaser at the sale, & subsequently disposed of the goods so purchased at private sale, the ct. declined to interfere with the judgment entered by the trial judge in pltf.'s favour for \$300 damages.—*DUCHEMIN v. MCKAY* (1919), 52 N. S. R. 225.—CAN.

PART II. SECT. 13, SUB-SECT. 9.

1. What is overplus—Balance after payment of sum mentioned in warrant.—Goods which were distrained upon under a warrant for

Sect. 13.—Sale of distress: Sub-sects. 9, 10 & 11.
14.]

without proof of the judgment was sufficient.—*TAYLOR v. HARRISON* (1832), 1 L. J. K. B. 155.

912. — Whether mortgagee entitled.]—A landlord, who has sold his tenant's goods under a distress for rent, is not liable in an action for money had & received at the suit of the mtgee. of the goods to recover the overplus money in the landlord's hands; the proper remedy being by an action on the case against him for not paying over the overplus to the sheriff, pursuant to 2 Will. & Mar. sess. 1, c. 5, sect. 2.—*YATES v. EASTWOOD* (1851), 6 Exch. 805; 20 L. J. Ex. 303; 17 L. T. O. S. 189; 155 E. R. 771.

*Annotation:—*Refd. *Evans v. Wright* (1857), 2 H. & N. 527.

913. Overplus retained by landlord — Rights of tenant.]—*YATES v. EASTWOOD*, No. 912, *ante*.

914. Disposal of surplus goods—Duty of bailiff.]—Where goods distrained for rent in arrear have been removed to a convenient place for sale, & sufficient sold to satisfy the distress, the proper course is for the broker to leave the surplus money with the sheriff & return the surplus goods to the premises from whence he took them.

D. assigned his furniture to pltf. as a security for money advanced. The deed of assignment provided that on default in payment of the principal or interest on a day named, or such earlier day as pltf. should appoint by notice, it should be lawful for pltf. to take possession of the furniture; but that until default D. should hold it. D. being indebted to his landlord for rent, deft., a broker, distrained the furniture. The pltf. gave notice to D. to pay the principal money & interest, & he afterwards gave notice to deft. that D. had assigned the furniture to him. Def. on receiving this notice said that he would "take care it was properly acted on." The goods were removed from D.'s house to an auction room, & sufficient having been sold to satisfy the distress, deft. returned the surplus goods to D.'s house & gave the surplus money to D.:—*Held*: (1) there was no conversion of the goods by deft.; (2) the action for money had & received could not be maintained for the surplus money.—*EVANS v. WRIGHT* (1857), 2 H. & N. 527; 27 L. J. Ex. 50; 30 L. T. O. S. 104; 157 E. R. 217.

arrears of rent were sold & realised more than the sum mentioned in the warrant as being due. In an action to recover the overplus:—*Held*: pltf. was entitled to the sum realised beyond the amount of the rent distrained for, even though the arrears of rent actually due exceeded the amount realised by the sale.—*McADAM v. MCINTYRE* (1911), 11 S. R. N. S. W. 205.—AUS.

m. Disposal of surplus goods—Necessary preliminaries to action—Demand & reasonable time.]—The distrainer is not bound to hand the surplus immediately to the owner of the goods. An actual demand is a necessary preliminary to a right of action in the owner; & the distrainer is entitled to a reasonable time after demand for investigating the claim of ownership.—*RYAN v. HOWELL* (1848), 1 Legge, 470.—AUS.

n. — Rights of tenant.]—Pltf. may sell a distress to the amount of the rent due; the rest he sells at his own peril, & may be recovered from him by action of trover. Def. may clearly recover in trover the value of the goods distrained, above the amount of the rent due. If, then, the jury take this over-distraining into their consideration, in an action of *assumpsit*, brought by the landlord to recover, the ct. will not set it aside, to

prevent a multiplicity of actions.—*OSBORNE v. JOURDAN* (1825), Rowe, 511.—IR.

PART II. SECT. 13, SUB-SECT. 10.

915 i. Sale proceeds—Vest in landlord—In satisfaction of rent.]—Pltf., the landlord of premises rented by N. who carried on business thereon, distrained the goods upon the premises for the amount of rent in arrear. The seizure was made upon pltf.'s warrant by his bailiff. The goods were not removed from the premises. N. executed under seal a document by which he agreed to hold the goods for the bailiff, & pay the arrears by monthly instalments. The seizure was made & the agreement executed on May 26, 1922. In pursuance of this agreement & of an oral understanding, the tenant accounted to pltf. at short intervals for the receipts of the business. This state of things going on deft., who held a chattel mtge. upon the goods which had been distrained, issued a warrant to the same bailiff, who thereupon made a second seizure of the same goods, or the portion thereof remaining unsold, on June 14, 1922, purporting to act on deft.'s warrant. By arrangement between the solrs. representing pltf. & deft. the goods were advertised by the bailiff, & sold as seized under both warrants:—*Held*: the parties

SUB-SECT. 10.—EFFECT OF SALE.

915. Sale proceeds—Vest in landlord—In satisfaction of rent.]—*MOORE v. PYRKE*, No. 406, *ante*.

916. Title of true owner divested — Notwithstanding purchase for tenant.]—*Semble*: the sale of goods under a distress for rent divests the title of the true owner, although such goods are purchased in order to be restored to the possession of the tenant. Therefore the title of pltf. to a pianoforte in the possession of A., distrained for rent due by him, & purchased by deft. was divested by the sale under the distress, although it was purchased by deft. as agent for B. in order that it might be restored to A., to remain as a security to B. under a bill of sale of the pianoforte & other effects, deft. & B. being ignorant of pltf.'s claim.—*CHAPPELL v. SALWAY* (1853), 21 L. T. O. S. 68.

917. Action for recovery of price of goods sold — Estoppel by concurrence in sale—Want of title.]—Pltf., being a widow, but not representative of her deceased husband, was in possession of goods which had belonged to him. She married B. supposing him to be single, & lived with him in the house in which the goods were. The goods being distrained for rent, B. sold to deft. so many of them as sufficed to pay off the distress, & pltf. authorised the sale. A month afterwards B. was convicted of bigamy:—*Held*: pltf. could not recover in an action against deft. for the value of the goods, first, because she had no title to them; & secondly, because she was bound by her concurrence in the sale.—*WALLER v. DRAKEFORD* (1853), 1 E. & B. 749; 22 L. J. Q. B. 274; 17 J. P. 663; 17 Jur. 853; 118 E. R. 616.

*Annotation:—*Mentd. *Richards v. Johnson* (1859), 5 Jur. N. S. 520.

Agreement as to sale between landlord & tenant — Whether bar to action for excessive distress.]—*See* Nos. 1306–1308, *post*.

SUB-SECT. 11.—IRREGULARITY IN SALE

See Distress Act, 1689.

Amount recoverable by tenant—In action for irregular distress.]—*See* Sect. 19, sub-sect. 5, B. (b), *post*.

— In action for excessive distress.]—*See* Sect. 10, sub-sect. 5, C.

having agreed that the goods should be sold & the proceeds divided according to their legal rights, pltf. must succeed, for his right as landlord was paramount.—*POOLE v. KIRK* (1923), 53 O. L. R. 390.—CAN.

o. Removal of goods purchased—Must be within reasonable time.]—The purchaser of property sold for rent must remove the same off the premises within a reasonable time after the sale. Where the property was sold on Feb. 15, & the purchaser entered to remove it off the premises on Mar. 26 following, he was held liable as a purchaser.—*ALWAY v. ANDERSON* (1848), 5 U. C. R. 34.—CAN.

p. Rights of grantee of bill of sale —Purchase by landlord.]—The property in goods, under Distress Act, 1885, s. 4, of the tenant or person in possession who has given a bill of sale over them is a limited property, it is only "for the purposes of distress," & does not give the tenant a right to deal with them outside the distress. Where, therefore, a landlord who has distrained buys such goods at auction with the consent of the tenant, no property in the goods passes, & the mtgee. can maintain trover against the landlord.—*MANNING v. JONAS* (1896), 14 N. Z. L. R. 53.—N.Z.

PART II. SECT. 13, SUB-SECT. 11.

q. Sale before expiry of time limit

918. Price realised under value.]—In an action for rent:—*Semble*: it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action.—*EFFORD v. BURGESS* (1831), 1 Mood. & R. 23.

Annotation:—*Mentd. Leham v. Philpott* (1875), 44 L. J. Ex. 225.

919. — Neglect causing depreciation.]—Upon a count for not selling goods distrained at the best prices, pltf. may go into evidence to show that the goods were allowed to stand in the rain, & that they were improperly lotted.—*POYNTER v. BUCKLEY* (1833), 5 C. & P. 512.

920. Sale by bailiff for his expenses — After withdrawal of authority by landlord.]—A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is then withdrawn, has no right to go on & sell for his expenses.—*HARDING v. HALL* (1866), 14 L. T. 410; 30 J. P. 344; 14 W. R. 646.

921. Sale before expiry of time limit—Goods of lodger—Remedy of lodger.]—*SHARPE v. FOWLE*, No. 433, *ante*.

922. —.]—*FRENCH v. BOMBERNARD, TOWER FURNISHING & FINANCE CO., LTD., CLAIMANTS* (1888), 60 L. T. 48; 5 T. L. R. 55, D. C.

Annotations:—*Expld. & Distd. Re Jones, Ex p. Tower Furnishing Co.* (1889), 6 Morr. 193. *Consd. Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

923. Sale by auctioneer—Wrongful distress—Jus tertii.]—The estoppel against a bailor from disputing the title of his bailor, & setting up a *jus tertii*, ceases when the bailment on which the estoppel is founded is determined by what is equivalent to an eviction by title paramount: it is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made upon him, so that he may be entitled to an interpleader. The goods of R. were seized by pltf. under a distress for rent of a house alleged to have been demised by pltf. to R. & were delivered by pltf. to deft. to sell as his auctioneer. When the sale was about to begin R. served a notice on deft. that the distress was void, & requiring him not to sell, or, if he sold, to retain the proceeds for him. Deft. sold the goods, but refused to pay over the proceeds to pltf. & defended an action by pltf. relying on the right & by the authority of R. The distress was void & tortious, as the relation between pltf. & R. was not that of landlord & tenant; but although pltf. was a wrongdoer, there was no fraud on his part, & he thought he had a right to distrain:—*Held*: deft. might set up the *jus tertii* of R. as an answer to the action.—*BIDDLE v. BOND* (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L. J. Q. B. 137; 12 L. T. 178; 29 J. P. 565; 11 Jur. N. S. 425; 13 W. R. 561; 122 E. R. 1179.

Annotations:—*Expld. & Distd. Kingsman v. Kingsman*

—*Quit-rents.*—*WINDEYER v. RIDDELL & FLOOD* (1846), 1 Legge, 295.—*AUS.*

r. Failure to give copies of charges to be paid—Effect of.]—Failure to comply with the provisions of Distress Act, s. 6, as to giving copies of charges to be paid renders the sale of the goods distrained irregular, but does not make the distress illegal.—*MCDERMOTT v. FRASER* (1915), 8 W. W. R. 196; 23 D. L. R. 430; 25 Man. L. R. 298.—*CAN.*

a. Owner present at irregular sale—Whether estopped from complaining.]—*Held*: the owner's presence at sale did not estop him from complaining of irregularities in sale.—*CLAXTON v. SHIBLEY* (1885), 9 O. R. 451; *Revsd.* 10 O. R. 295.—*CAN.*

t. Tenant consenting to postponement of sale—Whether amounts to waiver of irregularity.]—When the tenant consents to the postponement of the sale of a distress, he waives an irregularity arising from the notice of sale not having been posted in the next market town.—*DWYER v. PEACOCK* (1823), 2 Fox & S. Ir. 34.—*IR.*

PART II. SECT. 14.

a. Landlord's liability — For remuneration of person employed by sheriff.]—A person employed by a sheriff in connection with a distraint by a landlord compelled to use the sheriff or sheriff's officer can have no claim against the person directing distraint, in the event of the sheriff not remunerating him for his services.

(1880), 6 Q. B. D. 122. *Distd. Re Sadler, Ex p. Davies* (1881), 19 Ch. D. 86. *Consd. Rogers v. Lambert*, [1891] 1 Q. B. 318; *Henderson v. Williams*, [1895] 1 Q. B. 521. *Reid. Leese v. Martin* (1873), L. R. 17 Eq. 224; *Rogers v. Lambert* (1890), 24 Q. B. D. 573. *Mentd. Ross v. Edwards* (1895), 73 L. T. 100.

924. — Invalid warrant—Warranty of title.]—Deft., an auctioneer, sold by auction to pltf. a piano which had been seized under a distress warrant for rent in arrear. The warrant was invalid, & the piano was claimed from pltf. by the true owner, & was delivered up to him. In an action by pltf. against deft.:—*Held*: there was no implied warranty of title on the part of deft.—*PAYNE v. ELSDEN* (1900), 17 T. L. R. 161.

—.]—*See, generally, AUCTION & AUCTIONEERS*, Vol. III., pp. 2 *et seq.*

925. Irregularity of broker — Effect on sale — Title to goods.]—*LYON v. WELDON*, No. 772, *ante*.

926. Remedy of tenant.]—*WALLACE v. KING*, No. 1359, *post*.

927. —.]—*EFFORD v. BURGESS*, No. 918, *ante*.

SECT. 14.—EXPENSES OF DISTRESS.

See Distress Costs Act, 1817 (c. 93), s. 1, & Law of Distress Amendment Act, 1888 (c. 21).

928. Landlord's liability.]—A landlord having authorised a distress for rent, is liable for the necessary expenses, & although pltf. was sent by deft. who promised to pay him, to take possession of the goods distrained, deft. would not be liable without a note in writing.—*COLMAN v. EYLES* (1817), 2 Stark. 62, N. P.

929. — To broker.]—A broker having seized goods under a distress for rent, the tenant desired time, & that the broker would not remove or sell; on which the latter required the tenant to sign written requests from time to time, by which he also engaged to pay the charges of the levy, & the expenses of keeping a man in possession. The goods were not removed, & the broker applied for, & obtained those charges, but the tenant objected to the amount, as well as to the sum alleged to be due for rent:—*Held*: the payment by the tenant was not a voluntary payment, & if the charges were illegal or excessive, he might recover them back in an action for money had & received.—*HILLS v. STREET* (1828), 5 Bing. 37; 2 Moo. & P. 96; 6 L. J. O. S. O. P. 215; 130 E. R. 973.

930. Assessment of—At common law—Must be reasonable.]—*Ex p. ARNISON*, No. 932, *post*.

931. — Under statute — Scale of fees & charges.]—By Distress Costs Act, 1817 (c. 93), no person making a distress for rent where the sum demanded & due shall not exceed £20, shall take other or more charges than those set forth in the schedule; & in the schedule the charge for "man in possession" is 2s. 6d. per day. By Law of Distress Amendment Act, 1888 (c. 21),

—*WEAVER v. MCGREGOR & CALGARY FURNITURE STORE, LTD.*, [1917] 2 W. W. R. 795.—*CAN.*

931 i. Assessment of—Under statute —Scale of charges.]—The rights of a landlord's bailiff, levying a distress upon the goods of a tenant, are governed by Distress Act, R. S. B. C. 1911, c. 65. The bailiff made a seizure, & upon the request of the tenant, delayed making an inventory. He remained in possession during part of one day, & withdrew upon being paid the amount of rent due, \$3,000, & under protest from the tenant, the amount claimed for poundage or commission:—*Held*: the bailiff was entitled only to \$2 for levying & \$2 for the man in possession, & was not

Sect. 14.—Expenses of distress. Sect. 15.]

the Lord Chancellor may make rules for regulating the fees, charges, & expenses in & incidental to distresses. By Distress for Rent Rules, 1888, r. 15, made by the Lord Chancellor under the above sect., no person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in & authorised by the table in Appendix II. to these rules; & by r. 16, where the rent due exceeds £20 the fees, charges, & expenses specified in scale I. shall be allowed, & where it does not exceed £20 the fees, charges, & expenses specified in scale II. shall be allowed. Scale II. allows "for man in possession, 4s. 6d. per day: to provide his own board in every case":—*Held*: the Lord Chancellor had power under sect. 8 of the above Act to make rules authorising a scale of fees, charges, & expenses which should supersede the scale in the schedule to the Distress Costs Act, 1817 (c. 93), & therefore the charge of 4s. 6d. per day for a man in possession authorised by the scale where the rent due did not exceed £20 was not *ultra vires*.—*WALKER v. RETTER*, [1911] 1 K. B. 1103; 80 L. J. K. B. 623; 104 L. T. 821; 75 J. P. 331, D. C.; *previous proceedings, sub nom. RETTER v. WALKER*, 54 Sol. Jo. 843.

932. Sum due under £20 — "Man in possession"—Of growing crops.]—(1) A growing crop may be a sufficient distress within Tithe Act, 1836 (c. 71), s. 82.

(2) Charges for levying distress must at common law, independent of statute, be reasonable.

(3) Tithe Act, 1836 (c. 71), s. 82, provides a remedy in addition to the remedy by distress, for the recovery of tithe rentcharge "in case the rentcharge shall be in arrear & unpaid for the space of forty days next after any half-yearly day of payment, & there shall be no sufficient distress on the premises liable to the payment thereof":—*Held*: a tithe owner, in estimating whether or not there was a sufficient distress on premises distrained on by him, was bound to include the prospective value of growing crops, although not capable of actual realisation within forty days from the day on which the rentcharge was in arrear.

(4) Distress Costs Act, 1817 (c. 93), s. 1, enacts that no person making any distress for rent where the sum due shall not exceed £20, shall be allowed any other or more charges than those mentioned in the schedule to the Act. Among the charges in the schedule is, "Man in possession," 2s. 6d. a day:—*Held*: such a charge was excessive for retaining possession of growing crops distrained upon for a tithe rentcharge less than £20 in amount, on a piece of unenclosed meadow land.—*Ex p. ARNISON* (1868), L. R. 3 Exch. 56; *sub nom. Re HEYSHAM v. HESKETT*, *Ex p. ARNISON*, 37 L. J. Ex. 57; *sub nom. Re PLUMPTON WALL TITHE RENTCHARGE*, *HEYSHAM v. HESKETT*, 17 L. T. 480; 32 J. P. 103; 16 W. R. 368.

933. — Of goods — Removal from premises.]—A constable who had levied a distress for poor rates for an amount not exceeding £20 removed the goods seized to a police station for

safe custody; they were there locked up in a cupboard, the key of which was hung up in the police station; after remaining there for five days they were sold by public auction:—*Held*: under a table of fees authorised by Police Act, 1890 (c. 45), & approved by the Secretary of State, the constable was entitled to make a charge of 1s. per day for "keeping possession" of the distress.

The expression "man in possession," as used in the schedule to Distress Costs Act, 1917 (c. 93), means a man in possession of the goods seized, & is not confined to a man in possession upon the premises where the seizure took place (*LORD ALVERSTONE, C.J.*).—*SCOTT v. DENTON*, [1907] 1 K. B. 456; 76 L. J. K. B. 330; 95 L. T. 760; 71 J. P. 66; 23 T. L. R. 73; 51 Sol. Jo. 82; 5 L. G. R. 251, D. C.

934. — Extra remuneration—Agreement between bailiff & landlord.]—A certificated bailiff who levies a distress for arrears of rent for an amount not exceeding £20 is not prohibited by Distress Costs Act, 1817 (c. 93), or Law of Distress Amendment Act, 1888 (c. 21), or the rules thereunder, from making a special agreement with the landlord for extra remuneration beyond the costs & charges allowed under those Acts.—*ROBSON v. BIGGAR*, [1907] 1 K. B. 690; 76 L. J. K. B. 248; 96 L. T. 271; 71 J. P. 164; 23 T. L. R. 276; 51 Sol. Jo. 249, D. C.; *on appeal*, [1908] 1 K. B. 672, C. A.

Annotations:—*Mentd. R. v. Daly, Ex p. Newson* (1911), 104 L. T. 892; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

935. Bailiff levying execution & distraining — Double charges.]—Where a bailiff has levied execution under a *fi. fa.* & has also received a notice under County Courts Act, 1888 (c. 43), s. 160, of the landlord's claim to rent, & has distrained therefor, he is entitled to poundage or possession fees in respect of both proceedings.—*Re BROSTER, Ex p. PRUDDAH*, [1897] 2 Q. B. 429; 66 L. J. Q. B. 766; 76 L. T. 692; 45 W. R. 576; 13 T. L. R. 437; 41 Sol. Jo. 545; 4 Mans. 212, D. C.

936. Excessive or improper charges — Recovery by tenant.]—*HILLS v. STREET*, No. 929, *ante*.

937. — Penalty for taking—Enforcement of order.]—An order made by justices under Distress Costs Act, 1817 (c. 93), s. 2, for the payment of treble the amount of moneys unlawfully taken on the levying of a distress is enforceable by imprisonment in default of sufficient distress, such sum being a penalty & not a civil debt.—*R. v. DALY, Ex p. NEWSON* (1911), 104 L. T. 892; 75 J. P. 333; 22 Cox, C. C. 461, D. C.

938. — Appeal from Divisional Court — Jurisdiction of Court of Appeal—"Criminal cause or matter."]—The Ct. of Appeal has no jurisdiction to hear an appeal from a decision of a Div. Ct. upon a case stated by justices as to a complaint under Distress Costs Act, 1817 (c. 93), s. 2, against a certificated bailiff for unlawfully retaining certain charges exceeding those allowed by statute when employed to make a distress for rent for a sum not exceeding £20, the proceeding before justices being a "criminal cause or matter" within Jud. Act, 1873, s. 47.—*ROBSON v. BIGGAR*, [1908] 1 K. B.

entitled to stand upon his seizure & withdrawal as a sale to the tenant.—*BANCROFT v. RICHARDS* (1913), 23 W. L. R. 73; 3 W. W. R. 825; 9 D. L. R. 77; 18 B. C. R. 38.—*CAN.*

931 ii. — — — — —.]—Under Distress Act Amendment Act, 1913, s. 3, the Sheriff is not entitled to charge for a man in possession where goods are

distrained under a distress warrant unless he has remained in actual possession.—*R. v. BARTON* (1919), 27 B. C. R. 485.—*CAN.*

b. Excessive or improper charges—Recovery—Form of order.]—The form of order given in the schedule to C. S. U. C., c. 123, respecting the costs of distress for rents & penalties not

exceeding \$80, states the unlawful charges to have been taken from complainant "under a distress for (as the case may be)":—*Held*: it was sufficient to say "a distress for rent," & it was unnecessary to state such rent to have been under \$80, in order to show jurisdiction.—*R. v. STEWART* (1866), 25 U. C. R. 327.—*CAN.*

72; 77 L. J. K. B. 203; 97 L. T. 859; 24 L. R. 125; 52 Sol. Jo. 76, C. A.

Innovations:—*Folld. R. v. Daly, Ex p. Nowson* (1911), 104 L. T. 892. *Reid. R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

939. Who is entitled to — “Person making distress” — Whether bailiff of county court.—The bailiff of the county ct. is not the “person making any distress” within Agricultural Holdings Act, 1883 (c. 61), s. 49, & is therefore not entitled to the percentage allowed by that sect. & sched. 2 to the Act to be charged by the “person making any distress for rent on a holding to which this Act applies when the sum demanded shall exceed the sum of £20.”—*COODE v. JOHNS* (1886), 17 Q. B. D. 714; 55 L. J. Q. B. 475; 55 L. T. 290; 51 J. P. 21; 35 W. R. 47, D. C.

Annotation:—*Overd. Philpotts v. Rees* (1889), 24 Q. B. D. 17.

940. — — — — —.—In distress for rent under Agricultural Holdings Act, 1883 (c. 61), the bailiff & not the landlord is entitled to the percentage for levying distress authorised by sched. 2 of that Act.—*PHILIPPS v. REES* (1889), 24 Q. B. D. 17; 59 L. J. Q. B. 1; 61 L. T. 713; 51 J. P. 293; 38 W. R. 53; 6 T. L. R. 14, C. A.

SECT. 15.—ABANDONMENT OF DISTRESS.

941. Question of fact.—There is no illegality in distraining for rent by climbing over a fence, & so gaining access to the house by an open door. The broker having been forcibly expelled, regained possession by force after an interval of three weeks:—*Held*: he was justified in so doing; it was a question for the jury whether by staying out so long he had abandoned the distress.—*ELDRIDGE v. STACEY* (1863), 15 C. B. N. S. 458; 3 New Rep. 41; 9 L. T. 291; 10 Jur. N. S. 517; 12 W. R. 51; 143 E. R. 863.

Annotations:—*Reid. Lumsden v. Burnett*, [1898] 2 Q. B. 177. *Mentd. Long v. Clarke*, [1894] 1 Q. B. 119.

942. Destroys landlord's right to distrain.—*BAGGE v. MAWBY*, No. 951, *post*.

943. — — — — —.—After distress made by a broker, in a case within Distress Costs Act, 1817 (c. 93), the rent & charges may still be tendered to the landlord. The declaration contained six counts in case; the seventh charged, that defts. took & distrained the goods of pltf. for rent, of more than sufficient value to satisfy the rent & costs, & then

voluntarily abandoned the same, & afterwards wrongfully, injuriously & vexatiously again took & distrained the same goods for the same rent, & refused to return the same & converted them to their own use. On motion in arrest of judgment for misjoinder of case & trespass:—*Held*: although this second taking of the goods was a trespass yet pltf. might bring case for the conversion & the count was an informal one in case, & sufficient after verdict.—*SMITH v. GOODWIN* (1833), 4 B. & Ad. 413; 2 Nev. & M. K. B. 114; 2 L. J. K. B. 192; 110 E. R. 511.

Annotations:—*Distd. Lear v. Caldecott* (1843), 4 Q. B. 123. *Reid. Sedman v. Walker* (1847), 1 Exch. 589. *Mentd. Ellis v. Taylor* (1841), 10 L. J. Ex. 462; *Dawson v. Cropp* (1845), 1 C. B. 961; *Hatch v. Hale* (1850), 15 Q. B. 10; *Boulton v. Reynolds* (1859), 2 E. & E. 369; *Johnson v. Upham & Best* (1859), 5 Jur. N. S. 681.

944. — — — — — Unless good reason for abandonment.—A landlord cannot make a second distress for the same rent when the goods taken under the first distress were of sufficient value to satisfy the rent, unless there was a good cause for abandoning the first distress, although the rent may have remained unsatisfied. It is, therefore, a good replication to a plea justifying the taking of goods as a distress for rent, to allege that deft. took under a former distress for the same rent goods sufficient in value to satisfy the same, & then might & ought to have fully paid & satisfied the rent; “yet deft. wrongfully & vexatiously, & without any cause or excuse, refused & neglected so to do.” A rejoinder, alleging that deft. afterwards lawfully abandoned & put an end to the first distress, & that the rent was still unsatisfied, is bad, for not showing any lawful ground for relinquishing the first distress.—*DAWSON v. CROPP* (1845), 1 C. B. 961; 3 Dow. & L. 225; 14 L. J. C. P. 281; 5 L. T. O. S. 330; 9 Jur. 944; 135 E. R. 821.

Annotations:—*Consd. Grunnell v. Welch*, [1905] 2 K. B. 650. *Reid. Thwaites v. Wilding* (1883), 12 Q. B. D. 4; *Crosse v. Welch* (1892), 8 T. L. R. 401. *Mentd. Lechain v. Philpott* (1875), L. R. 10 Exch. 242.

945. What amounts to abandonment — Not leaving goods temporarily.—A man having been put into possession of goods under a distress, left the premises for a short time for a purpose not absolutely necessary; on his return he found the outer door fastened, & he broke it open to regain admission:—*Held*: there was no abandonment of the distress, & the breaking the outer door under the circumstances was justifiable.—*BANNISTER*

PART II. SECT. 15.

941 i. Question of fact.—Under a distress for rent issued on Mar. 12, deft. took possession of pltf.'s store & evicted him. On Mar. 13, discovering that the distress was illegal, he induced pltf. to go to the store with his attorney & the bailiff who made the distress, where they informed him that the distress was illegal, & a new one would have to be made, & they then handed him the key of the store & an inventory of the goods distrained, & tendered him \$17 as damages for the eviction. The bailiff immediately informed him that he had a new mand., & received back the key & they left the store. In an action for legal distress, it was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found, in answer to a question, that the bailiff at no time prior to the service of the second warrant gave up the possession & control of the goods under the first:—*Held*: it should have been specifically left to the jury to say whether what took place, & what was done on the discovery of the mistake made on executing the warrant, & making the distress after sunset, was done with

the intention of abandoning the distress.—*MOOERS v. MANZER* (1903), 36 N. B. R. 205.—*CAN.*

942 i. Destroys landlord's right to distrain.—D. was tenant to M. under a lease which provided that in the event of D. making an assignment in insolvency the term should become forfeited & void, but that the then current quarter's rent, as well as the next succeeding current quarter's rent, should immediately become due & payable. On June 21, 1872, D. made an assignment in insolvency to K., an official assignee; & M. immediately distrained for the rent, including two quarters due by virtue of the forfeiture. At the request of the official assignee, M. abandoned the distress, & in lieu thereof agreed to look to the insolvent estate, the assignee thinking that there would be abundance of property to pay it, but repudiating any interest in the term. Subsequently, the goods proving insufficient by reason of a chattel mtge., the assignee told M. that he could not continue responsible, & M. thereupon, on Sept. 24, issued a second distress for same rent:—*Held*: the second distress was bad, for on the abandonment of the first distress,

which could not be said to have been at the request of the tenant, M.'s right to distrain was gone, & he could only look to the insolvent's goods, which passed, without the term, to the assignee.—*MAY v. SEVERIS* (1874), 24 C. P. 396.—*CAN.*

c. What amounts to abandonment — Whether delay in selling.—*NAYLOR v. BELL* (1881), 2 R. & G. 444; 2 C. L. T. 263.—*CAN.*

d. — — — — —.—Where a bailiff in charge of goods distrained on leaves the premises for the night, he abandons the distress. Where a bailiff so leaves the premises & finds them barred against him on his return he is not justified in breaking in. A mere temporary absence, such as to smoke, buy food, etc., is not an abandonment.—*SOMERS v. MANDERS* (1895), 29 I. L. T. 128.—*IR.*

e. Effect on landlord's right to payment.—A tenant absconded leaving rent in arrear, whereupon the landlord distrained, but, before selling, the tenant sent to the landlord a power of attorney, authorising him to dispose of the property; & by letter he directed the landlord to pay himself his claim for rent, as also his claim for

15. of distress.

v. HYDE (1860), 2 E. & E. 627; 29 L. J. Q. B. 141; 1 L. T. 438; 24 J. P. 230; 6 Jur. N. S. 171; 121 E. R. 235.

Annotation:—*Consd. Jones v. Biernstein*, [1899] 1 Q. B. 470.

946. — Not failure to resume immediate possession—On forcible expulsion.]—*ELDRIDGE v. STACEY*, No. 941, *ante*.

947. — Not temporary removal of goods—By permission of distrainor.]—*KERBY v. HARDING*, No. 732, *ante*.

948. — Goods of lodger distrained — Withdrawal after statutory notice—Breach of agreement by immediate tenant.]—*THWAITES v. WILDING*, No. 428, *ante*.

949. — Withdrawal under false representation by tenant—Goods subsequently seized in execution.]—*WOLLASTON v. STAFFORD*, No. 841, *ante*.

950. Proceeds of sale retained by bailiff — Action for money had & received by landlord.]—*ST. JOHN'S COLLEGE, OXFORD v. MURCOTT* (1797), 7 Term Rep. 259; 101 E. R. 963.

Annotation:—*Distd. Brandling v. Barrington* (1827), 6 B. & C. 467.

SECT. 16.—SECOND DISTRESS.

951. General rule.] — A landlord abandoned a distress, in consequence of a notice from a creditor of the tenant, stating that the creditor had filed a petition in bkpcy. against the tenant, & intended proceeding with it, & warning the landlord not to sell. The tenant was afterwards declared bkpt. & the creditor was appointed assignee under the bkpcy. After such appointment, the assignee verbally promised to pay the landlord the arrear of rent. On the same day the landlord distrained a second time for the same rent; but the assignee sold the goods so seized:—*Held*: the second distress was illegal.

A person cannot twice distrain for the same rent. If he has had an opportunity of levying the amount by the first distress, it is vexatious in him to distrain a second time; unless there be some legal ground for doing so; as, for instance, if there has been some mistake as to the value of the goods, & the landlord fairly supposed the distress to be of the proper value, & he afterwards found it to be insufficient, he then might distrain for the remainder; or, if the tenant has done anything equivalent to saying "forbear to distrain now, & postpone your distress to some other time"; then the landlord might make a distress a second time. But if there is a fair opportunity, & there is no lawful cause why he should not make out the payment of the rent by reason of the first distress, it is his business to make it out by the first distress, & he cannot distrain again. The notice given by the petitioning creditor, who, at the time, had no interest whatever, to the landlord, to desist from selling on the first distress, was no excuse for his abstaining from exercising the power of distress

expenses & trouble; & after payment thereof & of pltf.'s claim to remit the balance to the tenant. The landlord then abandoned his warrant, & disposed of the property under the power:—*Held*: the landlord by so proceeding had not waived his right to payment of the rent due, & pltf. was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with

the landlord's expenses & charges for trouble in executing the trusts of the power.—*TYRRELL v. ROSE* (1870), 17 Gr. 394.—*CAN.*

PART II. SECT. 16.

952 i. Cannot be made for same rent.] — Pltf. was tenant to deft. who distrained for the first quarter's rent before the expiration of the first month. There was no evidence to show that the rent was payable in

B.).—*BAGGE v. MAWBY* (1853), 8 Exch. 641; 1 O. L. R. 285; 22 L. J. Ex. 236; 17 J. P. 345; 155 E. R. 1509; *sub nom.* *BUGGE v. MAWBY*, 1 Saund. & M. 125; 21 L. T. O. S. 142; 1 W. R. 357.

Annotations:—*Distd. Lee v. Cooke* (1858), 3 H. & N. 203. *Consd. Thwaites v. Wilding* (1883), 12 Q. B. D. 4. *Apld. Crosse v. Welch* (1892), 8 T. L. R. 709. *Distd. Grunnell v. Welch*, [1905] 2 K. B. 650.

952. Cannot be made for same rent.] — *ANON.* (1548), Moore, K. B. 7; 72 E. R. 402.

Annotations:—*Apld. Dawson v. Cropp* (1845), 1 C. B. 961. *Refd. Wallis v. Savill* (1701), 2 Lut. 1532.

953. —.]—A man cannot take two distresses for the same rent.—*ANON.* (1583), Cro. Eliz. 13; 78 E. R. 279.

Annotations:—*Refd. Wallis v. Savill* (1701), 2 Lut. 1532; *Dawson v. Cropp* (1845), 1 C. B. 961.

954. —.]—*WOTTON v. SHIRT* (1600), Cro. Eliz. 742; 78 E. R. 974.

955. —.]—*WALLIS v. SAVILL* (1701), 2 Lut. 1532; 125 E. R. 843.

Annotations:—*Consd. Hutchins v. Chambers* (1758), 1 Burr. 579. *Apld. Dawson v. Cropp* (1845), 1 C. B. 961. *Refd. Smith v. Goodwin* (1833), 4 B. & Ad. 413; *Bagge v. Mawby* (1853), 8 Exch. 641; *Owens v. Wynne* (1855), 4 E. & B. 579.

956. —.]—(1) Beasts of the plough are distrainable for the poor rates.

(2) A man who has an entire duty shall not split the entire sum & distrain for part of it at one time & for other part of it at another time . . . but if a man seizes for the whole sum that is due to him, & only mistakes the value of the goods seized, there is no reason why he should not afterwards complete his execution by making a further seizure (*per Cur.*).—*HUTCHINS v. CHAMBERS* (1758), 1 Burr. 579; 97 E. R. 458; *sub nom.* *HUTCHINS v. WHITAKER*, 2 Keny. 204.

Annotations:—*As to* (1) *Apld. MacGregor v. Clamp*, [1914] 1 K. B. 288; *McCreagh v. Cox & Ford* (1923), 92 L. J. K. B. 855. *Refd. Durrant v. Boys* (1796), 6 Term Rep. 580; *Nargett v. Nias* (1859), 1 E. & E. 439. *As to* (2) *Consd. Hudd v. Ravenor* (1821), 5 Moore, C. P. 542; *Bagge v. Mawby* (1853), 8 Exch. 641; *Owens v. Wynne* (1855), 4 E. & B. 579. *Refd. Grunnell v. Welch*, [1905] 2 K. B. 650. *Generally, Mentd. R. v. Newcomb* (1791), 4 Term Rep. 368; *Crowther v. Ramshottom* (1798), 7 Term Rep. 654; *Cortis v. Kent Water-Works Co.* (1827), 7 B. & C. 314; *R. v. Wilson* (1835), 5 Nev. & M. K. B. 119.

957. — After bankruptcy of tenant.]—A landlord distrained for arrears of rent before the bkpcy. of his tenant, & when the goods were appraised left them on the premises for the use of the bkpt.'s wife, the bkpt. himself being in prison. After the bkpcy. the landlord distrained again for the very same arrears of rent:—*Held*: the second distress was void; & the goods passed to the assignees, as being in the order & disposition of the bkpt. at the time of his bkpcy.—*Re DEANE, Ex p. SHUTTLEWORTH* (1832), 1 Deac. & Ch. 223, Ct. of R.

958. — First distress sufficient.] — Deft. took & distrained the goods of pltf. under colour & as & in the name of a distress for rent, which goods were sufficient to have satisfied the arrears of rent & costs, although deft. might, under the distress, have satisfied the arrears, etc., yet he wrongfully made a second distress on these goods & upon other goods of pltf. for the same arrears & wrongfully & injuriously kept & withheld the goods

advance. Deft.'s wife gave security for the month's rent. About the middle of the second month deft. distrained again for the first month's rent:—*Held*: even if the first distress was legal deft. was not justified in the second, as pltf. had committed no act to prevent him from getting the benefit of that distress.—*HARRIS v. WIER* (1871), 8 N. S. R. 466.—*CAN.*

i. — Neglect to take sufficient distress on first occasion.]—A. having

from pltf. under the second distress for a long time, etc. There were other counts, in case:—*Held*: although trespass might have lain for the injury alleged, pltf. was at liberty to sue for it in case.—*LEAR v. CALDECOTT* (1843), 4 Q. B. 123; 3 Gal. & Dav. 491; 12 L. J. Q. B. 169; 7 Jur. 277; 114 E. R. 844.

Annotations:—*Refd.* Dawson v. Cropp (1845), 1 C. B. 961. *Mentd.* Holford v. Bailey (1846), 8 Q. B. 1000.

959. — Neglect to take sufficient distress on first occasion—Or voluntary abandonment on taking sufficient distress.]—*DAWSON v. CROPP*, No. 944, *ante*.

960. — Abandonment of first distress on notice from creditor of tenant—Threatening bankruptcy proceedings.]—*BAGGE v. MAWBY*, No. 951, *ante*.

961. — Grantee may not split rentcharge—To distrain upon several portions of lands charged.]—Avowry, that avowant was entitled to a rentcharge of £300 payable half-yearly, & avows for £79 parcel of one half-yearly payment. Plea that, before the present seizure, avowant distrained in another part of the lands out of which the rent issued, for the same half-yearly payment, & took goods enough to satisfy the whole. Replication: that the first distress was for the half-yearly payment, less the £79 now distrained for:—*Held*: the grantee of the rentcharge could not divide the demand, & distrain for part on one part of the land, & afterwards for the residue on the other.—*OWENS v. WYNNE* (1855), 4 E. & B. 579; 3 O. L. R. 766; 24 L. T. O. S. 231; 3 W. R. 183; 119 E. R. 212.

962. Death or escape of animal distrained.]—*ANON.* (1568), 3 Dyer, 280 a, pl. 14; 73 E. R. 628.

Annotations:—*Refd.* Vaspur v. Edwards (1701), 12 Mod. Rep. 658; R. v. Cotton (1751), 2 Ves. Sen. 288; Lehalne v. Philpott (1875), 33 L. T. 98.

963. —.]—*ANON.* (1700), 12 Mod. Rep. 397; 88 E. R. 1405.

964. Insufficient goods on premises on first occasion.]—*WALLIS v. SAVILL* (1701), 2 Lut. 1532; 125 E. R. 843.

Annotations:—*Fold.* Dawson v. Cropp (1845), 1 C. B. 961. *Refd.* Hutchins v. Chambers (1758), 1 Burr. 579; Smith v. Goodwin (1833), 4 B. & Ad. 413; Bagge v. Mawby (1853), 8 Exch. 641; Owens v. Wynne (1855), 4 E. & B. 579.

965. —.]—To an avowry by exors. for rent due in testator's life, it is no plea "That testator levied a sufficient distress for the same rent," unless it be also averred that the rent was thereby satisfied.—*LINGHAM v. WARREN* (1820), 2 Brod. & Bing. 36; 4 Moore, C. P. 409; 129 E. R. 871.

Annotations:—*Fold.* Hudd v. Ravenor (1821), 2 Brod. & Bing. 662. *Distd.* Dawson v. Cropp (1845), 1 C. B. 961. *Refd.* Staniford v. Sinclair (1824), 2 Bing. 193; Bagge v. Mawby (1853), 8 Exch. 641; Lehaln v. Philpott (1875), L. R. 10 Exch. 242.

966. Mistake as to value of goods.]—*HUTCHINS v. CHAMBERS*, No. 956, *ante*.

967. —.]—*BAGGE v. MAWBY*, No. 951, *ante*.

968. Tenant preventing removal of goods on first distress.]—*LEE v. COOKE*, No. 1588, *post*.

distrained the goods of B. for rent said to be due to him by B., & abandoned the same without realising, & subsequently, upon a second distress for the same rent, having sold the goods, in an action for illegal distress:—*Held*: deft. having shown no sufficient ground for the abandonment of the first distress, without realising, the second was illegal.—*LYNESS v. SIFTON* (1862), 13 C. P. 19.—*CAN.*

g. — Withdrawal by arrangement with tenant—Fraud.]—A landlord may lawfully distrain a second time

distress is withdrawn by an arrangement for the benefit of the tenant, & which arrangement is at an end at the time of the second distress. *Semble*: when the withdrawal has been effected through the fraud of the tenant, the landlord can again distrain.—*HARPELLE v. CARROLL* (1896), 27 O. R. 240.—*CAN.*

h. When first distress illegal.]—A landlord having distrained without complying with the provisions of 9 & 10 Vict., c. 111, s. 10, the tenant replevied, & the landlord served notice that he did not intend to proceed with

969. When first distress illegal—Second distress must be independent.]—*BRICE v. HARE*, No. 456, *ante*.

970. —.]—*GRUNNELL v. WELCH*, No. 686, *ante*.

971. Arrears consisting of several instalments—Due on different dates.]—*GAMBRELL v. FALMOUTH (EARL)*, No. 729, *ante*.

972. —.]—*PALMER v. STANAGE* (1661), 1 Lev. 43; 1 Keb. 95, 113; T. Raym. 21; 83 E. R. 288; *sub nom.* PAMER v. STABICK, 1 Sid. 44.

973. —.]—Application of proceeds.]—If a tenant on whom his landlord has distrained for rent, gives a promissory note for the amount jointly with another person to release his goods & a subsequent distress is made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note. The landlord cannot apply it in discharge of the subsequent rent, & then sue the person who joined in giving the note for the former rent.—*PALFREY v. BAKER* (1817), 3 Price, 572; 146 E. R. 356.

Annotation:—*Refd.* Gullick v. Hamley (1848), 12 L. T. O. S. 130.

974. Rent accruing subsequently—To replevin action on first distress.]—The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, & the costs of the suit on the bond. If pltf. in replevin is non-suited, deft. is not bound to have his damages assessed by the jury, or to take the earliest moment to prosecute his writ *de retorno habendo*. He may again distrain the same goods for rent subsequently accrued, previously to executing his *retorno habendo*, without waiving his action against the sureties in the bond.—*HEFFORD v. ALGER* (1808), 1 Taunt. 218; 127 E. R. 816.

Annotations:—*Refd.* Ward v. Henley (1827), 1 V. & J. 285. *Mentd.* Paul v. Goodluck (1835), 2 Bing. N. C. 220.

975. —.]—Legality of former distress still in question.]—A landlord may, at his peril, make a distress for rent in arrear; although his right is in question in a suit depending between him & his tenant in respect of a previous seizure for rent previously due.

Semble: he may, upon a second distress for the rent subsequently due, seize the same goods which were seized on the former distress, & which were replevied, & the legality of which former distress is still in question.—*WILTON v. WIFFEN* (1830), 8 L. J. O. S. K. B. 303.

976. Postponement of distress—At request of tenant.]—*BAGGE v. MAWBY*, No. 951, *ante*.

977. —.]—*CROSSE v. WELCH* (1892), 8 T. L. R. 709, C. A.

Voluntary abandonment of first distress.]—*See* Sect. 15, *ante*.

Remedy for—Replevin.]—*See* Sect. 19, sub-sect. 4, C. (a), *post*.

that distress. He subsequently again distrained for the same rent:—*Held*: the first distress being illegal & void, the second distress made for the same rent was not illegal.—*CLOONEY v. WATSON* (1850), 3 Ir. Jur. 195.—*IR.*

k. Second distress for rent due at date of first distress.]—After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due & in arrear at the time of the first distress.—*MCDONALD v. FRASER* (1904), 14 Man. L. R. 582.—*CAN.*

SECT. 17.—FRAUDULENT REMOVAL.

B-SECT. 1.—WHAT CONSTITUTES—LANDLORD'S RIGHT TO SEIZE.

A. In General.

See Distress for Rent Act, 1737 (c. 19).

978. Distress for Rent Act, 1737 (c. 19)—Application of statute.]—The above Act applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly & in the face of day, & with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, & the landlord followed & distrained the goods:—*Held*: although the removal might not be clandestine, yet it was fraudulent, & the landlord was justified under the statute.—*OPPERMAN v. SMITH* (1824), 4 Dow. & Ry. K. B. 33; 2 L. J. O. S. K. B. 108.

Annotations:—*Distd.* Parry v. Duncan (1831), 5 Moo. & P. 19. *Refd.* Harris v. Thirkell (1852), 20 L. T. O. S. 98.

979. ———.]—To support an action under the above Act for assisting a tenant in fraudulently removing his goods, with intent to prevent a distress debt. must be privy to the fraudulent intent, & must actually assist in the removal.—*BROOKE v. NOAKES* (1828), 8 B. & C. 537; 2 Man. & Ry. K. B. 570; 6 L. J. O. S. K. B. 376; 108 E. R. 1142.

980. Removal by assignees — Of bankrupt tenant.]—Where the assignees of a bkpt. who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, & ordered them to be milked there:—*Held*: they thereby became tenants to the lessor; & the cows being removed on the 10th, to avoid a distress for arrears of rent, he had a right to follow & to distrain them under Distress for Rent Act, 1737 (c. 19).—*WELCH v. MYERS* (1816), 4 Camp. 368, N. P.

981. Removal by third person — Privy of tenant.]—In an action on Distress for Rent Act, 1737 (c. 19), against a tenant for fraudulently removing his goods to avoid a distress for rent, it is not necessary to show an actual participation in the act, if the removal takes place with his privy.—*LISTER v. BROWN* (1823), 3 Dow. & Ry. K. B. 501; *sub nom.* *LYSTER v. BROWN*, C. & P. 121.

B. Removal Fraudulent or Clandestine.

See Distress for Rent Act, 1737 (c. 19).

982. Fraudulent removal — Question for jury.]—*OPPERMAN v. SMITH*, No. 978, *ante*.

PART II. SECT. 17, SUB-SECT. 1.—A.

978 i. Distress for Rent Act, 1737 (c. 19)—Application of statute.]—The above Act, which provides a remedy for landlords in the event of tenants fraudulently carrying away or concealing goods, to avoid distraint, is in force in the Colony of Queensland.—*BARRETT v. AUSTIN, Ex p. AUSTIN* (1898), 8 Q. L. J. 157.—*AUS.*

978 ii. ———.]—A proceeding by a landlord against his tenant under sect. 4 of the above Act for fraudulently removing his goods is a civil & not a criminal proceeding, & an action for the malicious prosecution of a complaint under that sect. will not be without proof of special damage. The costs of the complaint as between solr. & client are not such damages as will support the action.—*HOUGHTON v. OAKLEY* (1900), 21 N. S. W. L. R. 26; 16 N. S. W. W. N. 183.—*AUS.*

1. Removal not fraudulent with-

out proof of legality of distress.]—Where a distraint is made for arrears of rent there is no presumption that it is legally made: & if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint or have removed their property to avoid it cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal.—*R. v. GOPALASAMY* (1902), 1 L. R. 25 Mad. 729.—*IND.*

PART II. SECT. 17, SUB-SECT. 1.—B.

m. Fraudulent removal — Whether goods seized must be shown to be goods removed.]—To a count in trespass, debts avowed under a distress for rent, alleging that pltf. fraudulently removed certain of his goods from the

983.

—An admission by the tenant on an issue of fraudulent removal that the goods were removed to prevent a distress by the landlord, is, it seems, not conclusive; but it is for the jury still to decide whether such removal was fraudulent, or under a *bona fide* belief of a right to remove.

Semble: under Distress for Rent Act, 1737 (c. 19), a landlord has no right to distrain goods, removed from the premises for rent due subsequent to the removal.—*JOHN v. JENKINS* (1832), 1 Cr. & M. 227; 3 Tyr. 170; 2 L. J. Ex. 83.

Annotations:—*Refd.* Harris v. Thirkell (1852), 20 L. T. O. S. 98. *Mentd.* Chapin v. Bluck (1838), 4 Bing. N. C. 187; Jones v. Reynolds (1841), 1 Q. B. 506.

Onus of proof on landlord.]—(1) The mere removal of goods by the tenant from premises demised, when rent is in arrear, is not, of itself, fraudulent as against the landlord; to justify the landlord in pursuing them he must show that they were removed with a view to elude a distress.

(2) In replevin, where the verdict is for pltf. the ct. will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, & a new trial would renew the liability of the sureties, & pltf.'s risk of paying double costs.—*PARRY v. DUNCAN* (1831), 7 Bing. 243; 5 Moo. & P. 19; 9 L. J. O. S. C. P. 83; 131 E. R. 94.

Annotation:—*As to* (2) *Refd.* Edgson v. Cardwell (1873), L. R. 8 C. P. 647.

985. ———.]—It is for the landlord, who has distrained on goods removed from the premises, to show that they were removed with an intention to defraud him of his remedy by distress.

On Nov. 1, 1860, pltf., a musical instrument maker, took a large room of debts, in a house which debt. occupied, for the exhibition of the instruments, at seven guineas a week, for the first two months, with an option of a third month from Jan. 1, at eight guineas a week. On Jan. 31, there was, as debt. alleged, £43 10s. due for rent, & on that day, he being away at the time, the instruments were removed. He came home, however, in time to see some of them removing, & took no step at the time. He wrote in a few days to pltf. who through their attorneys replied, claiming a deduction of £18 18s. for eighteen weeks, during which, as they alleged, the room was unfit for occupation. There was a dispute as to this, & subsequently within the thirty days debt. distrained upon some of the instruments. The value of the instruments removed was £2,000. There was no other evidence than this to show the removal to have been fraudulent:—*Held*: there was no evidence of a fraudulent intent in the removal of the goods.—*INKOP v. MORCHURCH* (1861), 2 F. & F. 501, N. P.

demised premises, whereupon debt. took the goods in the second count mentioned:—*Held*: the plea was good, & not open to the objection that the goods taken were not shown to be the goods fraudulently removed.—*HATCH v. HOLLAND* (1868), 28 U. C. R. 213.—*CAN.*

n. ——— *By assignment.]*—Debt. R. leased to husband of pltf. Z. certain land, on which was due & unpaid £600 for rent, on Oct. 1, 1919. In 1920 Z. had a crop of 1,400 bushels of wheat on the land in question. R. was away & gave a power of attorney to F. his co-debt. to collect his rents. On Nov. 4, 1919 F. saw Z. about rent & was told by Z. he had not yet sold his wheat & that he still had it on the premises. Z. had as a matter of fact sold some wheat before that date to certain companies, & some to his wife's granary. It was clear that 600 bushels had been hauled away

986. Clandestine removal—Necessary to give landlord right to follow.]—In order to justify the landlord in seizing within thirty days goods removed off premises as distress for rent wherever found, under Distress for Rent Act, 1737 (c. 19), the removal must have taken place after the rent became due & must have been secret.—*WATSON v. MAIN* (1799), 3 Esp. 15, N. P.

Annotation:—*Folld. Rand v. Vaughan* (1835), 1 Bing. N. C. 767.

987. ———.]—*OPPERMAN v. SMITH*, No. 978, *ante*.

C. Removal to Avoid Distress.

See Distress for Rent Act, 1737 (c. 19).

988. Right of landlord to follow.]—*WELCH v. MYERS*, No. 980, *ante*.

989. ——— Intent to elude distress.]—*PARRY v. DUNCAN*, No. 984, *ante*.

after F. sued to collect rent, & this was done fraudulently to prevent the landlord from distraining. On Nov. 10, F. distrained the 600 bushels of wheat & pltf., wife of Z., sued for damages, claiming the wheat was hers:—*Held*: the action could not be maintained.—*ZIULKOWSKI v. RABUKA* (1921), 59 D. L. R. 682.—*CAN.*

986 i. Clandestine removal—Necessary to give landlord right to follow.]—Where goods are clandestinely removed without a distress, the landlord may follow them & distrain within thirty days thereafter, under 1 Rev. Stat., c. 126, s. 4, although the rent may not have been due or in arrear at the time of removal.—*HOYT v. STOCKTON* (1870), 2 Han. 60.—*CAN.*

PART II. SECT. 17, SUB-SECT. 1.—C.

989 i. Right of landlord to follow—Intent to elude distress.]—The receiver will obtain liberty to distrain forthwith if he show the ct. that the only distress on the premises is about to be removed, & the tenant insolvent.—*HINDS v. REDDINGTON* (1835), 3 Ir. L. Rec. N. S. 181.—*IR.*

989 ii. ———.]—Where a landlord makes out a *prima facie* claim for rent against his tenant & definitely asserts that his tenant has intimated an intention of vacating the premises, & where such statement is not denied, the ct. will grant an interdict restraining such tenant from removing his furniture pending an action for the recovery of the rent.—*CURRIE v. KESSACK* (1904), T. H. 6.—*S. AF.*

o. ——— Question for jury.]—The mere removal of goods by the tenant from the demised premises, when rent is in arrear, is not conclusive evidence of fraudulent intent to prevent the landlord from distraining, although the effect of such removal may be to prevent the landlord from thus recovering the rent. In order to justify the landlord in pursuing them, it must appear that they were removed with a view to elude the distress: & it is a question for the jury whether the removal is fraudulent.—*MARTIN v. GILBERT* (1841), 1 Kerr, 202.—*CAN.*

p. ——— Grounds of apprehension.]—Even assuming that a landlord cannot claim an interdict attaching goods on leased premises as security for overdue rent, without showing reasonable grounds for apprehending that the goods will be removed, only slight grounds are required to entitle the landlord to an order. Where rent was in arrear, & there had been previous difficulty in connection with the rent, where there had been no reply to a letter of demand, where the tenant was not himself on the premises,

insolvent:—*Held*: there was sufficient to justify an apprehension by the landlord that his lien might be defeated, & a magistrate was justified in issuing an order of attachment pending action.—*LIEBERMAN v. GUARDIAN ASSURANCE & TRUST CO. OF PORT ELIZABETH* (1909), T. S. 1050.—*S. AF.*

q. ———.]—A lessor who reasonably apprehends that the lessee will remove movables from the premises leased is entitled to an order for the attachment of such movables pending an action to recover the rent due. Such apprehension is not unreasonable where the rent is long overdue after several applications for payment, & the lessor has reason to know that the lessee had left premises previously hired by him from another person without payment of the rent due.—*GRIFF v. PRETORIUS* (1895), 12 S. C. 101.—*S. AF.*

landlord is entitled to an interdict restraining a tenant from removing his goods from the leased premises, he must satisfy the ct. that he has reasonable grounds for believing that the tenant is about to remove. The mere fact that rent is overdue is not of itself a sufficient ground.—*PARKER v. MACDONALD* (1912), W. R. 900.—*S. AF.*

s. ——— Where removal not fraudulent.]—Resp., being the lessor of a farm in respect of which rent was owing by the lessee, discovered that certain sheep which were subject to his tacit hypothec had been removed to a neighbouring farm by applt. (its owner) who had bought the sheep without knowledge that rent was overdue:—*Held*: in the absence of any fraud or collusion on the part of applt., the sheep could not be attached after they had been removed to his farm.

To render the landlord's tacit hypothec effectual it is necessary that the goods should be attached, & the general rule is that the attachment must take place while the goods are on the leased premises. If, however, the goods have been taken away, they may still be attached while in the process of removal, unless they have been already delivered to a third person, who acquired them for value without notice of the landlord's claim.—*WEBSTER v. ELLISON* (1911), App. D. 73.—*S. AF.*

t. ——— Before interdict granted.]—Where a tenant has removed his effects either before rent is due by him or before an interdict has been granted, the goods cannot be followed up, & the landlord's lien is lost.—*WARREN v. CLEMENTS* (1891), 1 C. T. R. 287.—*S. AF.*

u. Rent must be due.]—A landlord

D. Insufficient Distress on Premises after Removal.

See Distress for Rent Act, 1737 (c. 19).

990. Whether sufficiency of distress left on premises—Onus of proof.]—*PARRY v. DUNCAN*, No. 984, *ante*.

991. ———.]—*Semble*: in justifying the seizure of goods, fraudulently removed to prevent a distress, it is not necessary in point of law to prove that no sufficient distress was left upon the premises, even though an allegation to this effect may have been put upon the record.—*GEGG v. PERRIN* (1845), 5 L. T. O. S. 434; 9 J. P. 619.

992. ———.]—In justifying under Distress for Rent Act, 1737 (c. 19), the seizure, for arrears of rent, of goods removed by the tenant from the premises, it is not necessary for the landlord to prove that a sufficient distress was not left on the premises.—*GILLAM v. ARKWRIGHT* (1850), 16 L. T. O. S. 88.

is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; & the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession, but not the property in the goods, in the alleged purchaser.—*WHITELOCK v. COOK* (1900), 20 C. L. T. 171; 31 O. R. 463.—*CAN.*

b. Rent must be in arrear.]—Goods fraudulently or clandestinely removed to avoid distress cannot be seized under distress if there is no rent in arrear.—*CLARK v. GREEN* (1916), 1 E. L. R. 552; 37 N. B. R. 525.—*CAN.*

c. Right of judgment creditor With knowledge of interdict removal.]—Where the Supreme Ct., in order to preserve the landlord's hypothec, has granted an interdict against the removal of goods in the possession of the tenant, it is the duty of an R. M. Ct. Messenger, who is aware that such interdict has been granted, to refrain from attaching & selling such goods in execution of a writ issued upon a judgment obtained in the magistrate's ct. against such tenant at the suit of a third party.—*SCHOLTZ'S ESTATE v. CARROLL* (1906), 23 S. C. 430.—*S. AF.*

d. ——— After interdict lapsed.]—Certain furniture belonging to a tenant was attached pending an action by the landlord for rent, & the tenant was interdicted from removing such furniture, also pending the action. The landlord obtained judgment & the interdict was confirmed, but not the attachment. Before the judgment was satisfied the messenger removed the furniture under a writ of execution taken out by another judgment creditor:—*Held*: the order of attachment, not having been confirmed, lapsed after judgment, & the interdict against the tenant was no bar to the removal of the furniture by the messenger at the instance of another creditor.—*SYMONS v. THE MESSENGER* (1909), T. S. 749.—*S. AF.*

e. Interdict forbidding removal—Conditional on payment of one year's rent.]—The tacit hypothecation possessed by landlords being limited by the fifth section of the Act No. 5, 1861, to a sum not exceeding one year's rent. Where a landlord had commenced a suit to recover three years' rent, the tenant was interdicted from removing certain property from the premises leased, except on payment into court of a sum to recover one year's rent & costs.—*RICHARDS v. CLARKE* (1883), 3 E. D. C. 93.—*S. AF.*

Sect. 17.—Fraudulent removal: Sub-sect. 1, E., F., G. & H.; sub-sect. 2.]

E. Removal after Rent Due.

See Distress for Rent Act, 1737 (c. 19).

993. General rule — Rent must be due at time of removal.]—WATSON *v.* MAIN, No. 986, *ante*.

994. ———.]—A distress cannot be made upon goods fraudulently removed to avoid distress, unless rent was due at the time of the removal.—NORTHFIELD *v.* NIGHTINGALE (1832), 1 L. J. K. B. 219.

*Annotation:—*Consd. Dibble *v.* Bowater (1853), 2 E. & B. 564.

995. ———.]—A landlord cannot distrain under Distress for Rent Act, 1737 (c. 19), goods fraudulently & clandestinely removed from the tenant's premises before the rent becomes due.—RAND *v.* VAUGHAN (1835), 1 Bing. N. C. 767; 1 Hodg. 173; 3 Nev. & M. M. C. 154; 1 Scott, 670; 4 L. J. C. P. 239; 131 E. R. 1313.

*Annotations:—*Consd. Dibble *v.* Bowater (1853), 2 E. & B. 564. *Mentd.* Atkinson *v.* Davies (1843), 11 M. & W. 236; R. *v.* Darlington School (1846), 6 Q. B. 682.

996. ———.]—Goods removed before rent becomes due cannot be followed & distrained, though they were removed fraudulently.—WATTS *v.* THOMAS (1837), 1 Jur. 919.

997. Whether rent must be in arrear.]—In an action upon Distress for Rent Act, 1737 (c. 19), s. 3, against a deft. for aiding & assisting a tenant in removing & concealing his cattle, to hinder the landlord from distraining, the acts & orders of the tenant are admissible evidence of his own fraud, & of knowledge on the part of deft., if by other evidence he is proved to have contributed to the facility of it: & circumstances of suspicion may be laid before the jury, to prove such a fraudulent cooperation as the legislature contemplated. It is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated. It is enough if the rent be shown to be in arrear, & that the goods have been removed afterwards. The remedy given by sect. 4 of the Act, of applying to two magistrates in a summary way, where the amount in value of goods removed is under £50 is cumulative, & the landlord may elect, at his option, whatever course may be most convenient to him to adopt; & therefore the cts. are not ousted of their jurisdiction by that provision. The ct. refused to grant a rule to arrest judgment on that last objection, & they refused to grant a rule to show cause why a new trial should not be had on the former objections.—STANLEY *v.* WHARTON (1822), 10 Price, 138; 147 E. R. 268; *previous proceedings* (1821), 9 Price, 301.

998. ———.]—Trespass for breaking & entering pltf.'s dwelling-house, & taking away certain goods. Deft. pleaded that B. was his tenant at the rent of £8, & that £8 rent for one year was in arrear; that B. had fraudulently removed his goods, to prevent a distress, to pltf.'s house; therefore he entered to take them; to which pltf. replied *de injuriâ*. At the trial, it was proved that B.'s goods had been fraudulently removed to pltf.'s house, to avoid the distress, but no evidence was given of any demise at the rent stated, or of

the rent in arrear:—*Held*: these facts were admitted, & ought to have been proved.—

v. WESCOMBE (1837), 2 M. & W. 349; Muir 18; 6 L. J. Ex. 164; 1 Jur. 43; 150 E. R.

*Annotations:—*Mentd. Dand *v.* Kingscote (1840), 9 279; Robertson *v.* Gantlett (1847), 16 M. & Newton *v.* L. B. & S. C. Ry. & Woodcock (L. T. O. S. 85).

999. ——— Removal on day on which re.]—DIBBLE *v.* BOWATER, No. 452, *ante*.

F. Goods the Property of Tenant.

See Distress for Rent Act, 1737 (c. 19).

1000. Goods of stranger cannot be seized.]—Distress for Rent Act, 1737 (c. 19), empowers landlords to follow goods fraudulently & clandestinely carried off the premises within thirty days; but this applies to the goods of the tenant only, & those of a stranger; wherefore a plea justifying the following goods off the premises, & distraining them for rent arrear, must show that the goods were the tenant's goods.—THORNTON *v.* ADAMS (1835), 5 M. & S. 38; 105 E. R. 965.

*Annotations:—*Refd. Postman *v.* Harrell (1883), 6 225; Angell *v.* Harrison (1847), 17 L. J. Q. B. 25; *v.* Taylor (1860), 5 H. & N. 202. *Mentd.* Nightingale *v.* Wilcox (1829), 8 L. J. O. S. K. B. 23.

1001. ———.]—Where, in trespass for breaking & entering a house, & taking pltf.'s goods, the defendant justifies as having distrained the goods of a tenant, fraudulently removed to pltf.'s house, & then, under Distress for Rent Act, 1737 (c. 19), he confines his justification to the breaking & entering the house, & traverse in another plea that the goods were his property in the goods.

A plea commenced, "As to the breaking & entering, & taking pltf.'s goods, that the defendant being the goods of deft.'s tenant, had been fraudulently removed to pltf.'s house, with his present consent, & therefore deft. entered & distrained them:—"—*Held*: to be bad, for if it denied property in the goods, it did so argumentally only; & if it admitted it, the statute did not apply; & there was no defence.—FLETCHER *v.* MARR (1839), 9 Ad. & El. 457; 1 Per. & Dav. 2 Will. Woll. & H. 14; 8 L. J. Q. B. 176; 112 E. R. 1285.

*Annotation:—*Consd. Williams *v.* Roberts (1852), 7 E. & B. 618.

1002. ———.]—In trespass for taking goods, & distress for rent, if they have been clandestinely removed, & are afterwards seized, the defence must be pleaded specially, as the Distress for Rent Act, 1737 (c. 19), does not apply to such a case. A landlord has no right to follow, & take under distress for rent, the goods of a lodger which have been taken off the premises, but only those of his own immediate tenant.—POSTMAN *v.* HARRELL (1833), 6 C. & P. 225, N. P.

G. Goods must be Distrainable by Landlord

See Distress for Rent Act, 1737 (c. 19).

1003. No seizure after expiration of tenancy.]—(1) In trespass for breaking pltf.'s house & taking pltf.'s goods; deft. pleaded, Not guilty; & that the goods were not pltf.'s; & as to the breaking & entering, that R. was in arrear for rent to W. & that R. fraudulently removed his goods to pltf.'s house, & that defts., as servants of W., distrained

PART II. SECT. 17, SUB-SECT. 1.—F.

1000 i. Goods of stranger cannot be seized.]—In case of a fraudulent removal, the landlord can follow the goods of his tenant only, & not those of a stranger, which had been on the premises.—MCARTHUR *v.* WALKLEY (1841), (1823-1900), 1 Ont. Dig. 2007.—CAN.

1000 ii. ———.]—A tenant is not liable to prosecution for the fraudulent & clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises.—MARTIN *v.* HUTCHINSON (1891), 21 O. R. 388.—CAN.

1000 iii. ———.]—Distress for Rent Act, 1737 (c. 19), s. 1, only applies to goods of the tenant & not to those of any other person, who may remove them from the demised premises to avoid distress, at any time before a distress is made upon the premises.—*Re* ROYAL TRUST CO. & MILLS, [1 W. W. R. 796.—CAN.

goods. Pltf. at the trial proved the trespass, & deft. went into evidence of the fraudulent removal:—*Held*: pltf. might go into evidence in reply, to show that W. had parted with his estate before the removal of the goods.

(2) A landlord has no right to follow the goods of a tenant who has removed them after the tenancy has expired, by reason of the landlord having conveyed away his reversion.—*ASHMORE v. HARDY* (1836), 7 C. & P. 501, N. P.

1004. — Although goods fraudulently removed.]—A landlord cannot follow & distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises had come to an end & he is no longer in possession.

Pltf. was tenant to deft. of a house. Deft. having terminated the tenancy, pltf. removed his goods on the day of its termination, & on the same day gave up possession of the house to deft. One quarter's rent was due on the day when the tenancy terminated, & as that remained unpaid, within thirty days of the removal, deft. followed pltf.'s goods to the place of removal, & there distrained them. An action having been brought for wrongful distress, the jury found that the goods had been fraudulently removed in order to prevent a distress:—*Held*: notwithstanding the finding of the jury, pltf. was entitled to judgment.—*GRAY v. STAIT* (1883), 11 Q. B. D. 668; 52 L. J. Q. B. 412; 49 L. T. 288; 48 J. P. 86; 31 W. R. 662, C. A.

1005. What is sufficient to support seizure—Reversion of premises in landlord.]—In trespass for entering pltf.'s dwelling house, deft. pleaded, that at the time when, etc., S. held certain premises, situate at, etc., as tenant thereof to deft., under a certain demise thereof, made on, etc., by deft. to S., for the term of, etc., from thence next ensuing, upon which a yearly rent of £60 was reserved by quarterly payments, on etc.; that half a year's rent was owing from S. to deft., & that after the said rent became due, & while it was unpaid S. fraudulently removed certain goods from the demised premises to prevent deft. distraining, & in concert with pltf. deposited the goods in the dwelling house of pltf., in which, etc., & justified entering pltf.'s house within thirty days after the removal, for the purpose of seizing goods as a distress, there being no sufficient goods upon the demised premises, under Distress for Rent Act, 1737 (c. 19), s. 1. On special demurrer.—*Held*: the plea contained a sufficient statement of deft.'s right to distrain.—*ANGELL v. HARRISON* (1847), 17 L. J. Q. B. 25; 12 Jur. 114.

Annotation:—*Refd.* *Pinhorn v. Souster* (1852), 8 Exch. 138.

1006. Agreement for lease—Occupation by tenant.]—A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease under seal of a house & premises, for three years at the yearly rent of £84, payable quarterly. The agreement specified the lessor's & lessee's covenants to be contained in the lease; & it concluded as follows: "It is hereby mutually agreed that these presents shall operate as an agreement only; & that, until a lease shall be executed, the rent, covenants & agreements agreed to be therein reserved & contained shall be paid & observed, & the several rights & remedies shall be enforced, in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, & remained till a quarter's rent became due, when he fraudulently removed his

goods from the premises, to prevent their being distrained:—*Held*: the agreement, coupled with A.'s entry into possession, made A. tenant at will to M. at a fixed reserved rent, for which M. had a right to distrain; and that, therefore, M. was entitled, under Distress for Rent Act, 1737 (c. 19), s. 1, to follow & seize A.'s goods.—*ANDERSON v. MIDLAND RY. CO.* (1861), 3 E. & E. 614; 30 L. J. Q. B. 94; 3 L. T. 809; 25 J. P. 405; 7 Jur. N. S. 411; 121 E. R. 573.

Annotation:—*Refd.* *Kearsley v. Phillips* (1883), 11 Q. B. D. 621.

H. Removal must be on Behalf of Tenant.

1007. Removal by creditor—With assent of tenant.]—A creditor may, with the assent of the debtor, take possession of the goods of his debtor, & remove them from the premises for the purpose of satisfying a *bona fide* debt, without incurring the penalty of Distress for Rent Act, 1737 (c. 19), s. 3, against persons assisting the tenant in removing his goods from the premises; although the creditor takes possession knowing the debtor to be in distressed circumstances, & under an apprehension that the landlord will distrain.—*BACH v. MEATS* (1816), 5 M. & S. 200; 105 E. R. 1021.

Annotations:—*Refd.* *Angell v. Harrison* (1847), 17 L. J. Q. B. 25; *Re British Fullers' Earth Co., Gibbs v. Same Co.* (1901), 17 T. L. R. 232.

1008. Removal by grantee of bill of sale.]—Distress for Rent Act, 1737 (c. 19), which gives to landlords a right of action to recover double the value of goods fraudulently carried off the premises to avoid a distress, applies to the goods of the tenant only, & not to those of a stranger.

Bills of Sale Act, 1882 (c. 43), s. 13, that all chattels seized under a bill of sale shall remain on the premises where they were so seized for five clear days after seizure is for the benefit of grantors.

Where a tenant of pltf. had given defts. a bill of sale over his furniture, & defts. seized the furniture under their bill of sale, & within five days removed it by the authority of the tenant, with the intention of preventing pltf. from distraining for rent then due:—*Held*: (1) the furniture being the property of defts. as grantees of the bill of sale, an action for double value under 1737 Act, would not lie against them; (2) pltf. had no cause of action in respect of the removal of the goods by defts. within five days after the seizure under the bill of sale.—*TOMLINSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN.* (1889), 24 Q. B. D. 135; 54 J. P. 644; 38 W. R. 118; 6 T. L. R. 54, C. A.; *sub nom.* *TOMKINSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN.*, 62 L. T. 162.

SUB-SECT. 2.—CLAIM BY BONA FIDE PURCHASER FOR VALUE.

1009. Purchaser's title must be proved—When possession alone not sufficient.]—A tenant, being in insolvent circumstances, sold his stock & effects by auction, at which sale his son was the principal purchaser. The son permitted the things which he bought to remain on the farm nearly two years, during which time, the receipts for rent were still given in the name of the father. To avoid a distress, the son removed the goods from the farm to his own house; the landlord followed & took them. In an action for trespass, for entering the house & taking the goods:—*Held*: it lay in the son to show his property in the goods, & under such circumstances, possession alone was not sufficient to maintain an action of trespass.

17.—*Fraudulent removal: Sub-sects. 2, 3 & 4,*

WHITEHEAD *v.* FISHER (1824), 3 L. J. O. S. K. B. 45.

1010. — **Complicity in fraud of tenant.**—HARTNELL *v.* FOX (1850), 15 L. T. O. S. 89.

1011. **Whether purchaser's title must be pleaded.**—A declaration in trespass alleged that defts. broke & entered a close of pltf., called the stable, & broke the doors & seized & carried away his goods therein. Plea, under Distress for Rent Act, 1737 (c. 19), s. 1, that at the time when, etc., O. was tenant of certain premises to deft. at a certain rent, & that half a year's rent was then due to deft. from O. & unpaid, & that within thirty days before the said time when, etc., O fraudulently & clandestinely conveyed from the premises held by him as such tenant, the goods, being the goods of O., in order to prevent deft. from distraining them for the rent; & that because the goods still remained in the close, & were then locked up to prevent them from being seized as a distress for the rent, deft., whilst the rent remained due, & within thirty days after the goods had so been conveyed & locked up, entered the close in order to seize the goods as a distress for the rent, & did at the time when, etc., & within thirty days after the goods had been so conveyed as aforesaid, seize them as a distress for the rent; & that because on that occasion the goods were put & kept in the close, locked up so as to prevent them from being seized as a distress for the rent, & so that deft. could not without breaking open & entering the close seize the goods, deft. was obliged & did, in order to seize the goods, first calling in to his assistance the constable of the place where the close & goods were, according to the form of the statute, & with his aid & assistance, in the day time, break open & enter the close in order to seize the said goods, for the arrears of rent, according to the statute; & that deft. in so doing did no unnecessary damage, etc.:—*Held*: (1) although it was stated in the plea that the goods were the tenant's at the time of the removal, the plea admitted them to be pltf.'s at the time of the seizure, as averred in the declaration, & the plea was not bad in form, as amounting to an argumentative traverse that at the time of the trespass the goods were the property of pltf.; (2) the plea afforded a good *prima facie* defence to the action within Distress Act, 1737 (c. 19), s. 1; (3) a plea framed under this statute need not show that the goods have not been made the subject of a *bonâ fide* sale to persons not privy to the fraudulent removal as provided by sect. 2, & that fact ought to be stated in the replication; (4) the plea need not state that the party upon whose land the goods are seized was privy to the fraud; & a previous request was unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods.—WILLIAMS *v.* ROBERTS (1852), 7 Exch. 618; 22 L. J. Ex. 61; 19 L. T. O. S. 143; 155 E. R. 1095.

SUB-SECT. 3.—LANDLORD'S RIGHT OF FORCIBLE ENTRY.

See Distress for Rent Act, 1737 (c. 19), s. 7.

See Metropolitan Police Act, 1839 (c. 47), s. 67.

1012. **Necessity for constable to be present.**—RICH *v.* WOOLLEY, No. 1071, *post*.

1013. — **Specially appointed.**—It is not necessary that a party seizing goods fraudulently removed under Distress for Rent Act, 1737 (c. 19), should first call to his assistance an ordinary

peace officer: it is sufficient if he be assisted by a person appointed a special constable for the occasion.—CARTWRIGHT *v.* SMITH & BATTY (1833), 1 Mood. & R. 284, N. P.

— **Protection of constable under local Act.**—By a police Act, the commrs. appointed under the Act were empowered to nominate a constable & assistant constables, "for executing all such warrants, etc. as the justices of the peace acting for the counties palatine of Lancaster & Chester, or either of them, should from time to time direct to them to be executed within the town of Stalybridge." Sect. 179 required notice of action for "anything done in pursuance of the Act":—*Held*: a constable appointed under the Act, & directed by a warrant of a justice acting for the counties palatine to enter a house & seize goods under Distress Act, 1737 (c. 19), is not entitled to the notice of action required by sect. 179.—SHATWELL *v.* HALL (1842), 10 M. & W. 523; 2 Dowl. N. S. 567; 12 L. J. Ex. 74; 7 J. P. 193; 152 E. R. 578.

Annotations:—*Distd.* Mellor *v.* Leather (1853), 1 E. & B. 619. *Mentd.* Elliot *v.* Allen (1845), 1 C. B. 18.

1015. **Previous request not necessary.**—WILLIAMS *v.* ROBERTS, No. 1011, *ante*.

SUB-SECT. 4.—RECOVERY OF PENALTIES.

A. *By Action.*

See Distress for Rent Act, 1737 (c. 19), s. 3.

1016. **Jurisdiction of courts.**—STANLEY *v.* WHARTON, No. 997, *ante*.

1017. **Action against tenant—Evidence & proof.**—In action of debt, on Distress for Rent Act, 1737 (c. 19), against a tenant for fraudulently removing his goods to avoid a distress; it is immaterial whether the removal is in the night or not; or with concealment or not. Evidence that the tenant's sons removed the goods with his consent, will support a declaration against him for removing the goods, & them for assisting him in such removal.—LYSTER *v.* BROWN (1823), 1 C. & P. 121; *sub nom.* LISTER *v.* BROWN, 3 Dow. & Ry. K. B. 501.

1018. **Action against third party—Evidence & proof.**—STANLEY *v.* WHARTON, No. 997, *ante*.

1019. — — — — —]—BROOKE *v.* NOAKES, No. 979, *ante*.

1020. — **Bonâ fide creditor of tenant—Assent of tenant to removal.**—BACH *v.* MEATS, No. 1007, *ante*.

1021. — **Grantee of bill of sale.**—TOMLINSON *v.* CONSOLIDATED CREDIT & MORTGAGE CORPN., No. 1008, *ante*.

1022. **Distress need not be in progress—Imminent or contemplated.**—STANLEY *v.* WHARTON, No. 997, *ante*.

1023. **Exact amount of rent due immaterial—Measure of damages.**—An averment in a declaration on the Distress for Rent Act, 1737 (c. 19), s. 3, to recover double the value of goods removed, in order to prevent a distress, that a certain sum was due for rent before the goods were removed, need not be precisely proved as laid. The notice of distress, which alleged a different sum to be due, was held immaterial.

Defts. incurred a penalty under this Act in fraudulently removing the goods which were subject to the distress. Whether £5 or any other sum were in arrear was perfectly immaterial; the damages were not to be measured by the quantity of rent, but by the value of the goods removed (LORD KENYON, C.J.).—GWINNET *v.* PHILLIPS (1790), 3 Term. Rep. 643; 100 E. R. 780.

1024. Plea of "not guilty by statute."]—21 Jac. 1, c. 4, s. 4, applies to penal actions given by subsequent statutes. Therefore in an action of debt on Distress for Rent Act, 1737 (c. 19), s. 4, for the double value of goods fraudulently removed from the premises of a tenant, the plea of *nil debet*, or not guilty, is still pleadable, notwithstanding the new rules & puts all the facts in issue.—JONES v. WILLIAMS (1838), 4 M. & W. 375; 7 Dowl. 206; 1 Horn & H. 348; 8 L. J. Ex. 70; 3 J. P. 512; 3 Jur. 224; 150 E. R. 1474.

—.]—See, also, R. S. C., Ord. 19, r. 12. Ord. 21, r. 19.

1025. Plaintiff not entitled to discovery—Affidavit of documents.]—An action for pound-breach & rescue of chattels distrained for non-payment of tithe rentcharge, in which pltf. claims treble damages under Distress Act, 1689 (c. 5), s. 4, is a penal action, & pltf. is therefore not entitled to an affidavit of documents.—JONES v. JONES (1889), 22 Q. B. D. 425; 58 L. J. Q. B. 178; 60 L. T. 421; 37 W. R. 479, D. C.

Annotations:—*Folld.* Hobbs v. Hudson (1890), 25 Q. B. D. 232. *Refd.* Saunders v. Wiel (1892), 67 L. T. 207.

1026. — Interrogatories.]—An action for double the value of goods fraudulently removed by a tenant, brought under Distress for Rent Act, 1737 (c. 19), is a penal action, & pltf. is not entitled to administer interrogatories to deft.—HOBBS & CO. v. HUDSON (1890), 25 Q. B. D. 232; 59 L. J. Q. B. 562; 63 L. T. 215; 38 W. R. 682; 6 T. L. R. 381, C. A.

Annotation:—*Refd.* Saunders v. Wiel (1892), 67 L. T. 207.

1027. Goods not exceeding £50 in value—Additional remedy—Both may be pursued.]—Although double the value of goods fraudulently removed to prevent a distress does not exceed £50, it is competent to the party injured to proceed either by action or in a summary way before a magistrate. The fact of his having in the first instance made his complaint before a magistrate will not preclude him from afterwards maintaining an action.—HORSEFALL v. DAVY (1816), 1 Stark. 169; Holt, N. P. 147, N. P.

1028. — — — — —.]—STANLEY v. WHARTON, No. 997, *ante*.

1029. — — — — —.]—A landlord may maintain an action on Distress for Rent Act, 1737 (c. 19), for double the value of goods fraudulently removed to prevent a distress, although they be worth less than £50; he is not confined to his remedy, by application to two magistrates.—BROMLEY v. HOLDEN (1828), Mood. & M. 175, N. P.

B. By Summary Proceedings before Magistrates.

See Distress for Rent Act, 1737 (c. 19), s. 4.

1030. Goods not exceeding £50 in value—Remedy additional to action.]—HORSEFALL v. DAVY, No. 1027, *ante*.

1031. — — — — —.]—STANLEY v. WHARTON, No. 997, *ante*.

1032. — — — — —.]—BROMLEY v. HOLDEN, No. 1029, *ante*.

1033. Jurisdiction — Goods removed out of county.]—Justices either of the county from which tenants fraudulently remove goods, or of that county in which they are concealed may convict the offender in their respective counties under Distress for Rent Act, 1737 (c. 19), s. 4.—R. v. MORGAN (1782), Cald. Mag. Cas. 156.

Annotation:—*Refd.* *Ex p.* Morgan (1840), 14 Jur. 916.

1034. — Title in premises disputed.]—Justices of the peace have jurisdiction, under Distress for Rent Act, 1737 (c. 19), s. 4, to inquire into & adjudicate on an information for the alleged fraudulent removal of goods by a tenant, although

it appears that the property in the premises is disputed, & that the tenant has paid the rent to one of the claimants. A warrant of commitment under the above sect. did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices, for payment of double the value of the goods removed, in which those matters were stated:—*Held*: sufficient, & the justices were not liable in trespass.—COSTER v. WILSON (1838), 3 M. & W. 411; 1 Horn & H. 141; 7 L. J. M. C. 83; 2 J. P. 376.

Annotations:—*Refd.* Ormerod v. Chadwick (1847), 16 M. & W. 367. *Mentd.* Green v. Elgie (1843), 5 Q. B. 99; Howard v. Gosset (1845), 10 Q. B. 359.

1035. Sufficiency of order.]—An order & adjudication founded on Distress for Rent Act, 1737 (c. 19), s. 4, for fraudulently & clandestinely removing goods & chattels, not exceeding the value of £50, to avoid a distress for rent, need not enumerate or specify the particular goods & chattels alleged to have been removed.—R. v. RABBITTS (1825), 6 Dow. & Ry. K. B. 341; 3 Dow. & Ry. M. C. 269; *sub nom.* *Ex p.* RABBITTS & PARSONS, 3 L. J. O. S. K. B. 230.

Annotation:—*Distd.* R. v. Davis (1833), 5 B. & Ad. 551.

1036. — — — — —.]—An order of justices under Distress for Rent Act, 1737 (c. 19), s. 4, adjudging a party to pay double the value of goods fraudulently & clandestinely removed to prevent a distress, must show on the face of it that the party removing the goods was tenant; & that is not sufficiently shown by stating that on complaint duly made the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them from arrears of rent due to him for the premises; & that, it appearing that he did so remove, etc., he is convicted thereof. *Semble*: also that the order should state that the complainant was the party's landlord or the bailiff servant or agent of such landlord.—R. v. DAVIS (1833), 5 B. & Ad. 551; 2 Nev. & M. K. B. 349; 1 Nev. & M. M. C. 406; 3 L. J. M. C. 29; 110 E. R. 893.

Annotation:—*Refd.* *Ex p.* Morgan (1840), 4 Jur. 916.

1037. — — — — —.]—COSTER v. WILSON, No. 1034, *ante*.

1038. — — — — —.]—If an order of justices, by which a party is adjudged, under Distress for Rent Act, 1737 (c. 19), s. 4, to pay double the value of the goods removed, for the purpose of preventing the landlord or lessor from distraining for arrears of rent, does not state that the offender was summoned, that the complaint was adjudged to be true on evidence given upon oath; & that there was proof before justices that the party wilfully & knowingly assisted in the removal of the goods, it is bad; although it specifies the full proof of the offence on which the justices convicted & adjudicated.—*Ex p.* MORGAN (1840), 4 Jur. 916.

1039. — — — — —.]—In an order by magistrates, under Distress for Rent Act, 1737 (c. 19), s. 4, it is necessary that the offence should be charged to have been committed "wilfully & knowingly."—R. v. RADNORSHIRE J.J. (1840), 9 Dowl. 90.

1040. — — — — —.]—An order for payment of double the value of goods fraudulently removed under Distress for Rent Act, 1737 (c. 19), s. 4, must show a complaint in writing by the landlord, his bailiff or agent. The ct. will not infer this, so as to support the acts of the parties on the principal *omnia rite acta* from a statement that deft. was "duly charged," & "duly convicted."—*Re* FULLER (1844), 1 New Sess. Cas. 284; *sub nom.* *Ex p.* FULLER, 13 L. J. M. C. 141; 3 L. T. O. S.

Sect. 17.—Fraudulent removal: Sub-sect. 4, B. Sect. 18: Sub-sects. 1, 2 & 3.]

207; *sub nom. R. v. FULLER*, 9 J. P. 104; 8 Jur.

1041. Validity of warrant of commitment.]—*COSTER v. WILSON*, No. 1034, *ante*.

1042. Appeal—Informal order of magistrates.]—After notice of appeal against an informal order of two justices for payment of double the value of goods fraudulently removed to prevent a distress, a formal order is drawn up & filed, of which notice is given to the applt. The ct. of quarter sessions is bound to try the appeal as an appeal against the original order.—*R. v. CHESHIRE JJ.* (1833), 5 B. & Ad. 439; 2 Nev. & M. K. B. 827; 2 Nev. & M. M. C. 25; 2 L. J. M. C. 95; 110 E. R. 852.

1043. — To quarter sessions—Summary Jurisdiction Act, 1879. (c. 49), ss. 31 & 32.]—An appeal from an order of justices under Distress for Rent Act, 1737 (c. 19), ss. 4 & 5, by a person adjudged guilty of fraudulently removing goods to prevent a distress, is subject to the conditions & regulations prescribed in the Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2) & s. 32, & therefore, notice of appeal must be given within seven days after the decision appealed against.—*R. v. SHROPSHIRE JJ.* (1881), 6 Q. B. D. 669; 46 J. P. 196; 29 W. R. 567, D. C.

SECT. 18.—RESCUE AND POUND BREACH.

SUB-SECT. 1.—RESCUE.

1044. What constitutes—Taking before impounding.]—(1) In an action for a pound breach pltf. need not show his right to distrain.

(2) If a distress is taken without cause, the owner may rescue it before it is impounded.

(3) If it is once impounded, he cannot justify a breach of the pound to take it out.—*COTSWORTH v. BETISON* (1696), 1 Ld. Raym. 104; 1 Salk. 247; 91 E. R. 965.

1045. — Whether actual possession of goods necessary.]—(1) In an action on Distress Act, 1689 (c. 5), for rescuing a distress, if pltf. states that he was seised in fee of the premises, & demised them by parol "for a year, & so from year to year," he must prove the seisin in fee; but he need not either state or prove that he gave warning; if however it appear that the letting was "for a year, & so from year to year as long as both parties pleased," this will not maintain the demise stated in the declaration.

(2) If a landlord come into a house & seize upon some goods as a distress in the name of all the goods in the house, that will be a good seizure of all (*HOLT, C.J.*).

(3) It appeared also that distrainant drew beer out of one of the barrels; which made him a trespasser *ab initio*, as to that barrel only (*HOLT, C.J.*).

(4) If a distrainer quit possession a re-taking of the goods is not a rescous.—*DOD v. MONGER* (1704), 6 Mod. Rep. 215; Holt, K. B. 416; 87 E. R. 967, N. P.

Annotations:—As to (3) Apprvd. Canadian Pacific Wine Co. v. Tuley, [1921] 2 A. C. 417. *As to (4) Rejd. Swann v. Falmouth* (1828), 8 B. & C. 458.

1046. — Sheriff selling distress under *fi. fa.*]—Where a bailiff in possession of goods under a landlord's distress receives a *fi. fa.* from the sheriff, & sells the goods under it, the sheriff is liable in an action, for pound-breach, & rescue, at the suit of the landlord.—*REDDLELL v. STOWEY* (1841), 2 Mood. & R. 358.

1047. — Sheriff's officer preventing removal of goods.]—Pltf. levied a distress for rent in arrear, & impounded the goods on the premises. While his bailiff was removing them, deft., a sheriff's officer, came into the house & said that he had a *fi. fa.* against pltf. & that he would not allow the goods to be removed. Pltf.'s tenant thereupon ejected pltf.'s bailiff, & brought back the goods which had been removed:—*Held*: those facts did not show a pound-breach or rescue by deft.—*STORY v. FINNIS* (1851), 6 Exch. 123; 2 L. M. & P. 198; 20 L. J. Ex. 144; 16 L. T. O. S. 417; 155 E. R. 480.

Annotations:—Mentd. Schreger v. Carden (1852), 11 C. B. 851; *Perren v. Monmouthshire Ry.* (1853), 11 C. B. 855; *Mundy v. L. C. C.* (1915), 14 L. G. R. 358.

1048. — Auctioneer selling goods in disregard of distress.]—Pltfs. brewers, were the lessors of a public-house to D. under an agreement which gave them all the rights & remedies of landlords for rent against the effects of the tenant for the recovery of any book debts for liquors sold by them to him. There being money due in respect of such debts, pltfs. sent in their bailiff with a written authority to distrain for the amount, who showed his authority to deft., an auctioneer then on the premises, took an inventory & made a valuation. The tenant D. & deft. thereupon proceeded to sell the goods in disregard of such distress, deft. putting up & knocking down the goods by auction, the tenant handing them to the purchasers:—*Held*: though pltfs. had not such possession as to enable them to sue for conversion, they could maintain an action for rescue against deft. for knowingly assisting in transferring the dominion & property in the goods seized to the respective purchasers.

It is also important to determine the effect of what was done by pltfs.' bailiff. I think it amounted to a seizure, & that the bailiff did his best to impound, & was only prevented by deft. & H. It appears from the authorities which were cited that, notwithstanding a distress, the property in the goods distrained remains vested in the tenant or owner until they are sold under the distress, & the landlord has no property in the goods distrained, nor even the possession of them. Pltfs. therefore could not maintain trover or trespass. Could they not, however, in the circumstances of this case, maintain an action for a rescue against any one who interfered with the goods? I think they could (*LOPES, J.*).—*IREDALE v. KENDALL* (1878), 40 L. T. 362.

1049. When justified—Distress when no rent due.]—*BEVIL'S CASE*, No. 586, *ante*.

1050. — —.]—*CASE OF AN AVOWRY*, No. 440, *ante*.

1051. — — Before impounding—Valid.]—*COTSWORTH v. BETISON*, No. 1044, *ante*.

1052. — Want of authority to distrain.]—In trespass for taking goods, the declaration stated that pltfs. were the proprietors of the Parrett Navigation, under certain Acts of Parliament, which empowered them when tolls were in arrear to distrain the goods in respect of which such tolls ought to have been paid, or the barge laden therewith, or any other barge or goods belonging to such owner, or to the person from whom the tolls were due, being on the navigation, or any premises thereunto belonging, & to detain the same till payment of the tolls; & that a certain sum was owing & in arrear for tolls, payable to pltfs. under the Acts, for the transit & conveyance of goods in a certain barge, navigated & conducted by defts. I. T. & J. M. upon the navigation. The declaration then stated a demand & refusal of

the tolls, a seizure of the barge for a distress, & a rescue by defts. whilst pltf.'s bailiff was about to detain & impound the same. The second count, for pound breach, stated that pltf. had seized a certain barge, then navigated by I. T. & J. M., & certain coals, being on the navigation, as a distress for tolls then in arrear for the conveyance of certain goods upon the navigation, & had detained & impounded the barge & coals, with intent to appraise & sell them, according to the form & effect of the statutes, whereupon defts. broke & entered the pound, & rescued the barge & coals:—*Held*: (1) the first count was bad, on the ground that it showed no authority on the part of pltf. to distrain the goods; (2) the second count was good, as it sufficiently appeared that defts. were wrongdoers in taking goods from a pound where they were in the custody of the law.—*PARRETT NAVIGATION CO. v. STOWER* (1840), 8 Dowl. 405; 6 M. & W. 564; 9 L. J. Ex. 180; 151 E. R. 537.

1053. — Excessive distress.—To an action of debt debt. pleaded: (1) the seizure by pltf. as a distress for rent, of certain goods of sufficient value to satisfy rent & costs due from debt. with the costs of sale, etc., that pltf. kept the goods nearly two years without selling them, & then, by agreement with debt. kept them absolutely upon the terms of discharging debt. from the debt due; (2) & wrongful seizure of debt.'s goods by pltf. the goods being alleged to be of greater value than the debt from debt. to pltf. & an agreement that the parties should be quit of all claims upon each other, & that pltf. should keep the goods; (3) a similar plea with the additional term, that debt. should give up possession of certain premises. Pltf. replied, traversing, that the goods were of the value assigned in the several pleas:—*Held*: the replications were bad on special demurrer.

He (debt.) says they were wrongfully seized. He might, therefore, retake them (*COLTMAN, J.*).—*JONES v. SAWKINS* (1847), 5 C. B. 142; 5 Dow. & L. 353; 17 L. J. C. P. 92; 10 L. T. O. S. 133; 136 E. R. 828.

1054. — Proper tender of rent—Refusal by landlord to accept.—*BEVIL'S CASE*, No. 586, *ante*.

1055. — Distress removed from pound—By distrainer for unlawful purpose.—*SMITH v. WRIGHT*, No. 2, *ante*.

1056. Attempt to rescue—Justifies assault.—An attempt to rescue (a distress) will justify an assault.—*ANON.* (1705), 11 Mod. Rep. 64; 88 E. R. 889.

SUB-SECT. 2.—POUND BREACH.

1057. What constitutes—Changing lock of pound—Animals not removed.—*ANON.* (undated), cited Win. 80; 124 E. R. 68.

1058. — Removal of cattle by open door.—*ALWAYES v. BROOME* (1695), 2 Lut. 1259; 125 E. R. 698.

1059. — Granting replevin without authority.—*TREVANNIAN'S CASE* (1704), 11 Mod. Rep. 32; 88 E. R. 865.

1060. — Sheriff selling distress under fi. fa.—*LEDDELL v. STOWEY*, No. 1046, *ante*.

PART II. SECT. 18, SUB-SECT. 2.

1. What constitutes—Goods left in charge of distrainee—Seizure by mortgagee.—Where the goods of a tenant, which had been mortgaged by him, were distrained for rent & impounded, & were left on the premises in his charge for over three weeks by agree-

ment between him & the bailiff, when on being advertised for sale under the distress they were seized & taken away by the mtgee.:—*Held*: as regards the mtgee., the goods were no longer *in custodia legis*, & in taking them he had not committed a breach of the pound.—*LANGTRY v. CLARK* (1896), 27 O. R.

1061. — — — — ——Pltf. being the owner of a piano, lent it to A. whose landlord seized it under a distress for rent. The landlord remained in possession of the piano for a fortnight, when a sheriff's officer seized it under an execution against A. & removed it to the premises of debt., an auctioneer, who afterwards sold it:—*Held*: pltf. might maintain an action of trover against debt. & trover would not lie, at the suit of the landlord, against debt.; but his remedy was against the sheriff's officer for pound breach.

Semble: if the conversion had amounted to pound breach, debt. would have been liable to the landlord in an action of pound breach, & also to pltf. in trover for the conversion.—*TURNER v. FORD* (1846), 15 M. & W. 212; 15 L. J. Ex. 215; 10 J. P. 426; 153 E. R. 826.

Annotation:—*Mentd.* *Beckham v. Drake* (1849), 2 H. L. Cas. 579.

1062. — Sheriff's officer preventing removal of goods.—*STORY v. FINNIS*, No. 1047, *ante*.

1063. — Taking possession of goods removed from pound by distrainer—For illegal purpose.—*SMITH v. WRIGHT*, No. 2, *ante*.

1064. — Goods not in actual possession of distrainer.—*SWANN v. FALMOUTH (EARL)*, No. 707, *ante*.

1065. — — — — ——Where goods distrained for rent by a landlord have been impounded on the premises under Distress for Rent Act, 1737 (c. 19), it is not requisite that any one on the landlord's behalf should be left in possession of the goods.

The action is brought for pound breach, & therefore, in order to succeed, pltf. must show that the goods, at the time that they were taken away by debt. were *in custodia legis*. When once the goods are *in custodia legis* the actual retention of possession by the party distraining on them is not necessary (*CHANNELL, J.*).—*JONES v. BIERNSTEIN*, [1899] 1 Q. B. 470; 68 L. J. Q. B. 267; 80 L. T. 157; 47 W. R. 239; 15 T. L. R. 164; 43 Sol. Jo. 224, D. C.; *affd.*, [1900] 1 Q. B. 100, C. A.

1066. Whether justifiable—Wrongful distress.—*ANON.* (1638), Clay. 64.

1067. — — — — ——*COTSWORTH v. BETISON*, No. 1044, *ante*.

1068. — — — — ——*PARRETT NAVIGATION CO. v. STOWER*, No. 1052, *ante*.

1069. — Tender of rent after distress.—It is no answer to an action under Distress Act, 1689 (c. 5), for a pound breach, that the rent & demand were tendered after the distress & impounding.—*FIRTH v. PURVIS* (1793), 5 Term Rep. 432; 101 E. R. 243.

Annotation:—*Refd.* *Ladd v. Thomas* (1840), 12 Ad. & El. 117; *Thomas v. Harries* (1810), 1 Man. & G. 695.

SUB-SECT. 3.—REMEDIES.

See Distress Act, 1689 (c. 5), s. 4, Limitation of Actions & Costs Act, 1842 (c. 97), s. 2, & Pound Breach & Rescue Act, 1843 (c. 30), ss. 1, 2.

1070. Recaption.—In a recaption, pltf. shall recover damages, & debt. shall be fined & imprisoned for his double vexation.—*BEECHER'S CASE* (1608), 8 Co. Rep. 58 a; 77 E. R. 559.

Annotation:—*Mentd.* *Cotton v. Westcott* (1617), Cro. Jac. 441; *Darcy v. Jackson* (1621), Palm. 224; *Eardley v. Turnock* (1622), Cro. Jac. 629; *Mason v. Fox* (1622),

280.—**CAN.**

g. — Releasing animals from pound—Impounding must have been authorised.—A person is not liable for setting at large a cow from pound, unless the impounding was by an authorised officer.—*R. v. CLOSE* (1910), 19 N. B. R. 502.—**CAN.**

18.—*Rescue and pound breach: Sub-sect. 3.*
Sect. 19:

(Cro. Jac. 632; Langham's Case (1641), March. 179; Threadneedle v. Linum (1674), Freem. K. B. 179; Walwin v. Smith (1691), 4 Mod. Rep. 86; Groenvelt v. Burwell (1700), 1 Salk. 200; Kent & May v. Kent (1734), 2 Barn. K. B. 441; R. v. York Sheriffs (1832), 3 B. & Ad. 770; Douglas v. R. (1848), 12 Jur. 974; London Corp'n. v. R. (1848), 13 Q. B. 30; Ebon v. Neville (1861), 10 W. R. 6; Kemp v. Neville (1861), 10 C. B. N. S. 523.

1071. — "Upon fresh pursuit"—Without breach of the peace.]—A plea under Distress for Rent Act, 1737 (c. 19), justifying the breaking open a lock to distrain cattle which have been fraudulently removed to elude a distress for rent, must aver that a constable was present when the lock was broken. A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit.

Recaption is confined to cases where the recaption can take place without a breach of the peace, & upon fresh pursuit (TINDAL, C.J.).—RICH v. WOOLLEY (1831), 7 Bing. 651; 5 Moo. & P. 663; 9 L. J. O. S. C. P. 219; 131 E. R. 252.

Annotation:—*Reid*. Fletcher v. Marillier (1839), 9 Ad. & El. 457.

1072. Action—Maintainable by one tenant in common.]—WENTWORTH & SAVELL v. RUSSELL (1597), Owen, 60; 74 E. R. 899.

1073. — Notice of distress not necessary—Penal action.]—BELLASIS v. BURBRIDGE (1696), 1 Ld. Raym. 170; 91 E. R. 1010; *sub nom.* BELASYSE v. BURBRIDGE, 1 Lut. 213.

Annotations:—*Mentd.* Eaton v. Jaques (1780), 2 Doug. K. B. 455; Birch v. Wright (1786), 1 Term Rep. 378; Denn v. Jacklin v. Cartright (1803), 4 East, 29; Williams v. Bosanquet (1819), 1 Brod. & Bing. 238; Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957.

1074. — Not trover.]—MONEUX v. GOREHAM (1741), 2 Selwyn's N. P. 11th ed. 1335.

Annotations:—*Reid*. Symons v. Hearson & Fisher (1823), 12 Price, 369; Gubbins v. Royer (1850), 16 L. T. O. S. 65.

1075. — Nor trespass.]—R. v. COTTON, No. 789, *ante*.

1076. — For pound breach—Removal of distress by sheriff's officer.]—TURNER v. FORD, No. 1061, *ante*.

1077. — Material allegations.]—In an action for pound breach founded upon 2 Will. & Mar. c. 5 & Distress for Rent Act, 1737 (c. 19), the allegations in the declaration, that the premises on which the goods were seized & impounded were held of pltf. as landlord, & that rent was in arrear, are material allegations, because they show how pltf. was the person grieved by the pound breach. A traverse, that A. B. the person alleged in the declaration to be tenant of pltf. held of pltf. *modo et forma*, is a material traverse.—BERRY v. HUCKSTABLE (1850), 14 Jur. 718.

1078. — — — — —.]—JONES v. BIERNSTEIN, No. 1065, *ante*.

1079. — For rescue—Demise need not be pleaded.]—*Semble*: in an action on the case for the rescue of goods taken under distress for rent in arrear, it is not necessary for pltf. to set out the deed creating the demise from himself to the tenant.—DORDOY v. SCOTT (1825), 4 L. J. O. S. K. B. 60.

1080. — Plaintiff not entitled to discovery.]—JONES v. JONES, No. 1025, *ante*.

1081. — Proof of special damage unnecessary.]—An action for treble damages for pound breach or rescous of goods distrained for rent, under 2 Will. & Mar., c. 5, is maintainable by the landlord without proof of any special damage suffered by

him.—KEMP v. CHRISTMAS (1898), 79 L. T. 233; 14 T. L. R. 572, C. A.

Annotation:—*Reid*. Jones v. Biernstein, [1899] 1 Q. B. 470.

1082. Indictment—For rescue.]—If a hayward take cattle straying in a common or lane, & they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are *damage feasant* in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till they get to the pound, the hayward is to be considered the mere servant of the occupier. R. v. BRADSHAW (1835), 7 C. & P. 233.

1083. — For pound breach.]—It is an indictable offence to rescue cattle seized under a distress warrant for rent & impounded in an enclosed field.—R. v. BUTTERFIELD (1893), 17 Cox, C. C. 598.

—.]—*See, further*, CRIMINAL LAW, Vol. XV., pp. 716, 717, Nos. 7744–7751.

1084. Summary proceedings—Rescue of cows & helpers—Pound Breach & Rescue Act, 1843 (c. 30), s. 1.]—R. v. GEE (1885), 49 J. P. 212; 1 T. L. R. 388, D. C.

1085. Replevin—Illegal impounding.]—ANON. (1544), 1 And. 31; Benl. 22; 123 E. R. 338.

1086. Goods on premises of third person—Not proof of pound breach.]—CASTLEMAN v. HICKS, No. 751, *ante*.

1087. — Rescue by third person.]—Where goods fraudulently removed by a tenant from his premises, to avoid a distress for rent in arrear, are followed & distrained, within thirty days, on the premises of a third party, by virtue of Distress for Rent Act, 1737 (c. 19), & are rescued by such third party. *Qu.*: whether an action for treble damages on 2 Will. & Mar. sess. 1, c. 5, s. 4, will lie against such third party.

Semble: the ct. ought to be guided by the same rules in considering whether they will grant a new trial in a penal, as they would in a remedial action (JERVIS, C.J.).—HARRIS v. THIRKELL (1852), 20 L. T. O. S. 98.

1088. Treble damages & costs.]—By 2 Will. & Mar. sess. 1, c. 5, pltf. shall recover treble costs as well as treble damages.—LAWSON v. STORY (1694), 1 Ld. Raym. 19; 1 Salk. 205; Carth. 321; Holt, K. B. 172; Skin. 555; 91 E. R. 909.

Annotations:—*Reid*. Smith v. Dunce (1736), 2 Stra. 1048; Butterton v. Furber (1820), 1 Brod. & Bing. 517.

1089. —.]—*Secundum leges et statuta* is an expression properly applicable to things at common law confirmed by statute. Not to things depending only on a statute. In case of the rescue of a distress, pltf. is not entitled to treble damages & costs, unless he shows that the distress was appraised & refers expressly to the statute.—ANON. (1698), 1 Ld. Raym. 342; 91 E. R. 1124.

See, now, Public Authorities Protection Act, 1893 (c. 61), s. 2.

Under Limitation of Actions & Costs Act, 1842, *see* COUNTY COURTS, Vol. XIII., p. 521, No. 718.

SECT. 19. — ILLEGAL, IRREGULAR, AND EXCESSIVE DISTRESS AND THE REMEDIES THEREFOR.

SUB-SECT. 1.—ILLEGAL DISTRESS.

See Distress for Rent Act, 1737 (c. 19), s. 19.

1090. Distrainor a trespasser ab initio—As to goods not distrainable.]—Where a landlord dis-

PART II. SECT. 19, SUB-SECT. 1.
h. Distrainor a trespasser ab initio.]—Where a distress is illegal in its inception, trespass lies.—

v. BUCKLEY (1885), 25 N. B. R. 264.—CAN.

k. — Removal after abandon-
—]—Where a distress for rent was

made upon the goods of pltf. R. by two of defts. in Dec.:—*Held*: they had no right to remove the goods in the following July, the distress having

trains for rent, amongst other things, goods which are not distrainable in law, as looms in work, there being sufficient without them to satisfy the rent, & the tenant pays the amount of the rent & the costs of distress, upon which the distress is withdrawn altogether, the tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular goods, & not the whole amount paid by him. In such a case, the distrainor is a trespasser *ab initio* only as to the goods which were not distrainable.—*HARVEY v. POCKOCK* (1843), 11 M. & W. 740; 12 L. J. Ex. 434; 1 L. T. O. S. 290; 152 E. R. 1003.

Annotations:—*Refd.* Price v. Woodhouse (1847), 1 Exch. 559; *Freeman v. Hoshier* (1849), 13 Jur. 881; *Attack v. Bramwell* (1863), 9 Jur. N. S. 892; *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417. *Mentd.* Edmonson v. Muttall (1864), 17 C. B. N. S. 280.

1091. — Unlawful mode of entry—Measure of damage.—*ATTACK v. BRAMWELL*, No. 692, *ante*.

1092. — Forcible re-entry.—*BOYD v. PROFAZE*, No. 702, *ante*.

Selling or removing goods not included in inventory.—*See* Sect. 10, sub-sect. 5, B. (b), *ante*.

Seizing goods privileged from distress.—*See* Sect. 5, *ante*.

Distress for debt which is not rent—Rent not arising from corporeal hereditaments.—*See* Sect. 3, sub-sect. 3, *ante*.

Distraining after tender of rent.—*See* Sect. 9, sub-sect. 6, *ante*.

Distraining when no rent in arrears.—*See* Sect. 6, sub-sect. 1, *ante*.

Unlawful entry or re-entry.—*See* Sect. 10, sub-sect. 3, *ante*.

No valid subsisting demise.—*See* Sect. 3, sub-sect. 2, *ante*.

Distress during prohibited periods.—*See* Sect. 6, sub-sect. 5, *ante*.

Distress after determination of tenancy.—*See* Sect. 6, sub-sect. 6, *ante*.

Second distress for same rent.—*See* Sect. 16, *ante*.

Distress after rent merged in judgment.—*See* No. 560, *ante*.

Without authority of receiver—Appointed under Conveyancing Act, 1881 (c. 41), s. 19.—*See* Nos. 158, 159, *ante*.

As to agreements in regard to distress.—*See* BANKRUPTCY, Vol. V., pp. 962–964, Nos. 7878–7893.

As to instruments with power of distress.—*See* BILLS OF SALE, Vol. VII., p. 24, Nos. 113–117.

Remedies for.—*See* Sect. 19, sub-sects. 4–10, *post*.

SUB-SECT. 2.—IRREGULAR DISTRESS.

See Distress for Rent Act, 1737 (c. 19), s. 19.

Turning tenant's family out of possession.—*See* Sect. 11, sub-sect. 1, B. (b), *ante*.

been abandoned; & the entry upon the premises in July was a trespass for which these dofts. were liable.—*RITCHIE v. SNIDER* (1914), 28 W. L. R. 735; 17 D. L. R. 31.—CAN.

1. Distrainor a trespasser — Pretence of distress to obtain possession.—*Deft.* in Oct. 1855, leased certain premises to W. & *pltf.* as joint tenants, to hold for seven years from Oct. 1, at a yearly rent, payable quarterly in advance, the first payment to be made at the commencement of the term; & in the conclusion of the lease it was agreed that the first three quarters' rent should be due & paid "on the day when the term commences." On Jan. 1, 1856, *deft.* distrained for two quarters' rent, due on Oct. 1, preceding. *Pltf.* brought tres-

pass, complaining that the distress, if rightful, was merely a pretence for getting possession. He gave evidence tending to show this, & proved that *deft.* entered into the house, assumed the management of it as if the term were at an end, insisted on *pltf.*'s wife leaving a room downstairs which she occupied as a bedroom, & taking another above; & remained there nine days against *pltf.*'s will. For *deft.* it was proved that W. the co-tenant, had surrendered to him his interest in the lease, & that *pltf.*, who had never paid his rent, though not then assenting, a few days afterwards entered into an arrangement by which he gave up possession. The jury gave £75 damages.—*Held*: any authority derived from W., the co-

tenant, could not be given in evidence under the general issue; at all events it would not have justified *deft.*'s conduct, & although the damages seemed excessive, the verdict must stand.—*CHASE v. SCRIPTURE* (1857), 14 U. C. R. 598.—CAN.

PART II. SECT. 19, SUB-SECT. 3.

m. What is excessive distress—Unreasonable excess.—While the landlord is not bound to calculate very nicely the value of the property taken upon a distress for rent, yet the excess of value of the goods above the arrears of rent must not be unreasonably great.—*SEIGMAN & GALE v. MILLER, SPENCER & CANNELL* (1915), 33 W. L. R. 117; 9 W. W. R. 729.—CAN.

On tender of rent.—*See* Sect. 9, sub-sect. 6, *ante*.

Sale without notice.—*See* Sect. 10, sub-sect. 5, A., *ante*.

Sale not within statutory periods.—*See* Sect. 13, sub-sects. 4 & 11, *ante*.

Selling for other than best price.—*See* Sect. 13, sub-sect. 7, *ante*.

Improper dealing with overplus.—*See* Sect. 13, sub-sect. 9, *ante*.

Remedies for.—*See* Sub-sects. 4–11, *post*.

SUB-SECT. 3.—EXCESSIVE DISTRESS.

See Statute of Marlbridge, 1267 (c. 4).

1093. What is excessive distress—Taking single chattel—Value exceeding amount of distress.—

(1) Case will not lie for taking an excessive distress, where one thing only could be taken, though greatly exceeding in value the amount of the distress.

(2) Express malice is not necessary to the maintaining of the action nor required to be proved (*LORD ELLENBOROUGH, C.*).

(3) It is not for every trifling excess that this action is maintainable; it must be disproportionate to some extent, & if disproportionate to an excess, the action is clearly maintainable (*LORD ELLENBOROUGH, C.*).—*FIELD v. MITCHELL* (1806), 6 Esp. 71, N. P.

1094. — Sale only to cover rent due.—*RODEN v. EYTON*, No. 777, *ante*.

1095. — Other articles available.—

(1) Where a party distrains for more rent than is due, but takes only a single chattel, he is not liable to an action for distraining for more rent than is due, though the thing taken be of greater value than is necessary to cover the rent actually due, unless there were others of less but sufficient value to be found.

(2) The appraiser of a distress must be sworn before the constable of the parish where it is taken.

(3) The constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted.—*AVENELL v. CROKER* (1828), Mood. & M. 172, N. P.

Annotations:—*As to* (1) *Consd.* *Tancred v. Leyland* (1851), 16 Q. B. 669. *Refd.* *Taylor v. Henniker* (1840), 12 Ad. & El. 488; *Rodgers v. Parker* (1856), 18 C. B. 112.

1096. — — — — ——*RODEN v. EYTON*, No. 777, *ante*.

1097. — Distraint for whole sum—When reduced by payments.—*CARTER v. CARTER*, No. 531, *ante*.

1098. — Sale for less than real value.—Declaration in case complained of a distress for more than was necessary to satisfy the rent due, including expenses, etc., & made no mention of sale, either as special damage or by way of

to contain an averment that deft. knew that the goods had been replevied.—*MOUNSEY v. DAWSON* (1837), 6 Ad. & El. 752; 1 Nev. & P. K. B. 763; Will. Woll. & Dav. 283; 6 L. J. K. B. 251; 112 E. R. 289.

B. Landlord's Title—Estoppel.

1117. Tenant estopped from disputing.]—Distress for Rent Act, 1737 (c. 19), respecting avowries in replevin does not extend to an avowry for a rent-charge.

Deft. in replevin having made cognisance for rent service as bailiff of A. & C. who were lawfully possessed of a certain manor of which the *locus in quo* was parcel, & holden at a certain rent, pltf. replied that A. & C. were not seised in their demesne as of fee of the manor. On demurrer:—*Held*: bad.—*BULPIT v. CLARKE* (1804), 1 Bos. & P. N. R. 56; 127 E. R. 379.

Annotations:—*Consd. Pluck v. Digges* (1831), 5 Bl. N. S. 31. *Refd. Musgrave v. Emmerson* (1847), 10 Q. B. 326.

1118. —.]—In an action of replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to show that the premises have been fraudulently conveyed to the landlord, & that the actual title is vested in another person. The plea of *nil habuit*, etc., cannot be pleaded, nor can evidence be given which amounts to it.—*PARRY v. HOUSE* (1817), Holt, N. P. 489, N. P.

1119. —.]—H. had been let into occupation of premises by N. After he had remained a year in possession, B. represented himself as landlord, of the premises, & N. confirmed his representation. B. permitted N. to take a quarter's rent then due, but H. afterwards paid B. a sum on account of rent which subsequently became due. B. having distrained for rent which afterwards accrued, H. brought replevin, & B. avowed as landlord. On a plea of *non tenuit*:—*Held*: H. could not dispute the title of B. to the premises.—*HALL v. BUTLER* (1839), 10 Ad. & El. 204; 2 Per. & Dav. 374; 8 L. J. Q. B. 239; 113 E. R. 78.

Annotation:—*Expld. Jew v. Wood* (1841), Cr. & Ph. 185.

C. When Available.

(a) In General.

1120. Goods illegally distrained—Goods impounded.]—*ANON.* (1544), Benl. 22; 1 And. 31; 73 E. R. 947.

1121. Only when unlawfully taken—Not when

PART II. SECT. 19, SUB-SECT. 4.—B.

1117 i. Tenant estopped from disputing.]—In replevin for scows, deft. averred the taking as a distress for rent of a ship, due them from W. Pltf. pleaded that the ship was a place over which the tide ebbed & flowed, & was with the knowledge & consent of deft. used by all persons as a public slip or landing place, in which their ships, etc., were accustomed to lie in the ordinary course of loading & unloading their cargoes, & other purposes connected with shipping & trade, paying to the occupier certain wharfage, & that the scows at the time of the distress were lying in the slip for the purposes aforesaid in the course of trade, with the consent of defts.; & that before the rent became due, all the estate & interest of W. in this slip were duly surrendered to defts. by operation of law. Replication: that the scows were not lying in the slip in the course of trade, with the knowledge, etc., & that the estate of W. in the premises was not surrendered to defts. by operation of law before the rent became due:—*Held*: these were proper questions for the consideration

of the jury, & they having found for pltf. on both issues, the ct. refused to disturb the verdict.—*HAMMOND v. JOHNSON* (1846), 3 Kerr, 161.—*CAN.*

n. Stranger estopped from disputing.]—A stranger, whose goods have been distrained for rent on the premises of a tenant, cannot, in replevin, any more than the tenant, question the landlord's right to demise.—*SMITH v. AUBREY* (1850), 7 U. C. R. 90.—*CAN.*

PART II. SECT. 19, SUB-SECT. 4.—C. (a).

o. Rent in arrear under illegal lease.]—Replevin will lie to recover goods distrained for rent in arrear under an illegal lease.—*GALLAGHER v. McQUEEN* (1898), 35 N. B. R. 198.—*CAN.*

p. Goods must have been in possession of plaintiff.]—To warrant a party in issuing a writ of replevin, he should have been in clear & unequivocal possession of the thing replevied, when it was taken. If he issues the writ in improper circumstances, he will be attached for contempt, the writ will

only unlawfully detained.]—Replevin lies only where goods, etc., are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract.—*GALLOWAY v. BIRD* (1827), 4 Bing. 299; 12 Moore, C. P. 547; 5 L. J. O. S. C. P. 180; 130 E. R. 782.

Annotation:—*Refd. Mellor v. Leather & Clough* (1853), 22 L. J. M. C. 76.

1122. — Not confined to distress.]—(1) Upon an issue joined on a plea of *non cepit* in an action of replevin, deft., under 5 & 6 Will. 4, c. 76, ss. 76 & 133, may show that he was a constable appointed for a borough under sect. 76, & took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen.

(2) Replevin lies for goods unlawfully taken. The remedy is not confined to the case of goods taken by way of distress.—*MELLOR v. LEATHER* (1853), 1 E. & B. 619; 22 L. J. M. C. 76; 21 L. T. O. S. 125; 17 J. P. 327; 17 Jur. 709; 118 E. R. 569.

1123. Distress originally lawful.]—*JOHNSON v. UPHAM*, No. 605, *ante*.

1124. — Part of rent due.]—*WHITE v. GREENISH*, No. 233, *ante*.

1125. Cattle taken in withernam.]—Cattle taken in *withernam* are not replevisable, but on satisfaction made, the owner shall have a writ of restitution without paying for their keep.—*ANNESLY v. JOHNSON* (1589), Cro. Eliz. 163; 78 E. R. 420.

Annotation:—*Refd. Horne v. Lewin* (1700), 1 Ld. Raym. 639.

1126. Goods taken beyond the seas—Not replevisable—Although afterwards brought into England.]—Replevin does not lie for goods taken beyond the seas, though afterwards brought into England.—*NIGHTINGALE v. ADAMS* (1688), 1 Show. 91; Holt, K. B. 426; 89 E. R. 470.

Annotations:—*Refd. Battersby v. Kirk* (1836), 2 Bing. N. C. 584; *Lane v. Bennett* (1836), 1 Gale, 368; *Ruckmaboye v. Lulloobhoy Mottichund* (1852), 5 Moo. Ind. App. 234.

1127. Taking of goods privileged from distress—Growing crops.]—*EATON v. SOUTHEY*, No. 466, *ante*.

1128. — Fixtures.]—*NIBLET v. SMITH*, No. 316, *ante*.

1129. — —.]—*DARBY v. HARRIS*, No. 257, *ante*.

1130. — —.]—*GIBBS v. CRUIKSHANK*, No. 175, *ante*.

—.]—*See Sect. 5, ante*.

1131. Entry illegal—Taking goods between sun-

be quashed, & the goods ordered to be restored.—*COMERFORD v. BLAKE* (1839), 2 I. Eq. R. 176 (C.).—*IR.*

q. Goods must be in possession of defendant.]—The goods mentioned in a writ of replevin cannot be taken by the sheriff unless they are in the possession of deft. named in the writ.—*WIGGINS v. GARRISON & WOOD* (1835), Ber. [21] 16.—*CAN.*

r. Promissory note—Whether replevisable.]—A promissory note is a chattel subject to replevin within County Courts Act, R. S. M. 1913 (c. 44), s. 222.—*WILTON v. MANITOBA INDEPENDENT OIL CO.* (1915), 32 W. L. R. 465; 9 W. W. R. 202; 25 D. L. R. 243; 25 Man. L. R. 628.—

s. Only at suit of person dispossessed.]—Writ of replevin does not lie, unless there has been a taking of the goods out of the possession of the person who sues it forth.—*Ex p. CHAMBERLAINE* (1804), 1 Sch. & Lef. 320.—*IR.*

t. Only on unlawful taking.]—The writ of replevin is merely to apply

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 4, C. (a), (b), (c) & (d), D. & E. (a).]

set & sunrise.—(1) In replevin, deft. avowed for a distress for rent, & pltf. pleaded that the goods were taken between sunset & sunrise, & deft. replied that the goods were taken between sunrise & sunset, without this, that they were taken between sunset & sunrise. On these pleadings:—*Held*: pltf. had the right to begin.

(2) In replevin, pltf. had given a bond under 9 & 10 Vict. c. 95, s. 121, to prosecute his suit with effect & without delay, & prove that the title to corporeal property was in question:—*Held*: he was not entitled to obtain a certificate from the judge at *nisi prius* that he had done so, if he did not succeed in the cause, & not having done so, he had not prosecuted his suit with effect.—*TUNNICLIFFE v. WILMOT* (1847), 1 Car. & Kir. 626. —See Sect. 6, sub-sects. 4 & 5, *ante*.

1132. For second distress.—Replevin is the remedy for a second distress.—*ANON.* (1702), 7 Mod. Rep. 118; 87 E. R. 1134.

1133. Distress for rentcharge.—A rentcharge is within Distress for Rent Act, 1738 (c. 19), s. 23: a sheriff therefore is authorised in taking a replevin bond under a distress for such a rent.—*SHORT v. HUBBARD* (1824), 2 Bing. 349; 9 Moore, C. P. 667; 3 L. J. O. S. C. P. 35; 130 E. R. 340; *subsequent proceedings* (1825), 2 Bing. 445. *Annotation*:—*Mentd. Edmonds v. Challis* (1849), 7 C. B. 413.

1134. No change in possession of goods.—*MENNIE v. BLAKE*, No. 1110, *ante*.

1135. To what time available—Before goods sold—After removal & appraisement.—Where goods are distrained, & at the end of five days appraised, but not sold, the act of appraisement does not take away pltf.'s right to replevy them.—*JACOB v. KING* (1814), 5 Taunt. 451; 1 Marsh. 135; 128 E. R. 765.

Annotation:—*Refd. King v. England* (1864), 28 J. P. 230.

(b) *Relationship of Landlord and Tenant.*

1136. Whether necessary.—*ROGERS v. BRADLY* (1690), 2 Vent. 143; 86 E. R. 358.

Annotation:—*Refd. Burrell v. Dodd* (1803), 3 Bos. & P. 378.

1137.—Pltf. in replevin may plead in bar to deft.'s avowry or cognisance, that he did not hold as tenant, with a plea of infancy.—*WILSON v. AMES* (1814), 5 Taunt. 340; 1 Marsh. 74; 128 E. R. 720.

1138.—An acknowledgment of title by a tenant, in one who claims as heir-at-law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of claimant, under a plea of *non tenuit*, if it appear that such acknowledgment proceeded from a misrepresentation or a misapprehension of the nature of the title set up.—*GREGORY v. DOIDGE* (1826), 3 Bing. 474; 11 Moore, C. P. 394; 4 L. J. O. S. C. P. 159; 130 E. R. 596.

Annotations:—*Consd. Doe d. Linsey v. Edwards* (1836), 6 Nev. & M. K. B. 633; *Doe d. Plevin v. Brown* (1837), 7 Ad. & El. 447; *Jew v. Wood* (1841), Cr. & Ph. 185; *Claridge v. Mackenzie* (1842), 4 Man. & G. 143.

1139.—*Downs v. Cooper*, No. 564, *ante*.

1140.—*Walker v. Giles*, No. 176, *ante*.

to the case when A. takes goods wrongfully from B. & B. applies to have them redelivered to him upon giving security, until it shall appear whether A. has taken them rightfully; but if A. be in possession of goods in which B. claims a property this is not the proper writ to try that right.—*Re*

WILSONS (1804), 1 Sch. & Lef. 320, n.—*IR.*

a. *Whether two replevins of same property.*—Deft. replevied certain account books under a writ & handed them to pltf., but before a removal could be effected & while the parties

1141. Attornment by lessee to mortgagee.—*ALCHORNE v. GOMME*, No. 536, *ante*. —See, also, Sect. 4, sub-sect. 7, B. (b), *ante*.

1142. Landlord's title—Avowant must show.—*ANON. v. HEREFORD (EARL)* (1311), Sel. Soc., Y. B. Vol. VI., p. 104.

1143. ——— Commencement—Derivation.—In an avowry, whenever title is made under a particular estate, the commencement of it, & the original whence derived, must be set forth in pleading.—*SILLY v. DALLY* (1698), 1 Ld. Raym. 331; Carth. 444; 12 Mod. Rep. 191; 91 E. R. 1117; *sub nom. SCILLY v. DALBY*, Comb. 476; 2 Salk. 562; *sub nom. STILLY v. DALLY*, Holt, K. B. 610 *affd. sub nom. DALLY v. SILLY* (1703), 1 Bro. Parl. Cas. 525, H. L.

Annotations:—*Fold. Reynolds v. Thorp* (1728), 1 Barn. K. B. 46. *Refd. Johns v. Whitley* (1770), 3 Wils. 65; *Hendy v. Stephenson* (1808), 10 East, 55.

1144. ————In avowries commencement of particular estates must be shown.—*REYNOLDS v. THORP* (1728), 1 Barn. K. B. 46; 2 Stra. 796; 94 E. R. 32.

1145. ————(1) An avowry not showing who was deft.'s tenant of the *locus in quo*, nor that the place was in lands or tenements of which deft. was seised as within his fee or seignior, is not good under 21 Hen. 8, c. 19, s. 2.

(2) An avowry stating that J. held the *locus in quo* as tenant to deft. under a demise thereof by A. to W., at a certain rent, for a term not expired, J. being assignee of all W.'s estate & interest, & that rent was in arrear from J. is not good, by 21 Hen. 8, c. 19, s. 2, or Distress for Rent Act, 1737 (c. 19), s. 22, or by the two conjointly.

(3) In a declaration in replevin, an insufficient description of the goods taken, or of the *locus in quo*, is cured by deft.'s avowing or making cognisance, & it makes no difference that pltf. has demurred to the avowry or cognisance.

(4) *Qu.*: whether deft. in replevin may avow for rent due from a tenant described only as "a person unknown to deft."—*BANKS v. ANGELL* (1838), 7 Ad. & El. 843; 3 Nev. & P. K. B. 91; 7 L. J. Q. B. 109; 2 Jur. 657; 112 E. R. 687.

1146. Sufficiency of.—In replevin, by reason of a clerical error the avowry omitted to state that pltf. was tenant to the avowant:—*Held*: the allegation that pltf. held the premises under a demise at a yearly rent, & that a certain sum of the rent aforesaid was due from pltf. to the avowant, sufficiently showed that the former was tenant to the latter.—*INNES v. COLQUHON* (1831), 7 Bing. 265; 5 Moo. & P. 63; 131 E. R. 102; *sub nom. JAMES v. COLQUHON*, 9 L. J. O. S. C. P. 90.

—**Tenant estopped from disputing.**—See Sub-sect. 4, B., *ante*.

Subsisting demise.—See Sect. 3, sub-sect. 2, A., *ante*.

Demise at fixed rent.—See Sect. 3, sub-sect. 5, *ante*.

(c) *Rent not due—Tender of Rent.*

Compulsory payment on behalf of landlord.—See Nos. 530–549, *ante*.

Payment of rent.—See Sect. 9, sub-sect. 5, *ante*.

Release of rent.—See No. 614, *ante*.

were yet together, a writ of replevin was placed in the hands of the sheriff, who thereupon again seized the books:—*Held*: the taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property.—*CRAWFORD v. THOMAS* (1858), 7 C. P. 63.—*CAN.*

Expiry of landlord's title.]—See Nos. 244, 563, 564, *ante*, No. 1273, *post*.

Tender of rent & costs.]—See Sect. 9, sub-sect. 6, *ante*.

(d) *Property not in Plaintiff.*

1147. General rule.]—PRESGRAVE *v.* SAUNDERS (1703), 2 Ld. Raym. 984; 6 Mod. Rep. 81; 1 Salk. 5; 92 E. R. 156; *sub nom.* PESGROVE *v.* SAUNDERS, Holt, K. B. 502.

*Annotation:—*Mentd. R. *v.* Haddock (1737), Andr. 137.

1148. —.]—(1) In avowing for rent under Distress for Rent Act, 1737 (c. 19), it is not necessary to aver that the rent continued in arrear at the time of the making avowry or conusance.

(2) Upon demurrer, if each party takes objections to the pleadings of the other, it is the duty of each to deliver paper-books, with the points intended to be made on both sides, stated in the margin.

(3) In replevin for taking pltf.'s goods in a dwelling-house, deft. made conusance of the taking as a distress for rent due upon a demise to pltf. Plea, that at the time of the demise & rent accrued, deft. was covert of J., then her husband:—*Held*: it must be intended that the husband continued living at the time of the distress taken, & therefore, the goods could not be pltf.'s, but her husband's, & so she had no ground of action.

(4) In replevin, an avowry or conusance for rent admits the property of the goods to be in pltf., but if the pltf.'s plea subsequently shows the property of the goods to be in another, pltf. cannot maintain the action.—CLARKE *v.* DAVIES (1816), 7 Taunt. 72; 2 Marsh. 386; 129 E. R. 29.

1149. Claim to property in goods—By landlord.]—SOLERS *v.* WOTTON (1405), Y. B. 7 Hen. 4, fo. 27, pl. 5.

*Annotations:—*Mentd. Marshalsea's Case (1613), 10 Co. Rep. 68 b; Zouch *v.* Thompson (1696), 1 Salk. 210; Mennie *v.* Blake (1856), 6 E. & B. 842.

1150. —.]—If a deft. in replevin plead property in himself, he may have return without avowry.—SALKOLD *v.* SKELTON (1619), Cro. Jac. 519; 79 E. R. 443.

*Annotation:—*Folld. Presgrove *v.* Saunders (1703), 6 Mod. Rep. 81.

1151. —.]—In replevin if deft. had the possession, it is a good bar against pltf. if he has no title.—PARKER *v.* MELLOR (1703), Carth. 398; 1 Ld. Raym. 217; 12 Mod. Rep. 122; 3 Salk. 54 90 E. R. 831.

1152. — By third person.]—BACON'S CASE (1596), Cro. Eliz. 475; 78 E. R. 726.

1153. Sufficiency of title—Claim by husband & wife.]—ANON. (1308), Sel. Soc., Y. B. Vol. I., p. 128.

1154. —.]—A declaration in replevin by J. & his wife, without showing any cause for joining the wife, is bad on demurrer, & if deft. demur without adding an avowry & prayer of return, it is no discontinuance.

In the present case nothing appeared upon the face of the record from whence the ct. could infer that the wife had any interest in the goods taken, & it was not sufficient for pltfs. to put imaginary cases of interest, but the title ought to be averred

(*per* CUR.).—SERRES *v.* DODD (1807), 2 Bos. & P. N. R. 405; 127 E. R. 686.

*Annotation:—*Consd. Johnson *v.* Lucas (1853), 1 E. & B. 659.

1155. Liability of official granting replevin—Knowledge as to property of goods.]—The sheriff may justify by grant of a replevin, without showing the property of the goods to be in pltf. in replevin.—MILLES *v.* DAVIES (1737); 2 Com. 590; 92 E. R. 1223.

—.]—See, now, County Courts Act, 1888 (c. 43), s. 134.

D. Who may grant Replevin.

Registrar of county court.]—See County Courts Acts, 1888 (c. 43), s. 134.

E. The Security.

(a) *Conditions of Security.*

See County Courts Act, 1888 (c. 43), ss. 135–137.

1156. To prosecute "with effect"—Meaning of—Action removed to High Court.]—CHAPMAN *v.* BUTCHER (1692), Carth. 248; 90 E. R. 748.

*Annotations:—*Refd. Lutwydg *v.* Jameson (1730), Fortes. Rep. 210; Morgan *v.* Griffith (1740), 7 Mod. Rep. 380; Perreau *v.* Bevan (1826), 5 B. & C. 284; Edmonds *v.* Challis (1849), 7 C. B. 413.

1157. —.]—NICOLS *v.* NEWMAN (1730), Fortes. Rep. 361; 92 E. R. 891.

*Annotation:—*Refd. Lutwydg *v.* Jameson (1730), Fortes. Rep. 210.

1158. —.]—The condition of a replevin bond is not satisfied by a prosecution of the suit in the county ct., but the plaintiff removed by *recordari facias loquclam* into a superior ct. must be prosecuted there with effect, & a return made if adjudged there.—GWILLIM *v.* HOLBROOK (1799), 1 Bos. & P. 410; 126 E. R. 981.

*Annotations:—*Refd. Perreau *v.* Bevan (1826), 5 B. & C. 284; Edmonds *v.* Challis (1849), 7 C. B. 413.

1159. — Effect of nonsuit in High Court.]

—Where in a replevin bond the condition was to appear in the county ct., & then & there prosecute with effect, the removing the cause by *recordari* into the Ct. of Common Pleas, & being there non-suited, is a breach of the condition for which an action of debt upon the bond lies. The words "then & there" relate to so much prosecution as shall lie in the county ct., but do not restrain it.—VAUGHAN *v.* NORRIS (1735), Lee *temp.* Hard. 137; 95 E. R. 87.

1160. —.]—In an action by the assignee of the sheriff on a replevin bond, conditioned for pltf. in replevin to appear at the county ct. & prosecute his suit with effect, & make a return of the goods distrained, if it should be adjudged, & pltf. in replevin, after removing the plaintiff into the Ct. of Common Pleas became non-suit:—*Held*: (1) he had thereby not prosecuted his suit with effect, & the condition of the bond was broken; (2) the avowant had its election of the proceeding by a writ *de retorno habendo*, or issuing a writ of inquiry under 17 Car. 2, c. 7, s. 2.

(3) Where to a declaration against one of the sureties on the bond, averring, that pltf. in replevin did not prosecute his suit with effect:—*Held*: a plea stating the writ of inquiry & judgment to

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E. (a).

b. Requirements as to sureties.]—It is not necessary under Replevin Act, C. S. B. C., 1888 (c. 101), that the sureties on a replevin bond should be worth the amount of the bond, or that there should be sureties at all, but only that there shall be a bond a double the value, etc., to the satisfaction of the sheriff.—DUNSMUIR *v.*

KLONDIKE & COLUMBIAN GOLD FIELDS, LTD. (1897), 6 B. C. R. 200, 258.—CAN.

c. Amount of security.]—In replevin, the bail bonds should amount to treble the value of the distress.—ANON. (1824), Rowe, 399.—IR.

d. Indemnity of defendant.]—The consolidated rule 1074, dealing with the question of indemnity of deft. in replevin proceedings, is 48 Vict., c. 13,

s. 8 (O.), imported into the rules, & does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff.—HARPER *v.* TORONTO TYPE FOUNDRY CO. (1899), 31 O. R. 422.—CAN.

e. Defect in bond—Form.]—No affidavit is required to be filed under Rule 2, where the distress is for rent. Bond filed being defective in form &

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recover the arrears of rent found under 17 Car. 2, c. 7, was no bar to the action on the bond, & was bad on general demurrer, it not showing that any execution had issued on the judgment, or that the sum recovered had been levied & paid to the avowant before action brought.

(4) If judgment be given against pltf. in replevin for not prosecuting his suit with effect, his sureties on the bond will be answerable to the avowant, notwithstanding he has afterwards proceeded on 17 Car. 2, c. 7, s. 2, & obtained a judgment under a writ of inquiry, in pursuance of that statute to recover the arrears of rent & costs.—*TURNOR v. TURNER* (1820), 2 Brod. & Bing. 107; 4 Moore, C. P. 606; 129 E. R. 898.

Annotation:—As to (1) Folld. Perreau v. Bevan (1826), 5 B. & C. 284.

1161. — With success.]—(1) A replevin bond is good although it do not appear to have been taken by the sheriff *virtute officii*.

(2) In all these sorts of bonds, to prosecute with effect, pltf. must not only proceed to a decision of the suit, but must have success in it, or he does nothing (*per cur.*).—*MORGAN v. GRIFFITH* (1740), 7 Mod. Rep. 380; 87 E. R. 1304.

Annotations:—As to (1) Distd. Short v. Hubbard (1824), 9 Moore, C. P. 607. *Refd. Miers v. Lockwood* (1841), 9 Dowl. 975. *As to (2) Refd. Dunbar v. Dunn* (1822), 10 Price, 54. *Generally, Refd. Perreau v. Bevan* (1826), 5 B. & C. 284.

1162. — — — — —.]—(1) In an action on the case against a sheriff for negligence in losing a replevin bond, given by a party for prosecuting his suit with effect in the county ct., the declaration averred that pltf. had been removed out of "the county ct. of the said sheriff" by *recordari facias loquelam*, etc., & it appearing that at the time of the removal, the sheriff who had taken the replevin bond, was out of office:—*Held*: there was no variance, & the word "said" might be rejected as surplusage.

(2) The condition of a replevin bond for prosecuting the plaintiff "with effect," means prosecuting it "with success" &, therefore, if a pltf. in replevin fails, the bond is broken, & deft. is not restrained from suing on the bond, though he omits to sue out a writ *de retorno habendo* & cause *clongata* to be returned thereon.

(3) If deft. in replevin elects to proceed on 17 Car. 2, c. 7, he is not confined to his execution under that statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the case, for negligence in losing the bond.—*PERREAU v. BEVAN* (1826), 5 B. & C. 284; 8 Dow. & Ry. K. B. 72; 4 L. J. O. S. K. B. 177; 108 E. R. 106.

Annotation:—As to (2) Distd. Hucker v. Gordon (1832), 1 Cr. & M. 58.

1163. — — — — —.]—(1) The condition in a replevin bond, for prosecuting the suit with effect, means the prosecuting it to a not unsuccessful termination.

(2) In a declaration in an action on a replevin bond, the breach assigned was, that deft. did not appear at the next county ct., & then & there prosecute his suit with effect:—*Held*: the breach was not well assigned, it being consistent therewith that the suit might have been begun at the next county ct., & be still pending.

(3) *Semble*: the words "then & there," usually

inserted in the condition of replevin bonds, are not proper.—*JACKSON v. HANSON* (1841), 8 M. & W. 477; 1 Dowl. N. S. 69; 10 L. J. Ex. 396; 151 E. R. 1127.

Annotations:—As to (1) Refd. Edmonds v. Challis (1849), 7 C. B. 413. *As to (3) Refd. Morris v. Matthews* (1841), 2 Q. B. 293.

—] — *TUNNICLIFFE v.*

WILMOT, No. 1131, *ante*.

1165.

—]—A declaration upon a replevin bond for prosecuting a suit with effect, set forth a plaintiff in a county ct. held under County Courts Act, 1846 (c. 95), & a judgment of that ct. that pltf. there should take nothing by his writ. Upon a plea of *nul tiel record*, & issue thereon, it appeared from the minute of proceedings of the county ct. that the cause was "struck out for want of jurisdiction on the ground of a disputed title having been sworn to":—*Held*: deft. was entitled to judgment.

You have got to make out that there was a judgment; you only show that the cause was struck out (*CRESSWELL, J.*).—*TUBBY v. STANHOPE*, (1848), 5 C. B. 790; 5 Dow. & L. 781; Cox, M. & H. 105; 12 Jur. 357; 136 E. R. 1089; *sub nom. TUBBY v. STANHOPE, TUBBY v. FISHER*, 17 L. J. C. P. 190; *sub nom. TUBLEY v. STANHOPE*, 11 L. T. O. S. 67.

1166. — — — — —.]—Where a party to a suit in replevin in a county ct., whether pltf. or deft., removes the case & gives a bond conditioned for prosecuting the suit with effect, the bond is forfeited if the obligor does not succeed in the suit.—*TUMMONS v. OGLE* (1856), 6 E. & B. 571; 25 L. J. Q. B. 403; 27 L. T. O. S. 154; 20 J. P. 789; 3 Jur. N. S. 82; 4 W. R. 596; 119 E. R. 977.

Annotation:—Refd. R. v. East Stoke (1865), 34 L. J. M. C. 190.

1167. To prosecute "without delay"—What constitutes delay—Lapse of nearly two years.]—A deft. in replevin having taken no proceedings in the suit for more than a year & a half after entering his plaintiff in the county ct.:—*Held*: to amount to a breach of the condition of the replevin bond to prosecute the suit with effect & without delay although judgment of *non prosequitur* had not been signed by pltf.—*AXFORD v. PERRETT* (1828), 4 Bing. 586; 1 Moo. & P. 470; 6 L. J. O. S. C. P. 116; 130 E. R. 894.

Annotation:—Folld. Harrison v. Wardle (1833), 5 B. & Ad. 146.

Due diligence necessary.]—(1) In an action on a replevin bond conditioned to prosecute with effect & without delay, it is a sufficient breach of the condition that pltf. in replevin did not use due diligence in the prosecution of the suit.

(2) But where the plaintiff was removed by *recordari facias loquelam* & pltf. in replevin appeared, & deft. did not:—*Held*: subsequent delay was not a breach of the bond even though the sheriff had neglected to summon deft. as directed by the *recordari facias loquelam*.

(3) *Semble*: the assigness of a replevin bond, are not estopped from replying a fact contrary to the sheriff's return to the *recordari facias loquelam*.

(4) *Qu.*: whether there can be a breach of a condition to prosecute with effect before action determined.—*HARRISON v. WARDLE* (1833), 5 B. & Ad. 146; 2 Nev. & M. K. B. 703; 110 E. R. 746.

Annotation:—As to (1) Refd. Rider v. Edwards (1841), 3 Man. & G. 202.

with one surety only, it was set aside, leave being given to file a new one as of date of one set aside.—*MCDONALD v. PRAUGHT & MUSGRAVE* (1909), 7

E. L. R. 231.—*CAN.*

**f. — Misdescription of defend-
ant.]—Qu.**: whether the calling deft.

by a wrong name in the bond is such misconduct in the sheriff as will make him answerable.—*R. v. HARTFORD* (1827), Rowe, 637.—*IR.*

1169. ———.]—The condition in a replevin bond, to prosecute the suit without delay, may be broken by a delay which does not exceed the time allowed by the ordinary practice of the cts., if deft. in replevin be unduly prejudiced by such delay.—*GENT v. CUTTS* (1847), 11 Q. B. 288; 2 New Pract. Cas. 386; 17 L. J. Q. B. 55; 10 L. T. O. S. 204; 12 Jur. 113; 116 E. R. 484.

1170. Death of distrainee—After proceedings commenced in county court—Before hearing in superior court.]—Declaration against surety in a replevin bond, conditioned that the distrainee should appear at the next county ct., & then & there prosecute his action with effect, not adding without delay, & should make return, assigning for breach that the distrainee did not appear in the same ct. & levied his plaint, which plaint afterwards was, at the instance of the distrainee, removed into the Ct. of Common Pleas by *recordari facias loquellam*, but that the distrainee did not appear in the Ct. of Common Pleas at the return of the *recordari facias loquellam*, & did not then & there, or at any time or place, prosecute the action with effect, though a reasonable time had elapsed, & that afterwards the distrainee died. The plea was that, after the removal of the suit, & before the *recordari facias loquellam* was returnable, the distrainee died, whereby the suit abated. The replication stated that the distrainee, in his lifetime, while the plaint was proceeding in the county ct., sued out the *recordari facias loquellam*, & thereby delayed the plaint & suit, & prevented them from proceeding in the county ct., wherefore the death of the distrainee was no excuse. On demurrer to the replication:—*Held*: the record showed no breach of the condition.—*MORRIS v. MATTHEWS* (1841), 2 Q. B. 293; 1 Gal. & Dav. 677; 11 L. J. Q. B. 57; 6 Jur. 600; 114 E. R. 115.

(b) Sureties.

See County Courts Act, 1888 (c. 43), ss. 108, 109.

Who may be—Not officer of county court.]—See County Ct. Rules, 1903–1922, Ord. 29.

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g. Number required.]—A writ of replevin is bad, & will be set aside upon application to a judge in chambers, where the replevin bond has been executed by one surety only. *Seemle*: a replevin bond that does not follow the form prescribed by the statute is bad.—*HUBBARD v. YOUNG* (1898), 34 N. B. R. 641.—CAN.

h. ———.]—Mere silence in an Act as to the number of sureties to be taken by the sheriff to a replevin bond cannot be allowed to have a repealing effect where the previous practice has been to require two sureties, & the form appended to the Act, is based upon the position that the rule is to be as it was before. The express recognition of the settled rule & practice in such cases contained in the form is sufficient answer to a contention based upon the words of Interpretation Act, R. S. (c. 1), s. 7 (r), "one person shall be sufficient unless otherwise expressly required."—*HORSFALL v. SUTHERLAND* (1899), 31 N. S. R. 471.—CAN.

k. Sheriff responsible for solvency.]—A sheriff who takes a bond in replevin proceedings is responsible for the solvency of the sureties, at the time the bond was given, but is not an insurer of their continued solvency.—*AZAR v. DOUCETTE* (1922), 55 N. S. R. 261.—CAN.

l. Replevin bond—Assignment—Form.]—An assignment by the sheriff

of a replevin bond is valid in Ontario, attested by only one witness. *Seemle*: a subscribing witness is necessary to its validity.—*HELEY v. COUSINS* (1875), 34 U. C. R. 63.—CAN.

m. ——— Who may execute.]—When a replevin bond had been executed to a sheriff prior to the expiration of his year of office:—*Held*: an assignment of the replevin bond in his name, after his year of office had expired, executed by his under-sheriff, was a valid assignment.—*BENISON v. GANLY* (1848), 12 L. L. R. 316.—IR.

n. ———.]—A *feme covert* sued out a writ of replevin, & the bond required by the Consol. Stat., c. 37, s. 202, was executed by her, & by her husband & another as sureties:—*Held*: the bond was sufficient & might be assigned under the Act.—*VERNON v. THOMPSON* (1881), 20 N. B. R. 116.—CAN.

o. ——— Who may take—Sheriff.]—A replevin bond with three taken by the sheriff was assignable, under 8 Geo. 1, c. 6, & also under 36 Geo. 3, c. 38. The former statute was not repealed by the latter, & included sheriffs, although they were not expressly named in the Act.—*HARDING v. LYHANE* (1824), 2 Fox & S. Ir. 160.—IR.

p. ———.]—The sheriff having replevied goods distrained for rent, in pursuance of a writ of replevin out of Chancery, & taken a replevin bond from defts., conditioned for appearance at the return of the writ,

Proceedings against—By action.]—See Subsect. 4, E. (c) i. & iv., *post*.

Discharge of.]—See Subsect. 4, E. (c) iii., *post*.

Liability of.]—See Subsect. 4, E. (c) ii., *post*.

Sufficiency of sureties—Duty of registrar.]—See COUNTY COURTS, Vol. XIII., p. 483, No. 324.

(c) Action for Breach of Condition.

i. In General.

1171. What necessary to support action—Breach of any of the conditions.]—A sheriff taking a bond with sureties from a tenant replevying his goods distrained for rent, is not bound to pursue in every respect the terms of 11 Geo. 3, c. 19, s. 23, & a bond conditioned to prosecute the action, in replevin, with effect, & to indemnify the sheriff, is good, & may be assigned & proceeded on in the name of the assignee under the statute, although it do not require by the condition that the suit shall be prosecuted without delay, & although it contain an undertaking to indemnify the sheriff. On a writ of error brought on objections founded on those grounds:—*Held*: the one term is not exacted by the statute, nor the other excluded or prohibited, & neither the omission in the one case, nor the insertion in the other, is error.

It is not necessary, in an action on the bond, to aver that a return has not been made, although it appear on the face of the declaration to have been awarded, where it is averred that the suit has not been prosecuted with effect.

A breach of either of the conditions for prosecuting with effect, returning the goods, or indemnifying the sheriff, will singly be sufficient to support the action.—*DUNBAR v. DUNN* (1822), 10 Price, 54; 147 E. R. 240, Ex. Ch.; *previous proceedings*, *sub nom.* *DUNN v. DUNBAR*, (1820) cited 5 B. & C. at p. 304.

Annotations:—*Reid*. *Miers v. Lockwood* (1841), 9 Dowl. 975; *Edmonds v. Challis* (1849), 7 C. B. 413.

1172. Grounds of defence—Condition to prosecute suit with effect—Replevin suit pending.]—To an action on a replevin bond, conditioned for

prosecuting the suit with effect, & making a return, if a return should be adjudged, & indemnifying the sheriff from all charges & damages by reason of the replevin:—*Held*: (1) 36 Geo. 3, c. 38, which provides that "all sheriffs & other officers having authority to grant replevins," shall, in every replevin of a distress for rent, take a bond in the manner specified in the Act, extended to the case of a sheriff replevying goods under a writ of replevin out of Chancery, & therefore, the bond taken by the sheriff was assignable under that statute; (2) the bond in this case was assignable under the same statute, although it contained a condition beyond what the statute directs, viz. a condition to indemnify & save harmless the sheriff.—*CATHNESS v. MURPHY* (1824), Sm. & Bat. 1.—IR.

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q. Grounds of defence—Condition to prosecute with effect.]—*MULVANEY v. HOPKINS* (1859), 18 U. C. R. 174.—CAN.

1172 i. ——— Replevin suit pending.]—To an action on a replevin bond, conditioned to prosecute a replevin suit with effect & without delay, defts. pleaded that the suit was still undetermined. The record showed that a verdict had been obtained against the principal obligor with points reserved, which also appeared by production of a special case to have been decided against

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deft. to prosecute his suit below with effect, & alleging a breach in his not prosecuting it according to the tenor & effect of the condition, but therein failing & making default, it is a good defence to plead that deft. did appear at the next county ct. & there prosecute his suit which he had there commenced against the now pltf., & which suit was still depending & undetermined, & such plea is not avoided by replying that deft. did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, & that that suit is not still depending, without showing how it was determined & ceased to depend.—**BRACKENBURY v. PELL** (1810), 12 East, 585; 104 E. R. 228.

Annotations:—Distd. Axford v. Perrett (1828), 4 Bing. 586. *Mentd. Bevins v. Hulme* (1846), 15 M. & W. 88.

—To an action on a replevin bond, the condition of which was, that deft. should appear & prosecute his suit below with effect, & the breach alleged being that deft. did not appear & prosecute, etc., deft. pleaded, that pltf. entered his appearance in the county ct. to the plaint of deft., & that the suit was still depending & undetermined. On special demurrer:—*Held*: the plea was ill.—**RIDER v. EDWARDS** (1841), 3 Man. & G. 202; 3 Scott, N. R. 456; 5 Jur. 728; 133 E. R. 1116; *sub nom.* **RYDER v. EDWARDS**, 10 L. J. C. P. 237.

Meaning of "To prosecute suit in the effect," see Nos. 1156–1166, *ante*.

1174. — Bond entered into by two sureties—

him:—*Held*: sufficient, without showing the entry of a judgment thereon, to entitle pltf. to a verdict for nominal damages.—**JOHNSON v. PARKE** (1862), 12 C. P. 179.—**CAN.**

1172 ii. — —.]—To an action upon a replevin bond for failure to prosecute "with effect," deft. pleaded that the original action was still pending & undetermined. Replication, "that the suit referred to in the bond mentioned in the declaration herein was at & before the commencement of this action determined, being entered for trial & brought on for trial, & the judge decided that the ct. had no jurisdiction over the suit, & struck the suit out of the list of suits entered for trial at the sittings, & declined to give judgment therein":—*Held*: the replication was bad, there being nothing to show that the suit was determined by the adjudication of the ct. before which it was in due course brought, or that such ct. or the ct. in which it was commenced had no jurisdiction to entertain the suit.

After the judgment in this case was given, the replication was amended by the addition of the words " & no other judgment has been given therein":—*Held*: the replication as so amended was good.—**CONWAY v. SCOTT** (1886), 3 Man. L. R. 557, 636.—**CAN.**

1172 iii. — —.]—To an action upon a replevin bond for not proceeding with effect, a plea that the replevin action is still pending is sufficient. A replication to such a plea, disclosing delay, is bad, unless the delay itself has terminated the action.—**MCINTOSH v. NICKEL** (1886), 4 Man. L. R. 51.—**CAN.**

r. — — Failure so to prosecute due to defendant objecting to jurisdiction of court.]—To a breach of the bond in not prosecuting the suit which was in a county ct., with effect, defts. pleaded that the suit was brought to trial without delay, & a verdict given for defts. with leave

reserved to move for a nonsuit or verdict for pltf.; that in the next term a *rule nisi* was obtained accordingly, on the argument of which defts. therein objected to the judge proceeding further because title to land had come in question, whereupon the judge determined that the jurisdiction of his ct. was ousted & declined giving judgment, & none had even been given; & that pltf. in the cause then applied in chambers for a *certiorari*, which was refused:—*Held*: the plea showed no defence: for the suit had been brought to an unsuccessful termination, & the facts of defts. in it having caused such result by objecting to the jurisdiction could not prevent their recovery on the bond.—**WELSH v. O'BRIEN** (1869), 28 U. C. R. 405.—**CAN.**

s. — Action for non-return of goods—Appeal pending.]—Action by the assignee of the sheriff on a replevin bond, alleging a judgment in favour of defts. in the replevin suit, & non-return of the goods. Plea, that pltf. in the suit applied for a new trial, which was refused, & thereupon an appeal was permitted, pursuant to 20 Vict., c. 5, & the security duly allowed, & that the appeal had been prosecuted with all reasonable speed, & was still pending:—*Held*: a good defence, & the averment of the appeal having been allowed sufficiently implied that the necessary notice had been given.—**BECKER v. BALL** (1859), 18 U. C. R. 192.—**CAN.**

t. — Payment into court.]—The declaration claimed damages for breaches of the condition of a replevin bond, assigning as breaches the non-payment of the costs of the replevin suit, or of the writ for the return, or of the sheriff's fees, & that the goods replevied were appraised at more than the rent for which they were seized, but were depreciated before the return of the writ & sold for less. Deft. pleaded payment of money into ct. under an order of a judge & upon authority of 23 Vict., c. 45:—*Held*:

Enacted by defendant only.]—It is no plea in debt on a replevin bond, that the bond purported to be entered into by two sureties, but is executed only by deft.—**AUSTEN v. HOWARD** (1816), 7 Taunt. 28; 2 Marsh. 352; 129 E. R. 11; *subsequent proceedings* (1817), Taunt. 327.

Annotation:—Refd. Peppin v. Cooper (1819) 2 B. & Ald. 431.

1175. Judgment for amount of bond—Writ of inquiry as to damages unnecessary.]—In debt. upon a replevin bond, assigning for breach the not making a return of the goods distrained for rent, pltf. may, after signing judgment against deft. for not returning the demurrer book, tax the costs & issue execution for the costs, & the amount of the goods distrained as indorsed on the replevin bond, without executing a writ of inquiry.—**MIDDLETON v. BRYAN** (1814), 3 M. & S. 155; 105 E. R. 569.

Annotations:—Folld. Dix v. Groom (1880), 49 L. J. Q. B. 430. *Mentd. Murray v. Stair* (1823), 2 B. & C. 82; *Smith v. Bond* (1833), 2 L. J. C. P. 269.

1176. — R. S. C., Ord. 27, rr. 2 & 4.]—If, in an action on a replevin bond, pltf., instead of claiming damages, claims the amount for which the bond is given, & becomes entitled to judgment by default, his proper course is to enter final judgment under r. 2 of the above Order, & not interlocutory judgment under r. 4 of that order.—**DIX v. GROOM** (1880), 5 Ex. D. 91; 49 L. J. Q. B. 430; 28 W. R. 370, D. C.

1177. Whether action may be brought—Before breach.]—The ct. will not set aside proceedings on a replevin bond because the action is commenced

the plea was good.—**THOMPSON v. KAYE** (1863), 13 C. P. 251.—**CAN.**

a. — Failure to deliver—Due to distraint by plaintiff.]—After the determination of a replevin action, brought by S. against R., in which R. was successful, R. distrained the goods in question, for rent due by S., & then sued S. upon the replevin bond, for non-delivery of the goods:—*Held*: deft. could not shield himself on the ground of the impossibility of delivering to pltf. that which pltf. had himself taken.—**ROBINSON v. SCURRY** (1884), 1 Man. L. R. 257.—**CAN.**

b. Excuse for delay.]—Deft. replevied a schooner in Sept. 1862. Issue in fact was joined in the replevin suit in Mar. 1863, & issues-in-law also raised were disposed of in Sept. 1863, but nothing more was done. In Feb. 1864, an action was brought on the replevin bond by pltf., as assignee of the sheriff, to which deft. pleaded only that he had prosecuted the replevin suit without delay. As an excuse for not going to trial at the assizes, which began on Oct. 12, 1863, deft. proved that he sailed in the schooner, as master, about Oct. 1, for C., which he was prevented from reaching until Oct. 25, the usual time required for the voyage being about ten days; & that his attorneys, not knowing where he was, & getting no answer to their letters, countermanded the notice of trial:—*Held*: no excuse, for it could not be presumed that deft.'s presence was necessary for the trial, nor that his attorneys were not properly instructed before he left, or were in ignorance of his going.—**BLETCHER v. BURN** (1865), 24 U. C. R. 259.—**CAN.**

c. Pleading—Breaches must be answered.]—Declaration, alleging that B., pltf. in replevin, did not prosecute his suit with effect, & did not make a return of the goods. Plea, that B. did make a return according to the condition but that pltf. refused to accept the same:—*Held*: a bad plea as answering only one breach.—

before breach, for it may be pleaded.—ANON. (1814), 5 Taunt. 776; 128 E. R. 897.
Annotation:—*Consd. Evans v. Bowen* (1849), 19 L. J. Q. B. 8.

ii. Liability of Sureties.

See, generally, GUARANTEE.

1178. Amount of the penalty—& costs.]—HEFFORD v. ALGER, No. 974, *ante*.

1179. ———.]—A judge has jurisdiction to order proceedings in an action upon a replevin bond to be stayed, upon payment of a penalty of the bond & the costs of the action, inasmuch as an order is not an order for relief under Distress for Rent Act, 1737 (c. 19), s. 23, but an order for payment of all that can be recovered under the bond.—BRANSCOMBE v. SCARBROUGH (1844), 6 Q. B. 13; 13 L. J. Q. B. 247; 3 L. T. O. S. 159; 8 Jur. 688; 115 E. R. 5.

Annotation:—*Mentd. Wall v. Rederiakt. Luggude*, [1915] 3 K. B. 66.

1180. Rent due at date of distress—& costs—Not for subsequent rent.]—The liability of sureties in a replevin bond, is limited to the amount of the rent in arrear at the time of the distress, & costs, & they are not liable for subsequent rent.

Where, on the trial of an action of replevin, a verdict was taken, by agreement between plff. in the action & the avowant, for the penalty of the bond, subject to a reference, not only as to the amount of the rent due at the time of the distress, but of the rent then due, & also of certain penal rents, the sureties being no parties to such agreement, & the arbitrator awarded damages to the full amount of the penalty of the bond:—*Held*: the sureties were entitled to be relieved from the bond, it appearing that the rent originally distrained for had been fully paid before the trial of the replevin.—*WARD v. HENLEY* (1827), 1 Y. & J. 285; 148 E. R. 679.

1181. ——— Or value of goods & costs.
 The sureties in a replevin bond are only liable for the value of the goods seized & double costs, & if that value exceeds the amount of rent due, they will only be liable for the rent.—*HUNT v. ROUND* (1834), 2 Dowl. 558.

Annotation:—*Apld. Miers v. Lockwood* (1841), 9 Dowl. 975.

1182. Unsatisfied judgment against principal—No defence.]—TURNOR v. TURNER, No. 1160, *ante*.

v. BELLNAP (1866), 26 U. C. R. 163.—CAN.

d. Damages.]—In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, plff. at the trial was awarded as damages the amount of the rent distrained for. On motion in term, on defts. undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum.—CHURCHILL v. DENHAM (1879), 29 C. P. 474.—CAN.

PART II. SECT. 19, SUB-SECT. 4.—E. (c) ii.

e. Death of principal — Before return of writ.]—Deft. in replevin is not bound to procure a return to the writ of replevin, or to appear to it before taking an assignment of the replevin bond; & he may proceed against the sureties, notwithstanding the death of the principal before the return of the writ, & before the assignment.—WHITE v. MURPHY (1828), 1 Hud. & B. 498.—IR.

PART II. SECT. 19, SUB-SECT. 4.—E. (c) iii.

1185i. Reference to arbitration—Without concurrence of sureties.]—Where, after proceedings have been commenced on the bond, the parties to the replevin go to arbitration without

the assent of the surety, all further proceedings against the surety will be stayed. *Aliter*, where the reference is with his assent.—*HUTT v. GILLILAND, HUTT v. KEITH* (1845), 1 U. C. R. 540.—CAN.

1185 ii. ———.]—An action of replevin, with all matters in difference between the parties, was referred to arbitration, & decided in favour of deft., who then sued the sureties on the replevin bond. On motion to stay proceedings, on the ground that they were discharged by the reference, defts. swore that they had not consented to the reference, & plffs. in answer showed that they were aware of it & did not object, but attended at the arbitration, & that one of the defts. had asked plff.'s attorney for time:—*Held*: as consent, on these affidavits, could not be assumed, defts. were discharged, & the rule was made absolute.—BURKE v. GLOVER (1861), 21 U. C. R. 294.—CAN.

f. Release of obligor by plaintiff—Effect on other sureties.]—A release by plff. to one of several obligors in a replevin bond to the sheriff, after an assignment to plff., releases all, & having released the sureties, plff. cannot sue the sheriff for taking insufficient sureties.—KIRKENDALL v. THOMAS (1850), 7 U. C. R. 30.—CAN.

g. Trial postponed by defendant—

1183. Effect of distraining for subsequent rent—Sureties not discharged.]—HEFFORD v. ALGER, No. 974, *ante*.

1184. Suit not prosecuted with effect—Stay by agreement between principals.]—A tenant, upon having a distress put on his premises, replevied his goods. A replevin bond was entered into & the usual steps taken to try the cause. Before the trial, an agreement was made to stay proceedings & for the payment of the rent on a given day & that the replevin bond should stand as a security. An action lies against the surety in the bond, because the suit has not been prosecuted with effect.—HALLETT v. MOUNTSTEPHEN (1823), 2 Dow. & Ry. K. B. 343; 1 L. J. O. S. K. B. 76.

iii. Discharge of Sureties.

See, generally, GUARANTEE.

1185. Reference to arbitration—Without concurrence of sureties.]—Where deft. in an action of replevin entered into an agreement with plff. to refer to arbn. a prior action of replevin between them, & then entered & standing for trial at the assizes, & also other matters in dispute between them, but not the second replevin suit, & that all proceedings should in the mean time be stayed till the award should be made, & which was stipulated to be published by a future certain time, but afterwards further enlarged by plff. & deft., all without the concurrence or privity of the surety in the replevin bond, whereby, in point of fact, the suit was delayed, & the surety placed in a different situation by the delay which might have been prejudicial to him whether it actually turned out to have been so or not:—*Held*: it affected the conscience of deft. in equity, & therefore, a perpetual injunction would be granted to restrain him from proceeding against the surety, on an assignment of the replevin bond, obtained upon a return of eloignment.—BOWMAKER v. MOORE, SHIRREFF & TRELFs (1819), 7 Price, 223; Dan. 264; 146 E. R. 954, Ex. Ch.

Annotations:—*Folld. Archer v. Halo* (1828), 4 Bing. 464. *Consd. The Harriett* (1812), 1 Wm. Rob. 182. *Mentd. Smith v. Winter* (1838), 4 M. & W. 451; *Michael v. Myers* (1843), 6 Man. & G. 702.

1186. ———.]—In an action of replevin,

Without concurrence of sureties.]—Where the trial of the replevin had been postponed at the instance of deft., but without the direct assent or concurrence of the sureties:—Held: the bail was discharged.

The true question is not whether the surety has been injured by the delay, but whether he might have been.—*CANNIFF v. BOGERT* (1857), 6 C. P. 471.—CAN.

h. Assignment of bond to third party—Recovery by assignee—Whether bond discharged.]—Qu.: whether in replevin, where a third party claims the property & his claim is found good, & he takes an assignment of the bond & recovers upon it, that satisfies the bond, or whether it can afterwards be assigned to deft. in the suit, in case he recovers judgment, or if plff. fails to prosecute the action.—*WHEELER (ASSIGNEE, ETC.) v. STEWART* (1876), 3 Pug. 398.—CAN.

k. Delay on part of plaintiff—Without connivance of defendant—Sureties not discharged.]—The trial of an action of replevin in a county ct. was, by a judge's order, on the application of plff. therein, postponed to the next sittings thereof, & subsequently the action was by judge's order transferred to another county ct. In an action on the replevin bond:—*Held*: the delay being that of plff. in replevin

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 4, E. (c) iii. & iv. & F. (a).]

it was agreed between pltf. & deft., without the knowledge or concurrence of the sureties in the replevin bond, that the cause, & all matters in difference between them, should be referred to an arbitrator, & that the replevin bond should stand as a security for such sum as should be found to be due:—*Held*: the sureties were discharged.—*ARCHER v. HALE* (1828), 4 Bing. 464; 1 Moo. & P. 285; 6 L. J. O. S. C. P. 79; 130 E. R. 846.

Annotations:—*Distd.* *Aldridge v. Harper* (1833), 10 Bing. 118. *Reid.* *The Harriett* (1842), 1 Notes of Cases, 325. *Mentd.* *Bonar v. Macdonald* (1850), 3 H. L. Cas. 226; *Giddins v. Dodd* (1856), 20 J. P. 580.

1187. ———.]—To an action on a replevin bond, entered into by the tenant & two sureties, upon a distress for rent, the sureties pleaded that the replevin suit, whilst pending, was referred to an arbitrator, without any notice to or consent of the sureties, & that after enlarging the time, he made his award, & that the sureties were thereby discharged from their obligations. On demurrer:—*Held*: the plea was bad, as the facts therein stated could not be pleaded as a bar to the action, as they amounted to a part discharge only, & the only plea of discharge from the performance of the condition of the replevin bond would be a plea of a discharge by a writing under seal.—*ALDRIDGE v. HARPER* (1833), 10 Bing. 118; 3 Moo. & S. 518; 2 L. J. O. P. 274; 131 E. R. 850.

1188. Unsatisfied judgment against principal—For rent & costs.]—*TURNOR v. TURNER*, No. 1160, *ante*.

1189. Nonsuit of plaintiff in replevin.]—If pltf. in replevin be nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, & need not execute a writ of inquiry for his damages.—*WATERMAN v. YEA, LYDE v. LAWRENCE* (1756), 2 Wils. 41; 95 E. R. 674.

Annotation:—*Reid.* *Perreau v. Bevan* (1826), 5 B. & C. 284.

iv. Stay of Proceedings.

1190. On payment into court—Of money due on bond.]—In replevin the money due on the bond may be paid into ct.

If you bring in what is due upon the replevin bond, proceedings shall be stayed, but if it is to stay proceedings on payment of what is due for damages, it shall not be granted, because the ct. has no rule to guide them in such case; but it is otherwise for rent, for that is certain (*per CUR.*).—*ANON.* (1725), 8 Mod. Rep. 379; 88 E. R. 270.

1191. ——— & costs.]—*BRANSCOMBE v. SCARBROUGH*, No. 1179, *ante*.

1192. ——— Of value of distress—& costs.]—

without the consent or connivance & against the opposition of deft. therein, the sureties to the bond were not discharged.—*O'DONNELL v. DUCHENAULT* (1887), 14 O. R. 1.—*CAN.*

1. Judgment obtained by defendant—Subsequent settlement between parties.]—A., a deft. in replevin, having obtained judgment, & issued a writ *de retorno habendo*; & B., pltf. in replevin, having obtained an injunction in a ct. of equity, to restrain A. from proceeding, which injunction was afterwards dissolved; A., instead of proceeding on his judgment entered into an agreement with B., the result of which was an order pronounced in the equity cause, upon the consent of A. & B., that A. should have a sum of money which had been lodged in ct. by B., & also a further sum, together with the costs of the equity cause, to be paid within a fortnight after

taxation, & that, thereupon, all further proceedings should cease between the parties, & A., if so required, should execute a warrant of attorney to satisfy the judgment. An action having been afterwards commenced by A. against one of the sureties in the replevin bond, & a motion having been made by the latter to set aside the proceedings:—*Held*: (1) the effect of the above consent was to give time to the principal & thereby discharge the sureties; (2) the ct. had jurisdiction, under 36 Geo. 3, c. 38, to set aside the proceedings on motion.—*O'BIERNE v. GREEN* (1841), 2 Jebb & S. 582.—*IR.*

PART II. SECT. 19, SUB-SECT. 4.—E. (c) iv.

1192 i. On payment into court—Of value of distress—& costs.]—Goods seized under an execution in the hands

Action on replevin bond stayed at the instance of the sureties, upon paying into ct. the value of the goods distrained, & costs, the value to be ascertained by the prothonotary.—*GINGELL v. TURNBULL* (1837), 3 Bing. N. C. 881; 5 Scott, 153; 132 E. R. 650.

1193. ———.]—(1) Where a replevin bond was taken in a penalty, greater than the amount of goods distrained, & with a clause in the condition to indemnify the sheriff for granting the replevin, & it appeared that the bond had been executed in Sept., & assigned in Feb., but no application to set it aside was made till Easter Term, the ct. refused to set it aside on those grounds, but intimated that it was objectionable that the bond should be taken in such an amount, & that the frequent practice so to do, & the delay, were the only causes for not interfering to set it aside.

(2) The terms on which the ct. will stay proceedings on a replevin bond at the instance of the sureties are the payment of the appraised value of the goods, if that is less than the amount of rent due, the double costs, & the costs of the application.—*MIERS v. LOCKWOOD* (1841), 9 Dowl. 975; *sub nom.* *MEYERS v. LOCKWOOD, KLOS & LANGSTON*, 11 L. J. Q. B. 47; 6 Jur. 103.

1194. ——— Of distress—& costs.]—*DAVIS v. PRINCE* (1754), Barnes, 429; 94 E. R. 988.

1195. ———.]—The ct. will not stay proceedings in an action of replevin, unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin with costs up to that time.—*HOPKINS v. SHROLE* (1799), 1 Bos. & P. 382; 126 E. R. 965. *Annotation*:—*Reid.* *Newman v. Barnard* (1833), 3 Moo. & S. 748.

1196. ———.]—Proceedings in replevin stayed after consuance & plea in bar, upon payment of costs of the action & distress, & replevying & delivering up the replevin bond to be cancelled, there being no special damage.—*BANKS v. BRAND* (1813), 3 M. & S. 525; 105 E. R. 707.

1197. ———.]—The assignee of a replevin bond having brought actions severally against the principal & his two sureties:—*Held*: the proceedings in all the actions should be stayed upon payment of the rent due & costs, & upon such payment not being made, the first action should be proceeded with, debts. in the other two actions to be bound by the event of the first.—*BARTLETT v. BARTLETT* (1842), 4 Man. & G. 269; 4 Scott, N. R. 779; 11 L. J. O. P. 223; 134 E. R. 110.

1198. Only at instance of sureties.]—The ct. will not stay the proceedings on a replevin bond, unless it clearly appears that the application is made on behalf of the sureties, & not of the

of the debtor were replevied by S., claiming under an assignment from such debtor. S. failed in the replevin; & in this suit, brought by the sheriff on the replevin bond, deft. suffered judgment by default & a verdict was rendered for the penalty. The jury having found at the trial the value of the goods, the ct. ordered proceedings to be stayed on payment of such value into ct. with the costs.—*RUTTAN v. SHORT* (1855), 12 U. C. R. 485.—*CAN.*

m. Power of court.]—The provision in 4 Will. 4, c. 38, authorising the ct. to grant relief in actions on replevin bonds, having been omitted from 13 Vict., c. 53, which repealed the former Act, the ct. or judge has no power to stay proceedings in such an action where it is brought for the breach of the condition to prosecute the replevin suit without delay, & pltf.'s proceedings are regular. The ct. can-

principal.—*WARTON v. BLACKNEILL* (1844), 12 M. & W. 558; 1 Dow. & L. 650; 13 L. J. Ex. 112; 2 L. T. O. S. 349; 152 E. R. 1320.

1199. Breach due to distrainer's default.]—The ct. will stay proceedings in an action brought by deft. in replevin on the replevin bond against pltf. in replevin, for not prosecuting the replevin suit with effect, when such pltf. has been prevented from declaring in the replevin suit, after removal into the superior ct., by reason of deft. in replevin not having appeared in that suit in such ct., pursuant to steps taken by such pltf. to compel his appearance.—*EVANS v. BOWEN* (1849), 7 Dow. & L. 320; 19 L. J. Q. B. 8.

1200. On payment of costs—By defendant.]—The ct. will not stay proceedings in replevin upon payment of costs on the application of deft.—*HODGKINSON v. SNIBSON* (1804), 3 Bos. & P. 603; 127 E. R. 325.

By agreement between parties.]—See No. 1184, ante.

F. Action of Replevin.

(a) In General.

1201. A personal action.]—*CHAPMAN v. WISH* (1730), Fitz-G. 153, 294; 2 Barn. K. B. 137; 94 E. R. 696, 763; *sub nom. WISH v. CHAPMAN*, Kel. W. 227.

not adjudicate in a summary way, as to say that no damages have resulted. The controlling power of the ct. over proceedings in suits can only be exercised where special circumstances arise to warrant it.—*BETTS v. MCGOWAN* (1872), 1 Pug. 155.—CAN.

n. Chattel mortgage—Payment.]—C. mtged. to pltf. the goods in his shop to secure £125. Pltf. having taken possession of all C.'s stock in the shop, the greater portion of which was not there at the execution of the mtge., C. replevied. This action on the replevin bond had been taken down to the county ct., & the trial postponed. The ct., on application, ordered proceedings to be stayed on payment of the amount secured by the mtge., with interest & costs.—*HEDLEY v. CLOSTER* (1856), 13 U. C. R. 333.—CAN.

PART II, SECT. 19, SUB-SECT. 4.—F. (a).

o. Notice of action—Necessity for.]—Notice of action is not necessary in replevin.—*FOLGER v. MINTON* (1853), 10 U. C. R. 423.—CAN.

p. ———.]—*KENNEDY v. HALL* (1858), 7 C. P. 218.—CAN.

q. ———.]—A writ of replevin having been issued without the notice required to be indorsed thereon by Practice Act:—*Held*: it was irregular, but might be amended on payment of costs.—*CAMERON v. CAMERON* (1868), 7 N. S. R. 170.—CAN.

r. ———.]—31 Vict., c. 61, s. 13, requiring notice of action does not apply to replevin; nor can the want of notice be made available as a plea in any way.—*MCGOWAN v. BETTS* (1871), 2 Pug. 90.—CAN.

s. ———.]—The provision in the N. S. Liquor Licence Act, 1886 (c. 3), s. 106, that no action shall be brought against an inspector without first giving thirty days' notice, does not apply to an action of replevin.—*WILSON v. REID* (1889), 21 N. S. R. 318.—CAN.

t. ———.]—Notice is not required as a preliminary to an action of replevin brought against a constable to recover goods taken & detained by him.—*JOHNSTON v. SMITH* (1899), 22 N. S. R. 93.—CAN.

a. Verdict divisible.]—In replevin the verdict is divisible, so that pltf. may recover for whatever part of the

goods he proves himself entitled to, & deft. for the rest.—*HENDERSON v. SILLS* (1858), 8 C. P. 68.—CAN.

b. Proceedings in replevin—How regulated.]—The proceedings in replevin as regards appearance are regulated by Replevin Act, not by C. L. P. Act; & an interlocutory judgment signed as for want of a plea, without any appearance by or for deft., is therefore a nullity.—*HART v. PACAUD* (1869), 28 U. C. R. 390.—CAN.

c. Issue of writ de proprietate probanda—Regularity.]—A writ of replevin was returned by the sheriff to pltf.'s attorney with a claim of property; the attorney's clerk, in his absence, issued a writ de proprietate probanda. The attorney gave notice to the sheriff that this writ was issued without his authority, & that he should not proceed on it, but the sheriff notwithstanding, held the inquisition:—*Held*: on an application to set aside the inquisition, the writ de proprietate probanda was rightly issued, & if pltf. was not prepared for the trial of the inquisition, he should have applied to the sheriff to postpone it.—*JONES v. CAIE* (1863), 5 All. 638.—CAN.

d. Claim of property—Not applicable to distress for rent.]—Sect. 12 of 1 Revised Statutes, c. 126, allowing claim of property to be put in in an action of replevin, is not applicable to cases of distress for rent.—*ORKWOOD v. MORRISSEY* (1875), 3 Pug. 140.—CAN.

e. ———.]—*ROURKE v. PARKS* (1877), 1 P. & B. 513.—CAN.

f. Writ of replevin—How return.]—Writs of replevin should be made returnable under Act of 1854, c. 7 & not on a special return day. On a motion for an order to set aside a writ of replevin upon the ground that it was made returnable ten days after service instead of one of the special return days mentioned in Practice Act, s. 10, & argued that the amending Act 1854, c. 7, s. 1, only applied to writs of summons & not to replevin or attachment:—*Held*: uniformity of process should be maintained & the writ should be sustained.—*JOHNSON v. ROSS* (1885), James, 446.—CAN.

g. ———.]—Irregularity—Effect of.]—A writ of replevin issued with blanks for deft.'s name is irregular. Putting in a claim of property:—*Held*: not to be a waiver of the irregularity.—*MILLERS' TANNING EXTRACT CO. v.*

1202. ———.]—*EATON v. SOUTHBY*, No. 466, ante.

1203. Two defendants—Nonsuit against first—When a discharge to both.]—Where defts. plead separately in replevin, nonsuit against one before judgment discharges both.—*BEALE v. BALDWIN & BROADWAY* (1672), Freem. K. B. 50; 89 E. R. 39.

1204. Authority of bailiff—Not traversable.]—The authority of a bailiff to distrain is traversable in trespass & not in replevin.—*HARRISON v. BRITTON* (1697), 1 Ld. Raym. 233; 91 E. R. 1052.

1205. Right to begin—Defendant pleading property in third person.]—Where deft. in replevin pleads property in a third person, & issue is taken thereon, he is entitled to begin.—*COLSTONE v. HISCOLBS* (1833), 1 Mood. & R. 301, N. P.

1206. ———.]—Plaintiff replying no arrears.]—If in replevin deft. avow for rent arrear, & pltf. reply no arrears, pltf. must begin.—*COOPER v. EGGINTON* (1839), 8 C. & P. 748, N. P.

1207. ———.]—Special case stated.]—Upon the hearing of a special case stated in replevin, pltf. has the right to begin.—*VIGAR v. DUDMAN* (1871), L. R. 6 C. P. 470; 40 L. J. C. P. 229; 24 L. T. 731; 35 J. P. 728; 19 W. R. 953; *affd.* on other grounds (1872), L. R. 7 C. P. 72, Ex. Ch.; *sub nom. DUDMAN v. VIGAR* (1873), L. R. 6 H. L. 212, H. L.

HORTON (1888), 27 N. B. R. 54.—CAN.

h. ———.]—A writ of replevin was issued on the application of pltf., & on what purported to be the affidavits of pltf., which in fact were not affidavits because the alleged affiants were not sworn. All proceedings upon the writ were set aside. Although the writ was irregularly issued, & irregularly executed, no order could be made in chambers for the restoration of the goods replevied under the writ.—*CHEW v. CROCKETT* (1912), 22 W. L. R. 119; 6 D. L. R. 368; 3 W. W. R. 32, 225.—CAN.

k. ———.]—Effect of non-compliance with.]—An attachment granted against a party for not complying with a writ of replevin.—*ANON.* (1825), Rowe, 416.

l. ———.]—Improvidently issued—Effect of.]—The writ of replevin being improvidently issued, the ct. quashed the writ, & ordered the goods to be restored, but refused to grant an attachment against the parties; nor could such an attachment be granted even had the parties appeared, & not controverted the facts sworn by deft.—*M'CARTHY v. MAGUIRE* (1827), 1 Mol. 47.—IR.

m. Praecipe order—Containing direction to sheriff to replevy goods to plaintiff—Effect of.]—A praecipe order of replevin taken out under King's Bench Act, r. 862, must not contain a direction to the sheriff to replevy the goods to pltf., as this is contrary to the express provisions of Rule 869. When the sheriff acts upon such a direction in a replevin order deft. is entitled, under Rule 864, to have the order set aside with costs & the goods re-delivered to him by the sheriff.—*SCHATSKY v. BATEMAN* (1908), 7 W. L. R. 526; 17 Man. L. R. 347.—CAN.

n. Wrongful taking of papers—Not by way of distress—Replevin granted.]—A writ of replevin was granted, when it was sworn there was a taking of books of account, & paper writings wrongfully, if not criminally, & not by way of or under colour of distress, it being usual to grant the writ of replevin in Ireland, in cases in which it does not issue in England.—*MANSFIELD'S CASE* (1828), 1 Mol. 278.—IR.

aa. ———.]—A writ of replevin will be issued to get back

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 4, F. (a),

1208. Form of judgment.]—A judgment in replevin "that defts. have a return of the cattle, & recover their damages & costs assessed by the jury," etc. is good either as a judgment at common law, though the return be not adjudged irreplevisable, or as a judgment under 21 Hen. 8, c. 19, which entitles defts. to damages & costs.—*GAMON v. JONES* (1792), 4 Term Rep. 509; 100 E.R. 1146.

(b) Jurisdiction of Court.

See County Courts Act, 1888 (c. 43), ss. 133-137; County Court Rules, 1903-1922, Ord. 31.

1209. Extent of jurisdiction of county court—Damages laid above £20.]—In replevin the county ct. has jurisdiction, although the damages are laid above £20, & it is no ground for a prohibition that a verdict is given for damages above that sum.—*Re LANCASHIRE COUNTY COURT* (1818), 11 L. T. O. S. 62.

1210. — Whether for rent & damage feasant only.]—*Semble:* the jurisdiction of the new county cts. in replevin extends only to cases where the distress was for rent in arrear or for damage feasant.—*HARRIES v. HANDS* (1854), 23 L. T. O. S. 116.

See COUNTY COURTS, Vol. XIII., pp. 469, 475, 476. Nos. 189, 250-256.

Objection to.]—See COUNTY COURTS, Vol. XIII., pp. 546-551, Nos. 1011-1073.

(c) Removal of Action into High Court.

1211. Removal by certiorari—Plaintiff not bound

possession of papers taken wrongfully, but not by way of distress—*ANON.* (1828), 1 Mol. 390.—*IR.*

p. Evidence — Proposal in writing accepted by parol—Whether admissible.]—In replevin for goods distrained for rent, a proposal in writing, accepted by parol, cannot be read in evidence as proof of the terms of the tenancy, without a stamp.—*BOWEN v. HORN* (1842), Arm. M. & O. 318. —*IR.*

q. Necessity for both writ of summons & writ of replevin.]—In proceedings in replevin, under 13 Vict., c. 18, plff. is bound both to serve the writ of summons in replevin, & also to sue out the writ of replevin.—*BARRY v. PURCELL* (1852), 2 L. C. L. R. 373.—*IR.*

PART II. SECT. 19, SUB-SECT. 4.—F. (b).

r. Extent of jurisdiction of county court—To set aside inquisition.]—*GREGORY v. McQUADE* (1875), 3 Pug. 1.—*CAN.*

s. — — —.]—The ct. has power to set aside an inquisition in replevin, found under a writ *de prop. prob.*—*BAILEY v. McDUFFEE* (1878), 2 P. & B. 26.—*CAN.*

t. — — — Value claimed not the test.] The mere fact of plff. in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not show that the action could not have been brought in a district ct. Plff., to entitle himself to Queen's Bench costs, must prove at the trial that the goods are really of greater value.—*WHEELER v. SIME* (1847), 3 U. C. R. 265.—*CAN.*

a. — — — Value of goods—Power of court to give judgment.]—In actions of replevin in the county ct., the declaration should show that the value of the goods does not exceed \$200, otherwise it will be demurrable.

Though a county ct. has no jurisdiction to try a cause, it may nevertheless give judgment for debt. on that ground with costs.—*MORICE v. FORSTER* (1885), 25 N. B. R. 1.—*CAN.*

b. — — — Goods in another county.]—In an action of replevin, brought in the county ct. of H., for a mare taken by defts. from plff.'s close in that county, removed to the county of B., & there detained until replevied:—*Held:* the taking could not be justified under a warrant issued for the arrest of plff. on a charge of stealing the mare; & although the original taking was justified under a search warrant issued in H., to search plff.'s premises in H. for the mare, & to bring it before a justice of that county, yet the subsequent removal to the county of B., & detention there, were not, & constituted debt. a trespasser *ab initio*, & therefore the county ct. of H. had jurisdiction to replevy the goods in B.—*HOOVER v. CRAIG* (1885), 12 A. R. 72.—*CAN.*

c. — — —.]—An order of a county ct. judge for the issue of a writ of replevin out of the ct. for any county ct. division other than that in which the goods to be replevied are situate, & the writ issued thereunder is wholly *ultra vires* & void.—*R. v. FINLAY* (1901), 13 Man. L. R. 383.—*CAN.*

d. Contents of writ.]—A writ of replevin in the county ct. need not allege that the value of the goods to be replevied does not exceed \$200.—*DUNLAP v. BABANG* (1888), 27 N. B. R. 549.—*CAN.*

e. Setting aside writ—Summary motion.]—The ct. will not set aside a writ of replevin on a summary motion, unless in a clear case. Where there was some proof of property & possession in plff., & to connect debt. with the taking the ct. refused to interfere.—

to follow cause—No judgment for defendant.]—*CLERK v. BERWICK CORPN.*, No. 1228, *post*.

See, generally, COUNTY COURTS, Vol. XIII., pp. 543-546, Nos. 968-1010.

See County Courts Act, 1888 (c. 43), s. 137.

(d) By and against what Persons maintainable.

1212. By what persons—Mesne tenant—Distress by lord upon undertenant.]—*CASE OF AN AVOWRY* No. 440, *ante*.

1213. — — — Executors.]—*LEMASEN v. DICKSON* (1627), Benl. 200; W. Jo. 173; 73 E. R. 1057; *sub nom.* *LEMASON & DICKSON'S CASE*, Poph. 189. *Annotations:—**Refd.* *Williams v. Carey* (1695), 1 Salk. 12; *Hambly v. Trott* (1776), 1 Cowp. 371. *Mentd.* *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588.

1214. — — —.]—*ARUNDELL v. TREVILL* (1662), 1 Sid. 81; 82 E. R. 983.

1215. — — — Husband & wife—Though taking not during coverture.]—Declaration in replevin for taking a gross number of different articles without specifying how many of each:—*Held:* good, on motion for arrest of judgment, by reason that the avowant had avowed the taking.

Where it does not appear that the taking was during the coverture, husband & wife may declare in replevin for taking the goods of the husband & wife, for as they might have been jointly possessed before marriage, so after, they might declare as for the goods of husband & wife.—*BERN v. MATTAIRE* (1735), *Lee temp. Hard.* 119; 95 E. R. 74; *sub nom.* *BOURN v. MATTAIRE*, 2 Stra. 1015.

*Annotation:—**Refd.* *Pope v. Tillman* (1817), 1 Moore, C. P. 386.

— — — Only person having property in goods.]—See Sub-sect. 4, C. (d).

1216. Against what persons—Survivor of two

CLIFF v. GUNTER (1844), 2 Kerr, 493.—*CAN.*

f. Court to which writ returned.]—Before the return of either a common law or a Chancery replevin, in the case of an abuse thereof, the party might have applied either to the Ct. of Ch. or to the ct. into which it was made returnable; but after the writ was returned, only to the ct. into which it was returned.—*ANON.* (1825), Rowe, 416.—*IR.*

g. — — —.]—On motion to quash a writ of replevin, it appeared that the writ was returned into the King's Bench:—*Held:* it was then out of the jurisdiction of the Ct. of Ch.—*DUNNE v. BERGIN* (1828), 1 Ir. L. Rec. 1st ser. 468; 1 Mol. 522.—*IR.*

PART II. SECT. 19, SUB-SECT. 4.—F. (d).

h. Against what persons—Actual or constructive taker of goods.]—If replevin is brought against one who is not actively or constructively the taker of the goods, the writ will be set aside.—*GROVES v. GRIFFITH* (1833), (1825-1897), N. B. Dig. 685.—*CAN.*

k. — — — Sheriff—Holding goods of third party.]—Sect. 330 of 4th R. S., c. 94, prevents the replevying of goods seized by & in the custody of the sheriff, under process, out of the cts. therein referred to, though such goods are those of a third party, a stranger to the cause in which the process issued.—*CARTY v. BONNETT* (1878), 3 R. & C. 293.—*CAN.*

l. — — — Inspector under Liquor Licence Act, 1886.]—The inspector under the above Act directed the issue of a warrant of distraint under which plff.'s goods in question were seized:—*Held:* the inspector was rightly joined as a debt. in replevin proceedings.—*WILSON v. REID* (1889), 21 N. S. R. 318.—*CAN.*

defendants.]—In replevin against two, if one of them die after issue joined, yet the action shall survive.—*WYTHERS v. ROOKS & SMITH* (1597), Cro. Eliz. 574; 78 E. R. 819.

(e) *Pleading.*

See County Ct. Rules, 1903–1922, Ord. 34, r. 2.

1217. Necessary allegations—Place of taking.]—In replevin, the place of the taking must be alleged.—*WARD v. LAVILE* (1602), Cro. Eliz. 896; Moore, K. B. 678; 78 E. R. 1120.

*Annotations:—*Refd. *Bullythorpe v. Turner* (1744), Willes, 475; *Walton v. Kersop* (1767), 2 Wils. 354.

—]—*JOHNSON v. WOLLYER* (1722), 1 Stra. 507; 93 E. R. 666.

*Annotation:—*Distd. *Walton v. Kersop* (1767), 2 Wils. 354.

1219. ———.]—A declaration in replevin must state the parish or place in which the taking occurred.—*O'NEILL v. PAUL* (1831), 9 L. J. O. S. K. B. 268.

1220. ——— Declaration omitting place not objected to—Defect cured.]—A declaration in replevin is bad, if it do not specify the place where the goods were taken, but if deft. do not demur, but plead to it, the defect is cured. A plea of *cepit in alio loco*, is a plea in bar though it pray judgment of the declaration. If pltf. in his replication do not answer some matter contained in the plea, or answer it improperly, deft. must demur to it.

In replevin deft. pleaded *cepit in alio loco* & avowed taking the goods in the place in question, whither they had been fraudulently conveyed within thirty days, etc. from the demised premises, as a distress for rent. Pltf. in his plea in bar traversed the avowry, & took no notice of the

plea. On demurrer:—*Held*: the plea was ill, the avowry being in the nature of a suggestion to entitle the party to a return of the distress & not traversable.—*BULLYTHORPE v. TURNER* (1744), Willes, 475; Barnes, 353; 125 E. R. 1275.

*Annotation:—*Consd. *Banks v. Angell* (1838), 3 Nev. & P. K. B. 94.

1221. ——— Place alleged not original place of taking.]—Replevin, pltf. declared for taking his cattle at M. Deft. pleaded *non cepit modo et forma*: pltf. proved that the cattle were in deft.'s custody at M., deft. proved they were originally taken at H. Judgment for pltf.—*WALTON v. KERSOP* (1767), 2 Wils. 354; 95 E. R. 855.

1222. ———.]—*BANKS v. ANGELL*, No. 1145, ante.

1223. ——— Particulars of goods taken.]—In a declaration in replevin for taking goods, the description, number, & value of them must be stated with certainty.—*POPE v. TILMAN* (1817), 7 Taunt. 642; 1 Moore, C. P. 386; 129 E. R. 256.

1224. ——— Insufficient description.]—*BANKS v. ANGELL*, No. 1145, ante.

1225. Avowry—As bailiff of executor—Title of testator need not be set out.]—To a declaration of replevin for taking pltf.'s goods, deft. made cognisance as bailiff of an extrix. under 32 Hen. 8, c. 37, for arrears incurred in the lifetime of testator:—*Held*: such avowry need not set out the title of testator & show the extrix. was entitled to distrain under that statute & at all events it could not be objected to after verdict.—*MARTIN v. BURTON* (1819), 1 Brod. & Bing. 279; 3 Moore, C. P. 608; 129 E. R. 730.

*Annotations:—*Apld. *Stanford v. Sinclair* (1824), 2 Bing. 193. Refd. *Prescott v. Boucher* (1832), 3 B. & Ad. 849.

PART II. SECT. 19, SUB-SECT. 4.— 2 Ont. Dig. 3754.—CAN.

F. (e).

m. Necessary allegations—Place of taking—Description.]—Where in replevin the place of taking is described not by name but by abutments:—*Held*: it is not necessary on the plea of *non cepit* that the place should be proved to be in one occupation, & the calling it a "close" where different parts of the land within the abutments are held by several parties, is not material, defts. not having been misled by the generality of the description.—*MILLS v. DEWITT* (1842), 1 Kerr, 486.—CAN.

n. ——— Place where goods found.]—In replevin on the plea of *non cepit*, proof that deft. had the goods at the place alleged is sufficient to entitle pltf. to recover.—*MCLEOD v. McMILLAN* (1845), 3 Kerr, 64.—CAN.

o. ——— Persons in possession of goods.]—When pltf. in a plea in bar in replevin alleged generally that deft. did not give the particulars required by the 9 & 10 Vict., c. 111, s. 10, to "the person or persons in possession of the premises," but did not aver that any such were in possession:—*Held*: bad.—*O'DONNELL v. MAHONY* (1854), 6 Ir. Jur. 266.—IR.

p. Allegations excessive.]—On a motion to set aside a paragraph of a summons & plaint, alleging that deft. distrained, for certain "pretended arrears" of rent, the goods of pltf., of greater value than "the actual arrears":—*Held*: the form was good.—*M'GUICKIN v. DOBBIN* (1863), 15 Ir. Jur. 311.—IR.

q. Avowry for rent—Non tenuit—Variance as to term.]—Where in replevin the landlord avowed for two & a quarter years' rent, but proved a tenancy for only one year, although the tenant continued in possession for three years, having, however, paid no rent, nor made any acknowledgment during the last two years:—*Held*: a fatal variance on the plea of *non tenuit*.—*THOMPSON v. FORSYTH* (1839),

r. ——— Replication necessary.]—Deft. in replevin avowed for rent, & pltf. did not reply, relying on the statutory replication denying the facts alleged in the plea:—*Held*: a replication was necessary to put the cause at issue.—*BREMNER v. WALLACE* (1878), 3 R. & C. 481.—CAN.

s. Avowry or cognisance—Not a plea.]—When pltf. in replevin proceeds to trial without pleading to the avowry or cognisance of deft., it is a mistrial, an avowry or cognisance not being a plea within Practice Act, s. 243.—*SKINNER v. CLARKE* (1857), 2 Thom. 189.—CAN.

t. Proof of plea.]—Deft. in replevin pleaded property in M., & a seizure as sheriff under execution against M. Replication: Property in pltf. On the trial deft. failed to prove property in M., & a verdict was given for pltf.:—*Held*: deft. was bound to prove the whole plea, & was not entitled to judgment *non obstante veredicto*, on the ground that the replication had admitted that the property was in custody of the law, & was therefore not repleviable.—*GRAHAM v. WETMORE* (1859), 4 All. 377.—CAN.

a. Plea of non cepit—Replication impeaching lessor's title.]—A replication which admits the taking of goods under a distress for rent & impeaches the lessor's title to the demised premises, pleading in answer to a plea of *non cepit* in an action of replevin, is bad on demurrer.—*MCLEAN v. GREEN* (1905), 37 N. B. R. 204.—CAN.

b. Uncertainty in plea.]—To an avowry by a landlord for a distress for rent, the tenant pleaded that the distress was made after 9 & 10 Vict., c. 111, & that the person making the distress did not deliver to the person in possession of the premises, for the rent of which the distress was made, or affix on a conspicuous part of such premises, a particular in writing of the rent demanded:—*Held*: bad for un-

certainly, as it should have been confined to an averment of one or other of these matters.—*RICHARDSON v. NEWENHAM* (1849), 13 L. J. R. 281; 1 Ir. Jur. 204.—IR.

c. Action for rent—Plea of set-off.]—Set-off may be pleaded to an action for rent due under a demise, though not to an avowry for rent in replevin.—*MCANNANY v. TIOKELL* (1863), 23 U. C. R. 122.—CAN.

d. Mistake in plea—Leave to withdraw.]—A deft. in replevin claiming the goods under a sale & delivery from A., an alleged partner of pltf., pleaded by mistake, that at the time of the taking pltf. had no property in the goods except jointly with A.; leave was given to withdraw the plea & plead property in himself, on payment of the costs occasioned by his mistake, the ct. rejecting a motion made on behalf of the pltf. for leave to discontinue the replevin suit without payment of costs, & to order the replevin bond to be cancelled.—*ROURKE v. KEOGH* (1849), 1 All. 370.—CAN.

e. Plea not proved—Application to alter.]—In replevin, the deft. pleaded property in himself & P. The property was owned by pltf. & P. as tenants in common, & deft. held under P.:—*Held*: the plea was not proved: to entitle the deft. to a verdict, it must be shown that there was no property in pltf. An application at the trial to add a plea alleging that pltf. & P. were tenants in common of the goods, & that deft. at the time of the replevin held the goods for & on behalf of P., was refused.—*GODARD v. TUOK* (1866), 6 All. 370.—CAN.

f. Distress for breach of covenant—Replication contradicting effect of covenant.]—In replevin deft. avowed justifying under a distress for \$40 rent, due May 1, 1867, under an indenture of lease, by which deft. demised to pltf. for five years, to be computed from Mar. 15, 1867, at the yearly rent of \$280, payable Nov. 1 & May 1, during the term, excepting the last payment,

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1226. Terms of tenant's contract—To be correctly stated.]—PHILPOTT *v.* DOBBINSON, No. 87, *ante*.

1227. — Must be in name of reversioner—Not only of person usually receiving rent.]—(1) A deft. having obtained a verdict, pltf. had moved to have same entered for him, & obtained a rule *nisi*, but died before it came on to be argued:—*Held*: deft. could not, when it was so called on to be argued, by producing a certificate of pltf.'s burial, & an affidavit verifying it, contend that the counsel, before instructed upon the rule *nisi*, should not be heard in support of it. *Semble*: the suggestion should have been before made the subject of a special application.

(2) An avowry should be in the name of the owner of the reversion, not merely in the name of the person who has usually received the rent.—WHEELER *v.* STYLES (1819), 13 L. T. O. S. 214.

(f) Effect of Non-Prosecution.

1228. Removal by certiorari—Plaintiff not appearing—Whether defendant entitled to judgment.]—A replevin suit was removed, by defts., from an inferior ct., by a writ of *certiorari*. Pltf. did not appear:—*Held*: defts. were not entitled to sign a

which was to be made on Mar. 15, preceding May 1. Pltf. pleaded, setting out the indenture in full, & alleged that only one instalment of rent had become due before action, which he paid deft. before distress. Deft. replied that there were two instalments due before distress, on May 1 & Nov. 1, 1867, & not one only as alleged:—*Held*: replication bad, as contradicting the legal effect of the lease.—BROWN *v.* McCARTY (1868), 18 C. P. 454.—CAN.

g. Defence improperly pleaded—Waiver.]—Deft. in replevin pleaded *non cepit* & gave notice that the goods were the property of A.; no objection was made that this defence was not pleaded, as required by 13 Vict., c. 32, & both parties went into evidence of property. On verdict for deft.:—*Held*: pltf. had a right to waive the pleading of the defence, & not having taken the objection at the trial, the ct. refused to set aside the verdict.—WILBUR *v.* TRITES (1863), 5 All. 633.—CAN.

h. Pleas apparently contradictory.]—In an action of replevin, the pleas of *non tenet* & tender of rent, although apparently contradictory, allowed to be pleaded in the circumstances.—L'ANGLAIS *v.* HAUGHTON (1834), 2 Ir. L. Rec. N. S. 116.—IR.

k. Amendment.]—In replevin for an illegal seizure of pltf.'s goods & chattels, leave given, upon payment of costs, to amend the summons & plaint, by introducing therein a prayer for the recovery of the goods & chattels in the summons & plaint mentioned.—HUDSON *v.* ROGERS (1860), 11 I. C. L. R. App. ix.—IR.

l. —.]—Application on behalf of pltf. to amend the writ of replevin by striking out the name of the wife who had been joined as a pltf., the husband alone having declared, refused with costs.—DANIEL *v.* DUNN (1850), 2 Ir. Jur. 160.—IR.

m. Necessity for demand.]—The writ alleged only an unjust detention, & no unlawful taking:—*Held*: the possession of deft. being wrongful no demand was requisite to sustain replevin.—WALLACE *v.* LAIDLAW (1881), 2 R. & G. 420; 2 C. L. T. 263.—CAN.

n. Plea of non tenet—Eviction

*may be shown.]—*In replevin under the plea of *non tenet* to an avowry for rent in arrear, pltf. may show an eviction.—CORMACK *v.* BERGIN (1836), 5 O. S. 561.—CAN.

PART II. SECT. 19, SUB-SECT. 4.—F. (f).

o. Breach of condition of replevin bond—Damage.]—A tenant replevied goods distrained for rent in Nov. 1858; the landlord appeared, & the cause was entered for trial in May, 1859, but pltf. not appearing when it was called on, it was struck off the docket:—*Held*: this was a breach of the condition of the replevin bond, to prosecute without delay; & the breach of the bond was necessarily a damage.—STEEN *v.* HANSON (1860), 4 All. 459.—CAN.

p. Defendant having possession by return bond—Judgment de retorno habendo refused.]—Where pltf. discontinued an action of replevin, deft. having possession of the goods under a return bond, the ct. declined to allow deft. to dry the cause, or to enter up judgment *de retorno habendo*, but passed a rule for judgment for deft. with costs.—EVANS *v.* ROSS (1878), 3 R. & C. 50.—CAN.

q. Sheriff ordered to deliver up bail bond to defendant.]—If pltf. in replevin make default, the ct. will, on motion of deft., direct the sheriff, on being paid his costs, to deliver up the bail bond to deft.—ANON. (1824), Rowe, 399.—IR.

PART II. SECT. 19, SUB-SECT. 4.—F. (g).

1229 i. By defendant—Residing out of jurisdiction.]—If some of defts. in replevin reside within reach of the process of the ct., security will not be required for the costs, although the other deft. be resident abroad, & although this deft. have the substantial interest in the suit, the other defts. being only bailiffs & insolvent.—REDDICK *v.* SINNOTT (1827), 1 Hud. & B. 204.—IR.

1229 ii. —.]—Deft., who was a seafaring man, was not required to give security for costs in an action of replevin.—CORSCADEN *v.* STUART (1839), 1 I. L. R. 110.—IR.

judgment of *non prosequitur*.—CLERK *v.* BERWICK CORPN. (1825), 4 B. & C. 649; 107 E. R. 1202; *sub nom.* CLARK *v.* BERWICK CORPN., 7 Dow. & Ry. K. B. 104; 4 L. J. O. S. K. B. 36.

(g) Security for Costs.

1229. By defendant—Residing out of jurisdiction.]—A deft. in replevin residing out of the jurisdiction of the ct. is liable to give security for costs.—SELBY *v.* CRUCHLEY (1820), 1 Brod. & Bing. 505; 4 Moore, C. P. 280; 129 E. R. 817.

Annotation.—*Refd.* Maatschappij Voor Fondsenbezit *v.* Shell Transport & Trading Co., [1923] 2 K. B. 166.

1230. — In poor circumstances.]—The ct. refused to grant a rule calling upon deft. in replevin to find security for costs on account of his poverty, pltf. being able to stop his proceedings, if he did not think it worth his while to proceed.—HISKETT *v.* BIDDLE (1835), 3 Dowl. 634; *sub nom.* HESKETT *v.* BIDDLE, 1 Hodg. 119; 4 L. J. C. P. 242.

1231. Real plaintiff or defendant not on record—Stay of proceedings.]—The proper course where the real pltf. or deft. does not appear on the record, is to move, while the cause is depending, that proceedings be stayed till security be given for costs.—EVANS *v.* REES (1841), 2 Q. B. 334; 1 Dowl. N. S. 338; 1 Gal. & Dav. 579; 11 L. J. Q. B. 11; 5 Jur. 1060; 114 E. R. 131.

Annotation.—*Mentd.* Mobbs *v.* Vandenbrando (1864), 4 B. & S. 904.

1229 iii. —.]—In an action of replevin, when deft. was a pauper residing in England, the ct. refused him permission to file an additional avowry on the usual terms, unless the costs provided to be paid by him to pltf. in a consent to postpone the trial at the last assizes were paid; & ordered all further proceedings to be stayed until they were paid.—MANN *v.* EDWARDS (1841), 3 I. L. R. 378.—IR.

r. When court will order.]—Where the penalty of the replevin bond was \$1,400 the ct. refused to order security for costs.

Qu.: whether security for costs can be ordered in replevin.—KING *v.* MCKINLEY (1893), 32 N. B. R. 373.—CAN.

s. By plaintiff residing out of jurisdiction—Bond not in statutory form.]—An order for security for costs obtained by deft. in a replevin action, on the ground that pltf.'s place of residence was outside the province, was rescinded by the Chambers Judge on the ground that the bond taken by the sheriff was conditioned to prosecute the suit to effect & to pay any judgment that deft. might recover in the suit:—*Held*: while the decision of the Chambers Judge was undoubtedly right on the assumption on which the hearing before him took place, as it was made to appear on the appeal that the bond was not in the statutory form, a bond in the proper form should be taken by the sheriff, & in the meantime the further consideration of the appeal should stand over.—BOWSER & Co. *v.* CHARLOTTETOWN MOTOR Co., LTD. (1919), 52 N. S. R. 1.—CAN.

t. —.]—In an action in Saskatchewan for replevin, where pltf. has replevied the goods claimed & has filed a replevin bond in the form prescribed, & the ct. will assume the bond was in proper form in the absence of any suggestion to the contrary, as deft. is thereby secured against any loss for costs in the action, he will not be allowed an order for security for costs applied for on the ground of pltf. residing outside the province.—SHAW *v.* ROBERTSON, [1922] 1 W. W. R. 44.—CAN.

(h) Payment of Money into Court.

See, now, R. S. C., Ord. 22.

1232. By plaintiff—Rent distrained for.]—Where an administrator sues, he cannot bring money into ct. Money may be brought into ct. in covenant for rent, debt for rent, replevin & avowry for rent.—*GREGG'S CASE* (1707), 2 Salk. 596; 91 E. R. 504.

Annotations:—Refd. Anon. (1729), 1 Barn. K. B. 148. *Mentd. Bellue v. Pew* (1729), 1 Barn. K. B. 187; *Olivant v. Perineau* (1743), 2 Stra. 1191.

1233. ———.]—Pltf. in replevin may pay the rent into ct. for which deft. avows.—*VERNON v. WYNNE* (1788), 1 Hy. Bl. 24; 126 E. R. 16.

Annotation:—Distd. Hopkins v. Shrole (1799), 1 Bos. & P. 382.

1234. ——— Special application.]—(1) The ct. will allow money to be paid into ct., by pltf. in replevin, upon a special application for that purpose.

(2) Where a distress is made for more than a year's rent, after an act of bpkcy. by the tenant, the ct. will allow the assignees of the tenant to avail themselves of the 6 Geo. 4, c. 16, s. 74, & to pay a year's rent into ct.

(3) If the landlord under such a rule accept the sum so paid into ct., he is entitled to double costs under Distress for Rent Act. 1737 (c. 19), s. 22.—*ALDERSON v. GADSDEN* (1828), 7 L. J. O. S. K. B. 89.

1235. ——— Whether permissible.]—(1) If, by agreement, the relation of landlord & tenant subsist between two parties for one year, *e.g.* from Lady Day to Lady Day, & if, before the ensuing Michaelmas Day, the landlord give a regular notice to his tenant to quit possession upon the next Lady Day a waiver of such notice & a continuance of the tenancy may be presumed, from the subsequent conduct & demeanour of the parties.

(2) *Seemle:* the ct. will not send a cause to a new trial, when the sum substantially recovered is less than £20 though the verdict of the jury may be for a sum ostensibly more.

(3) *Qu.:* whether in avowry for a certain sum or rent in arrear, pltf. in replevin may bring the money into ct.—*FLECKNOE v. PURSELL* (1833), 2 L. J. C. P. 177.

PART II. SECT. 19, SUB-SECT. 4.—
F. (h).

1232 i. By plaintiff—Rent distrained for.]—A pltf. in replevin may pay money into ct., under the plea of *riens in arrear*, by 3 & 4 Vict., c. 105, s. 46.—*WILSON v. WILSON* (1841), *Jebb & B.* 79.—**IR.**

PART II. SECT. 19, SUB-SECT. 4.—
F. (j).

1237 i. When granted—General rule.]—Where the ct. has set aside a verdict for deft. in replevin upon the ground that he had no legal right of distress, & the jury have found a second time for deft., the ct. will always grant a second new trial to pltf. without costs.—*SANDERSON v. KINGSTON MARINE RY. CO.* (1848), 4 U. C. R. 340.—**CAN.**

1237 ii. ———.]—Where a wharf has been leased "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained upon for rent. Where the ct. has set aside a verdict for defts. in replevin upon the ground that he had no legal right of distress, & the jury have found a second trial for deft. the ct. will almost always grant a second new trial to pltf. without costs.—*SANDERSON v. KINGSTON MARINE RY. CO.* (1848), 4 U. C. R. 340.—**CAN.**

a. ——— Jury not finding on several.]—It is no ground for a new

trial in replevin, that the jury have not distinctly found on the several issues, it being understood that the substantial question was, to whom the property in dispute belonged; & that the ct. might enter the verdict on the several issues accordingly.—*FEARON v. MURRAY* (1861), 5 All. 11.—**CAN.**

b. ——— Jury finding for defendant on one of the issues—Though defendant entitled to finding on merits of issue.]—Where, in replevin, deft. was entitled to a verdict on the merits on one of the issues, but the jury found for him on an issue which should have been found for pltf., the ct. refused a new trial, giving pltf. leave to amend the verdict by entering it on the issue on which it should have been found for deft.—*BAXTER v. JOHNSTON* (1862), 5 All. 350.—**CAN.**

c. ———.]—In an action for replevin for logs, pltf. was entitled to recover a small portion, about 6,000 feet, but the jury found for deft. A new trial was refused, as it could only have been granted on payment of—*TOMKINS v. TIBBITS* (1868), 1 Han. 317.—**CAN.**

d. ———.]—In replevin for wood deft. pleaded *non cepit*. The jury found for deft. contrary to the evidence. On motion for a new trial:—*Held:* as pltf. could only have recovered nominal damages a new trial should not be granted.—*HAMIL-*

1236. By defendant—As to part of distress.]—

In replevin a deft. may pay money into ct. as to a part of the distress & avow as to the residue.—*LAMBERT v. HEPWORTH* (1842), 2 Q. B. 729; 2 Gal. & Dav. 112; 11 L. J. Q. B. 85; 114 E. R. 284.

Action on replevin bond.]—*See* Nos. 1190–1197, *ante*.

Stay of proceedings.]—*See* Sub-sect. 4, E. (c) *iv.*, *ante*.

(j) New Trial.

1237. When granted—General rule.]—*PARRY v. DUNCAN*, No. 984, *ante*.

1238. ——— Not to amend avowry.]—Where deft. in an action of replevin avowed for £650 rent, without any leave asked to amend, & the question went to the jury, whether the tenancy was at £650, or £500, & they found that it was £500 only:—*Held:* (1) deft. would not be given leave to amend his avowry to £500, & have a new trial; (2) the ct. had no power to enter judgment according to the very right & justice of the case, no leave to amend having been asked for at the trial.—*SERGEANT v. CHAFY* (1836), 5 Ad. & El. 351; 2 Har. & W. 273; 6 Nev. & M. K. B. 819; 5 L. J. K. B. 227; 111 E. R. 1199.

1239. ——— Measure of damages awarded—Trifling.]—Where, in an action of replevin, pltf. obtained a verdict, damages £4 4s., the ct. refused to grant a new trial, which was moved for on the ground that the verdict was against evidence, although it was insisted that the rule as to trifling damages could not apply to an action of this nature.—*BROWN v. RAY* (1824), 9 Moore, C. P. 583; 3 L. J. O. S. C. P. 2.

Annotation:—Dtd. Edgson v. Cardwell (1873), L. R. 8 C. P. 647.

1240. ——— Under £20.]—The rule that a new trial will not be granted for either party, where the sum given or recoverable is under £20, does not apply to replevin.—*EDGSON v. CARL* (1873), L. R. 8 C. P. 647; 28 L. T. 819.

See, generally, DAMAGES.

v. SIMPSON (1910), 19 N. B. R. 497.—**CAN.**

e. ——— Stamp on lease wrongly calculated.]—Motion to set aside a verdict had for deft. in an action of replevin, on the ground that the stamp on deft.'s lease should have been calculated on both the rent & the fine, whereas it was only calculated on the one which carried the highest duty, refused, with costs.—*COLHOUN v. CRAWFORD* (1828), 2 Ir. L. Rec. 1st ser. 10.—**IR.**

f. ——— Misdirection.]—To an avowry in an action of replevin of distress for rent, pltf. replied, in effect, that he was prevented from obtaining possession of the lands demised, because that, prior to demise to him, a portion of the lands was & still continued in the possession of certain persons who derived as tenants in fee under defts. Upon the evidence on the trial, it was not clear whether the parties so in possession derived under defts. or by title paramount. The jury were told that it was immaterial to the issue whether they derived under or independently of defts.; & that the substance of the issue was, whether pltf. had got the entire quantity of the land demised:—*Held:* a misdirection, & whether material or not the jury were bound to find in the terms of the issue.—*TYRRELL v. IRISH SOCIETY* (1863), 14 I. C. L. R. 493; 16 Ir. Jur. 395.—**IR.**

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 4, F. (k)

(k) Damages.

See County Court Rules, 1903-1922, Ord. 34, r. 4.
See, generally, DAMAGES, Vol. XVII.

1241. What damages are recoverable—Illegal distress—Injury to credit & reputation.]—(1) Certain goods belonging to plffs. having been taken under a distress for alleged arrears of rent, plffs. claimed damages under various heads in an action in the county ct. One of these heads of damage was "illegal distress," & another was "annoyance & injury to credit & reputation in trade":—*Held*: such damages are recoverable in an action of replevin.

(2) County Courts Act, 1888 (c. 43), s. 120, contains a proviso that "there shall be no appeal . . . in any action of replevin where the amount of rent or the damage or value of the goods seized does not exceed £20." On an objection that the goods seized were not of the value of £20:—*Held*: where there was no finding of the value of the goods, the ct. must determine the value on such evidence as might be before it.—*SMITH v. ENRIGHT* (1893), 63 L. J. Q. B. 220; 69 L. T. 724, D. C.

1242. Several damages—For taking & detaining.]—In replevin for taking & detaining, damages must be several.—*ASH v. WOOD* (1587), Cro. Eliz. 59; 78 E. R. 320.

1243. Special damages—For trespass to goods.]—*GIBBS v. CRUIKSHANK*, No. 175, *ante*.

1244. When writ of inquiry issues—Damages not assessed by jury.]—A writ of inquiry in replevin cannot be granted after an imperfect verdict to supply the defect.—*FREEMAN v. ARCHER (LADY)* (1771), 2 Wm. Bl. 763; 96 E. R. 447.

1245. — Not where no avowry.]—No inquiry for debt in replevin where there is no avowry.—*DURHAM v. PRICE* (1728), Cooke, Pr. Cas. 42; 125 E. R. 946.

PART II. SECT. 19, SUB-SECT. 4.—
F. (k).

g. What damages are recoverable.]—Plff. may recover as damages the value of any of the property in deft.'s hands at the time of issuing the writ, to which plff. proves his right, though not actually replevied.—*ROLSTON v. LAWSON* (1859), 17 U. C. R. 494.—**CAN.**

h. —.]—*LEWIS v. TEALE* (1873), 32 U. C. R. 108.—**CAN.**

k. — — Damages for unjust detention.]—Deft. in replevin is entitled to damages for the unjust detention, & when the cause comes to trial the jury assess these damages, & they form part of their verdict.—*FREEMAN v. HARRINGTON* (1863), 1 Old. 358.—**CAN.**

l. — — Substantial damages.]—Substantial damages may be recovered in replevin, though no special damage is alleged in the declaration.—*FIRTH v. FITZPATRICK* (1866), 6 All. 348.—**CAN.**

m. — — Distress unnecessarily harsh or oppressive.]—The practice, generally, as to damages in actions of replevin is, that where the goods are promptly returned, only sufficient will be given to recover the expense of preparing the replevin bond, but where the necessary distraining acts in a manner unnecessarily harsh or oppressive, substantial damages may be recovered. Where the sheriff was unable to replevy some of the articles mentioned in the writ, by reason of their having been lost or elogned by deft., plff. was held entitled to recover their value as damages; the count being in the

detinet as well as in the detinuit.—*GRAHAM v. O'CALLAGHAN, RUSSELL v. O'CALLAGHAN* (1887), 14 A. R. 477.—**CAN.**

n. — — Sheriff's expenses.]—Expenses paid to the sheriff in connection with the safe keeping of property replevied are recoverable as damages. Where plff. complains only of the last taking, he cannot recover as he might in trespass, for damages consequent on a first taking, even when the first was illegal, or deft.'s subsequent conduct was such as would make him a trespasser *ab initio*.—*McGOWAN v. BETTS* (1871), 2 Pug. 90.—**CAN.**

o. — — Failure of plaintiff to establish claim.]—Plff. who replevies goods thereby undertakes an obligation to pay such damages as deft. may suffer if plff. fails to establish his claim.—*SHEWCZUK v. BREEKO*, [1918] 1 W. W. R. 639; 13 Alta. L. R. 234; 39 D. L. R. 588.—**CAN.**

p. — — Nominal damages.]—*SCOTT DAIRY v. ROSS*, [1923] 3 D. L. R. 1202; 17 Sask. L. R. 207.—**CAN.**

q. — —]—The action of replevin is instituted to recover the possession of the goods distrained & nominal damages only. When substantial damages have been recovered, the ct. will, on application, reduce the amount to four guineas.—*BRAMAN v. SHEARMAN* (1857), 9 Ir. Jur. 310.—**IR.**

r. — — Damages for taking & distraining—Not for consequential injuries.]—In an action of replevin the jury are only to decide on the damages for the taking & distraining, but on no

Recovery of damages sole remedy.]—See No. 1113, *ante*.

New trial after small damages awarded.]—See Sub-sect. 4, F. (j), *ante*.

(l) Costs.

See, now, R. S. C., Ord. 65.

Security for costs.]—See Sub-sect. 4, F. (g).

1246. Defendant partly successful—May be awarded costs in part.]—*WINNARD v. FOSTER* (1691), 2 Lut. 1190; 125 E. R. 660.

*Annotation:—**Distd. Holroyd v. Breare* (1820), 4 B. & Ald. 43.

1247. — —.]—Where some issues in replevin are found for plff., which entitle him to judgment, & some for deft., deft. must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that plff. had probable cause for pleading the matter on which those issues are joined.—*DODD v. JODDRELL* (1788), 2 Term Rep. 235; 100 E. R. 128.

*Annotations:—**Consd. Duberley v. Page* (1788), 2 Term Rep. 391. *Refd. Cook v. Green* (1814), 1 Marsh. 234; *Bird v. Higginson* (1836), 5 Ad. & El. 83; *Partridge v. Gardner* (1849), 4 Exch. 303.

1248. — — Several issues.]—In replevin, deft. pleaded that the goods belonged to himself & others, as assignees under a commission of bkpt. He also avowed taking the goods as a distress for rent arrear:—*Held*: (1) verdict for plff. on the issue joined on the plea, & for deft. on the avowry; (2) deft. would not be allowed costs on the issue found for plff.—*MIDDLETON v. MUCKLOW* (1834), 10 Bing. 401; 131 E. R. 959; *sub nom. EMERY v. MUCKLOW*, 4 Moo. & S. 263.

1249. — — Costs of pleadings.]—If plff. in replevin plead several pleas in bar, upon which issues are joined, & some issues are found for plff. & some for deft., the latter is entitled to such costs of the trial as relate to the issues on which he has succeeded as well as to the costs of the pleadings.—*VOLLUM v. SIMPSON* (1801), 2 Bos. & P. 368; 126 E. R. 1331.

*Annotations:—**Consd. Bird v. Higginson* (1836), 5 Ad. & El.

consequential injury.—*CUMS v. BLAKE-NEY* (1824), Rowe, 400.—**IR.**

s. — — Not damages for unlawful taking.]—In replevin, the party can only have damages for the things distrained, not for an unlawful taking or vexatious mode of proceeding.—*FRENCH v. TAARFE* (1835), 3 Ir. L. Rec. N. S. 26.—**IR.**

PART II. SECT. 19, SUB-SECT. 4.—
F. (l).

1246 i. Defendant partly successful—May be awarded costs in part.]—In replevin, where some of the issues are found for plff., & others for deft., each party is entitled to the costs of the issues found in his favour.—*DICKINSON v. KETCHUM* (1835), Ber. 120.—**CAN.**

1246 ii. —.]—In replevin, deft. pleaded *non cepit*, & property in himself; a verdict was found for deft. on the first issue, & for plff. on the other:—*Held*: as the plea of *non cepit* went to the whole cause of action, deft. was entitled to the general costs of the cause, but not to the costs of any evidence except such as was provided to support that issue, & plff. was entitled to the costs of the other issue, & to have them deducted from deft.'s costs.—*HOLDERNESS v. McKENDRICK* (1851), 2 All. 213.—**CAN.**

1246 iii. —.]—Deft. in replevin only allowed the costs of the one avowry on which he had succeeded, although the arbitrator to whom the case has been referred at *Nisi Prius* had found, by his award, 46 issues for deft., with costs, & thirteen for plff.,

83; *Spencer v. Hamerton* (1836), 4 Ad. & El. 413. *Reid*. *Cook v. Green* (1814), 5 Taunt. 594; *Partridge v. Gardner* (1849), 4 Exch. 303.

1250. ———. ———.]—If pltf. in replevin pleads three several issues, two of which are found for deft., & one for pltf. with the general costs, deft. is entitled to deduct thereout the costs both of the pleadings & trial of those issues which are found for him.—*COOK v. GREEN* (1814), 5 Taunt. 594; 1 Marsh. 234; 128 E. R. 822.

1251. ———. ———.]—Where several pleas were pleaded under 4 & 5 Ann., c. 16, & one party obtained a verdict on some of the issues, entitling him to the general costs of the cause, he was liable to pay the opposite party on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues. There was no difference in this respect between replevin & other actions.—*SPENCER v. HAMERTON* (1836), 4 Ad. & El. 413; 1 Har. & W. 700; 6 Nev. & M. K. B. 22; 5 L. J. K. B. 114; 111 E. R. 843.

Annotations:—*Appld.* *Newton v. Holford* (1845), 1 C. B. 141. *Reid*. *Bird v. Higginson* (1836), 5 Ad. & El. 83; *Partridge v. Gardner* (1849), 4 Exch. 303; *Callander v. Howard* (1850), 10 C. B. 290; *Howell v. Rodbard* (1850), 4 Exch. 309.

1252. Defendant successful—Costs in writ of error—Ordinary costs—Not costs of making distress.—In replevin, if judgment be given for the avowant, he shall not be allowed costs on a writ of error, though the judgment be affirmed, for he is not a pltf. within 3 Hen. 7, c. 10.—*CONE v. BOWLES* (1691), 4 Mod. Rep. 3; 1 Salk. 205; 87 E. R. 230.

Annotations:—*Consd.* *R. v. York City JJ.* (1834), 1 Ad. & El. 828. *Reid*. *R. v. Glastonby* (1737), *Lee temp. Hard.* 355; *Golding v. Dias* (1808), 10 East, 2. *Mentd.* *Keniston v. Friskobaldi* (1727), *Fitz-G.* 1; *Met. Ry. v. Wilson* (1871), L. R. 6 C. P. 376.

1253. ——— **Replevin action discontinued by plaintiff.**—The person entitled to the rentcharge in lieu of tithes, who distrains under Tithe Act, 1836 (c. 71), s. 81, is not entitled to an indemnity in lieu of double costs under Limitations of

Actions & Costs Act, 1842 (c. 97), s. 2, if such person avows under Distress for Rent Act, 1737 (c. 19), s. 22, & pltf. discontinues his action of replevin.—*NEWNHAM v. BEVER* (1849), 8 C. B. 560; 19 L. J. C. P. 129; 137 E. R. 627.

1254. ——— **Entitled to "full costs."**—The term "full costs," which occurs in 17 Car. 2, c. 17, s. 3, has the same meaning as ordinary "costs."

In an action of replevin, in respect of a distress for arrears of a rentcharge, both pltf. & defts. had taken down the record for trial, & defts. obtained a verdict:—*Held*: sect. 3 of the above statute, which gives "full costs" to successful defts. in replevin, defts. were entitled to ordinary costs only, & they were entitled to the costs of taking down the record, but not to the costs of making the distress.—*JAMIESON v. TREVELYAN* (1855), 10 Exch. 748; 3 C. L. R. 702; 24 L. J. Ex. 74; 1 Jur. N. S. 334; 3 W. R. 172; 156 E. R. 642; *previous proceedings* (1854), 10 Exch. 269.

Annotation:—*Reid*. *Avery v. Wood*, [1891] 3 Ch. 115.

1255. Where one of two defendants succeeds.—One of two defts. in replevin cannot have his costs upon acquittal.—*INGLES v. WADSWORTH* (1762), 1 Wm. Bl. 355; 3 Burr. 1284; 96 E. R. 198.

1256. Person not party to the record—Whether liable for costs.—The ct. will not order a person not party to the record to pay costs in any action but ejectment, & in an action of replevin they refused to make such order at deft.'s instance, though it appeared that nominal pltf. had brought the action really to try a right to valuable minerals claimed by a third party against whom the application for costs was made, & pltf.'s attorney had declared on affidavit that he acted solely on behalf of that party, who was real pltf. in the cause. The proper course where real pltf. or deft. does not appear on the record is, to move, while the cause is depending, that proceedings be stayed till security be given for costs.—*EVANS v. REES* (1841), 2 Q. B. 334; 1 Dowl. N. S. 338; 1 Gal. &

without mentioning costs.—*BURKE v. ORMSBY* (1841), 3 I. L. R. 288.—*IR.*

t. Defendant successful.—Where avowant successfully defends a replevin suit, & subsequently institutes proceedings on the replevin bond, he is entitled to recover as part of his damages, the excess of solr. & client costs of his defence, over & above his taxed party & party costs, in that action. *Semble*: the effect of R. S. O. 1877, c. 50, s. 352, is to make Limitations of Actions & Costs Act, 1842 (c. 97), s. 2 (Imp.), as to costs in cases of replevin on a distress for rent in arrear, applicable to our practice.—*WILLIAMS v. CROW* (1884), 10 A. R. 301.—*CAN.*

a. Whether certificate necessary—To obtain full costs.—A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit & bond state the goods to be worth a sum above the jurisdiction of the inferior cts.—*ASHTON v. McMILLAN* (1861), 3 P. R. 10.—*CAN.*

b. Sheriff's fees—Part of general costs of cause.—Sheriff's fees, on executing a writ of replevin, being part of the general costs of the cause, are not taxable in the costs of opposing a rule to set aside the writ, as having been improperly issued.—*McGOWAN v. BETTS* (1871), (1825–1897), N. B. Dig. 202.—*CAN.*

c. No affidavit before writ—Whether costs allowed.—Where no affidavit is filed before the issue of the writ, & the writ is in consequence set aside, unless this ground is taken in the summons, no costs will be allowed.—*McGREGOR v. McGREGOR* (1897), 6 B. C. R. 258.—*CAN.*

d. Rent payable in grain—Agreement to pay half of grain grown on farm—Plaintiff replevying part of defendant's goods.—Pltf. was tenant of deft. under a written lease by which deft. let to pltf. half a section of land for a term of five years. The rent payable under the lease was one-half of the grain grown on the land, this half to be delivered to the lessor at the time of threshing. Early in 1905, pltf. desired to purchase a horse. The owner would not take pltf.'s note unless payment was secured. Pltf. persuaded deft. to go on the note with him, he agreeing to give deft. an additional one-quarter of the grain to be grown in 1905 as a security against payment of the note. The first page of the lease was altered in pencil so as to read "three-fourths share" instead of "one equal half share" as it stood originally. Pltf. agreed to this & signed it in pencil. Copy of lease showed no other charge, but on deft.'s copy a further charge appeared on the second page which made three-quarters of grain deliverable at the time of threshing. When pltf. commenced his threshing in the autumn of 1905 deft. appeared & demanded three-quarters of the grain. Pltf. agreed to give him half his share & enough in addition to pay the note which was falling due about that time. Deft. insisted on getting the three-quarters, & a dispute ensued & pltf. took legal advice. Deft. took three-quarters of the grain & the remainder stored for pltf. which he denied having received:—*Held*: deft. had acted in an arbitrary manner & had exceeded his rights, but pltf. was wrong in replevying for such an amount of grain much of which

belonged to deft. & so extra expense was incurred, but pltf. might have chosen a more suitable action than replevin; & pltf. must pay one-half of sheriff's bill & should receive one-half pltf.'s ordinary taxed bill of costs.—*RICHEY v. REAR* (1907), 5 W. L. R. 420.—*CAN.*

e. Writ returned into different court—Costs of motion to quash writ disallowed.—The rule that this ct. will not interfere to quash a writ of replevin after it is returned into another ct. being well established, the costs of a motion to quash the writ which had been returned, were given against deft.—*v. POWER* (1828), 1 Mol. 524.—*IR.*

f. Mistaken proceedings by plaintiff—Whether court will restrain defendant from recovering costs.—Where H. distrained upon the lands of V. on account of rent charges alleged to be in arrear, but without the means of defending the distress at law, & V. replevied & filed his declaration, & was proceeding to have judgment & execution for his costs; H. filed his bill to stop V.'s proceedings at law, & for an account of the arrears of the annuities, stating that he was unable to defend the distress in consequence of outstanding terms, & of not having in his possession the annuity deeds which he believed to be in the possession of V; & V. by his answer questioned H.'s equity, & denied having possession or power over the deeds. As it appeared that pltf. had clearly mistaken his course, the ct. would not continue the common injunction to the hearing to restrain deft. from recovering the costs which he

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 4, F. (l) & (m); sub-sect. 5, A. (a) &

Dav. 579; 11 L. J. Q. B. 11; 5 Jur. 1000; 114 E. R. 131.

Annotation:—Consd. Mobbs v. Vandenbrande (1864), 4 B. & S. 904.

(m) Appeals.

See County Courts Act, 1888 (c. 43), s. 120.

1257. Value of goods below £20—Necessity for appraisalment.]—SMITH v. ENRIGHT, No. 1241, ante.

SUB-SECT. 5.—ACTION FOR DAMAGES.

A. Illegal Distress.

(a) In General.

See Distress for Rent Act, 1737 (c. 19), s. 19.

1258. Right of action.]—An action of trespass lies for making a distress if there was no right of distraining.—MOIR v. MUNDAY (1755), Say. 181; 96 E. R. 845.

Annotation:—Expld. Hutchins v. Chambers (1758), 1 Burr. 579.

1259. Against landlord—For act of bailiff—Effect of disclaimer.]—HURRY v. RICKMAN & SUTCLIFFE No. 663, ante.

1260. ——— What is ratification.]—A landlord who, knowing that it is alleged that his bailiff has made an illegal distress, retains the proceeds of the sale of things distrained, thereby ratifies the act of the bailiff, & if the distress was in fact wrongful is liable to the tenant in damages.—BECKER v. RIEBOLD (1913), 30 T. L. R. 142.

1261. ——— For act of agent—Sufficiency of authority to agent.]—A warrant of distress was produced by pltf., purporting to be issued by the solrs. of the landlords of certain property, the writing being in the hand of a junior partner of the firm. The solrs. had, on previous occasions, issued distress warrants in respect of other property of the landlords:—*Held*: not to be sufficient evidence of an authority by the landlords to

distrain.—JONES v. BUCKLEY (1838), 2 Jur. 204, N. P.

1262. ———.]—Expressions such as “I know nothing about it, I left it all to my brother;” & by another deft., who, when served with notice of replevin, said only “Very well”; held to be evidence of an authority given by them to distrain.

The only question is whether the parties authorised the distress. The notice of replevin was served personally on all defts., & from the observations made by the parties on that occasion, all appeared to be perfectly aware of the proceedings taken. No person who was an entire stranger to the matter would say “He left it to a brother”; or simply say “Very well,” or “He was glad” (MARLE, J.).—**BOTTELEY v. ROGERS (1847), 8 L. T. O. S. 559.**

1263. ——— Ignorance of illegal act—Receipt of proceeds.]—LEWIS v. READ, No. 664, ante.

1264. ———.]—FREEMAN v. ROSHER, No. 665, ante.

1265. ———.]—GREEN v. WROE, [1877] W. N. 130.

1266. ——— Joint liability.]—GAUNTLETT v. KING, No. 342, ante.

See, also, Sect. 10, sub-sect. 2, E., ante.

1267. Against landlord's broker—Authorised by landlord's agent.]—TOPLIS v. GRANE, No. 633, ante.

1268. ———.]—BENNETT v. BAYES, No. 591, ante.

1269. Against bailiff—Lodger's goods distrained.]—PAGE v. VALLIS, No. 434, ante.

1270. ———.]—LOWE v. DORLING & SON, No. 435, ante.

———.]—See, now, Law of Distress Amendment Act, 1908 (c. 53), s. 2.

1271. By administrator—Before grant of letters of administration.]—An administrator may maintain trespass for the seizure of goods of the intestate between the death & the grant of the letters of administration.—THARPE v. STALLWOOD (1843), 1 Dow. & L. 24; 5 Man. & G. 760; 6 Scott, N. R.

unavoidably incurred by the mistaken proceedings of pltf.—**HOUNAHAN v. VIZE (1838), 6 Ir. L. Rec. N. S. 261.—IR.**

PART II. SECT. 19, SUB-SECT. 4.—F. (m).

g. Judgment as in Given in replevin action—Whether court will set aside.]—Judgment as in case of a nonsuit cannot be granted in replevin. Where such a judgment was inadvertently granted, the nature of the action not having been stated, the ct. set it aside, notwithstanding the omission of pltf.'s counsel to take the objection on the motion for the judgment.—MCGERHAN v. HALE (1857), 3 All. 507.—CAN.****

PART II. SECT. 19, SUB-SECT. 5.—A. (a).

h. Act of levying distress—Estops landlord from disputing ownership of goods distrained.]—A landlord, when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale.—GIBBS v. CRAWFORD (1851), 8 U. C. R. 155.—CAN.****

k. Distress by receiver—Subsequent notice of prior incumbrance on goods for rent—Whether action by tenant against receiver for trespass.]—The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, & three days afterwards the bailiff was withdrawn. The tenant whose goods had been distrained thereupon began an action of trespass

against the receiver. The ct., under the circumstances, restrained the action.—**SIMPSON v. HUTCHISON (1859), 7 Gr. 308.—CAN.**

l. Whether rightly raised by way of counterclaim—In action for recovery of land.]—In an action for the recovery of land & for mesne profits:—*Held*: a counterclaim for damages for illegal distress against the pltf. & his bailiff who executed the distress was good.—DOCKSTADER v. PHIPPS (1882), 9 P. R. 204.—CAN.****

m. Distraint before rent due—No necessity to plead tenancy—When seizure made under colour of distress.]—In an action for taking a distress when no rent was due, the declaration need not set forth any tenancy between the parties; it is sufficient if it appear that the seizure was made under colour of a distress.—STODDART v. ARDERLY (1842), 6 O. S. 305.—CAN.****

n. ——— Admissibility of parol evidence varying document—To show agreement to pay rent in advance—Whether equitable plea admissible under general issue.]—In an action for illegal distress before the rent was due, evidence was tendered that the instructions to draw the lease & the agreement of both parties was that the rent should be paid in advance:—*Held*: there being no equitable plea, such evidence was properly rejected, & an equitable defence was not admissible under the general issue by statute.—BROWN v. BLACKWELL (1874), 35 U. C. R. 239.—CAN.****

o. ——— Document entitling defendant so to distrain—Necessity for

seal or consideration.]—Deft. attempted to justify a seizure for rent under a warrant of distress, by producing a document signed by pltf., which purported to give him the right to seize pltf.'s goods for rent before the rent fell due according to the lease. The judge found as a fact that this document was not sealed at the time of its execution, & no consideration was shown for pltf. executing it:—*Held*: it was a *nudum pactum*, & deft. could not justify under it.—BRAYFIELD v. CARDIFF (1893), 9 Man. L. R. 302.—CAN.****

p. Loss of right of action—Barred against executor six months after death of defendant.]—An action for wrongful distress does not survive against the exors. of deft. where deft. died more than six months after the act complained of.—BUCHNER v. DAVIS (1879), 5 V. L. R. 444.—AUS.****

q. ——— Acceptance from bailiff of surplus proceeds of sale—Must be in condonation of wrong.]—In an action for wrongful distress, the tenant had accepted from the bailiff the surplus of the proceeds of the sale:—*Held*: no condonation of the wrong complained of the payment having been neither made nor accepted in satisfaction or compromise of the injury suffered.—ROBINSON v. SHIELDS (1864), 15 C. P. 386.—CAN.****

r. ——— Conduct of plaintiff stopping claim to be owner of goods distrained—What amounts to.]—Some of pltf.'s goods having been seized & sold along with those of his wife under a distress warrant issued by deft.

715; 12 L. J. C. P. 241; 7 J. P. 400; 7 Jur. 492; 134 E. R. 766.

Annotations:—*Refd.* Foster v. Bates (1843), 1 Dow. & L. 400. *Mentd.* Welchman v. Sturgis (1849), 18 L. J. Q. B. 211; Litchfield v. Ready (1850), 5 Exch. 939; Barnett v. Guildford (1855), 11 Exch. 19; *In the Goods of Pryse*, [1904] P. 301; Ocean Accident & Guarantee Corpn. v. Ilford Gas Co., [1905] 2 K. B. 493; Isaacs v. Hobhouse, [1919] 1 K. B. 398.

1272. By assignee of bankrupt—Distress on sub-tenant—By landlord—For rent already paid to mesne lessee.—Deft., a leaseholder, underlet to N. & put him in possession under an agreement to grant a lease when N. should have paid £1,200, which he was to do by instalments in three years, in the mean time paying rent at certain days to deft., subject to distress for non-payment. Deft. received rent from N. but omitted to pay the superior landlord, who distrained on N. for arrears due from deft. N. having become bkpt.:—*Held*: the damage incurred by this distress was a cause of action on which his assignees might sue.—HANCOCK v. CAFFYN (1832), 8 Bing. 358; 1 Moo. & S. 521; 1 L. J. C. P. 104; 131 E. R. 432.

Annotations:—*Refd.* Chapman v. Bluck (1838), 4 Bing. N. C. 187. *Mentd.* Beekham v. Drake (1849), 2 H. L. Cas. 579.

1273. Loss of right of action—Assignment of premises—Before distress.—In an action for wrongful & excessive distress, deft. pleaded not guilty by statute:—*Held*: (1) this plea not only put in issue the wrongful act complained of, but also the tenancy itself, & the distress, & all matters of justification; (2) where pltf. had assigned her interest in the premises before the date of the distress, but still remained upon the premises, the person to whom her interest was assigned not having entered, she was there merely as the agent of such other person, & she therefore could not maintain an action for distress.—NASH

H. to his co-deft., for the purpose of levying an amount due by the wife for rent of certain premises, from which, before the seizure, all the goods had been removed with the fraudulent intention of evading payment of the rent, pltf. brought this action for damages. When the bailiff made the seizure, pltf. forbade him to do so, but he did not at any time inform H. or the bailiff that he claimed some of the goods to be his; & after the seizure his attorney wrote several letters to H., demanding that the goods be given up, & referring to them as belonging to pltf.'s wife. Counsel for defts. contended that pltf. was estopped by his silence as to his ownership of some of the goods, & by the language of the attorney's letters, from setting up the present claim:—*Held*: defts. had failed to prove that they had been induced to do anything, by reason of what pltf. had said or done, or omitted to say or do, & pltf. was entitled to recover.—MONTGOMERY v. HELLYAR (1894), 9 Man. L. R. 551.—CAN.

s. What is court of competent jurisdiction—When distress amounts to trespass—Likely to cause breach of peace.—In an action in the Supreme Ct. for damages for trespass arising out of the wrongful seizure of goods & chattels under a distress warrant pltf. recovered a sum within the jurisdiction of the county ct.:—*Held*: in a case of this nature where a trespass is liable to result in a breach of the peace, an action in the Supreme Ct. is justifiable & though the damages awarded come within the county ct. jurisdiction the costs should be taxed on the Supreme Ct. scale.—THOMPSON v. HULL (1921), 70 D. L. R. 863; 30 B. C. R. 358.—CAN.

t. Security for costs—When ordered.—Pltf. sued as lessee from her brother of certain goods, for damages

for illegal distress. An action had been previously brought by her brother in respect of the same distress against the same deft., & had been dismissed:—*Scmble*: in these circumstances security for costs might be ordered.—DENHAM v. GOOCH (1890), 13 P. R. 344.—CAN.

a. Payment into court—To satisfy claim—Permitted.—Money may be lodged in ct. in satisfaction of an action on the case for an illegal distress.—YOUNG v. ROBINSON (1841), 4 L. L. R. 13.—IR.

b. Whether plaintiff entitled to inspect defendant's rent-books.—Pltf., in an action for an illegal distress is not entitled, under C. L. P. Act, for an order for the inspection of deft.'s rent-books.—FITZGERALD v. CHRISTMAS (1855), 5 I. C. L. R. 180.—IR.

PART II. SECT. 19, SUB-SECT. 5.— A (b).

1276 i. Illegal entry—Trespass ab initio—Full value of goods without deducting rent.—The landlord in distraining upon the tenant's goods, whose rent was in arrear, was a trespasser ab initio:—*Held*: the tenant was entitled to recover the full value of the goods, & not their value minus the rent due.—CHOWLEY v. APTE (1893), 14 N. S. W. L. R. 146.—AUS.

c. Taking privileged goods—Tools of trade—Compensation for loss of employment resulting therefrom.—In trespass for seizing & selling goods under an illegal distress, pltf. may recover not only the value of the goods distrained & sold, but also damages for being deprived of the use of them, if thereby he is thrown out of employment, & in estimating the damages the jury have a right to take into consideration the circumstances in which pltf. was placed, & the difficulty of obtaining employment in his trade

v. LUCAS (1867), 16 L. T. 610; *subsequent proceedings*, L. R. 2 Q. B. 590.

Annotation:—*Consd.* Crabtree v. Robinson (1885), 15 Q. B. D. 312.

(b) Measure of Damages.

1274. Illegal entry—Forcible entry—Unfounded claim to property—Exemplary damages.—Where in trespass for a forcible entry into a mansion-house under colour of making a distress for rent, & remaining there for three or four days, the defence was *lib. ten.* & a justification under a distress for rent, to enforce a claim to the property, for which there was not the slightest foundation & the jury gave £1,000 damages:—*Held*: a new trial would not be granted on the ground of excessive damages.—BLAND v. BLAND (1835), 1 Har. & W. 167.

1275. — Entry at night—Prevention of removal of goods—Actual damage.—LAMB v. WALL, No. 457, *ante*.

1276. — Trespass ab initio—Full value of goods without deducting rent.—ATTACK v. BRAMWELL, No. 692, *ante*.

See, also, Sect. 10, sub-sect. 3, *ante*.

1277. Taking privileged goods—Tenant's fixtures—Severance not value.—In trespass one count was for taking away "goods, chattels, & effects," & another for tearing away & severing "fixtures & effects." The pleas were the general issue, & two special pleas to the first count, stating the tenancy of pltf. to one of defts. at a certain rent, which being in arrear, they distrained the "goods & chattels" in that count mentioned. Replication, *similiter* to first plea, & *non tenuit* to the other two. The jury found the tenancy to exist as thirdly pleaded:—*Held*: (1) on the issue taken in the replication the trespasses laid in the first count were after verdict covered by that special

without tools, taken on illegal distress.—REILLEY v. MCINN (1874), 2 Pug. 370.—CAN.

d. No rent due—Value of goods—Not in addition to amount realised by sale of goods.—In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 Will. & Ma., sess. 1, c. 5, s. 5, nor that the goods distrained were "sold," but merely an allegation that deft. "sold, carried away the same & converted & disposed thereof to his own use"; nor was a claim made for double the value of the goods distrained & sold, within the terms of the statute:—*Held*: the action was the ordinary action for conversion, & the value, & not the double value, of the goods distrained was recoverable; & pltf. was not entitled to recover from deft. the amount received by him from the sale of pltf.'s goods in addition to the value thereof; nor was deft. obliged to deduct the amount so received by him from the rent which afterwards fell due.—WILLIAMS v. THOMAS (1894), 25 O. R. 536.—CAN.

e. — Double value.—Where landlord levied wrongful distress when there was no rent due judgment was given for double value of goods seized.—WEBB v. BOX (1909), 14 O. W. R. 802; 1 O. W. N. 112; 19 O. L. R. 540.—CAN.

f. Payment by plaintiff to release goods wrongfully distrained—Value of goods.—Where a tenant, to relieve his goods from an illegal distress, pays the amount of the distress & recovers his goods:—*Scmble*: in an action of trespass for the wrongful seizure, he is entitled to recover as damages, at least the value of the goods.—MATHESON v. KELLY (1875), 24 C. P. 598.—CAN.

g. No appraisal before distress

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 5, A. (b)

plea, though some of the articles taken were fixtures; (2) pltf. was entitled to recover for the damage done to his house by severing his fixtures from it, but not for the value of them.—*TWIGG v. POTTS* (1834), 1 Cr. M. & R. 89; 3 Tyr. 969; 3 L. J. Ex. 336.

Annotation:—Generally, Mentd. Moore v. Tuckwell (1845), 1 C. B. 607.

1278. Value to incoming tenant.]—

MOORE v. DRINKWATER, No. 310, *ante*.

1279. — Other goods available—Seizure only—Actual damages sustained.]—*HARVEY v. POCOCK*, No. 1090, *ante*.

1280. — Seizure & sale—Full value of goods.]—*KEEN v. PRIEST*, No. 356, *ante*.

1281. — Goods pledged at pawnbrokers—Full value.]—*SWIRE v. LEACH*, No. 279, *ante*.

See, generally, DAMAGES, Vol. XVII., pp. 130-136, & Distress for Rent Act, 1737 (c. 19), s. 19.

See, also, Sect. 5.

1282. No rent due—Actual damage sustained—Action by executrix.]—A. had his goods distrained on for rent, no rent being due, & was obliged to pay a sum of £9 13s. to procure the distress to be withdrawn. A. died & his executrix brought trespass for the taking of the goods, & the declaration stated that the goods were detained till A. paid £9 13s. whereby his personal estate was diminished:—*Held*: executrix could only recover damages to the amount of £9 13s. *Semble*: executrix could not have received any greater amount if the declaration had been in any other form.—*LOCKIER v. PATERSON* (1844), 1 Car. & Kir. 271, N. P.

1283. — Illegality & annoyance.]—*SMITH v. ENRIGHT*, No. 1241, *ante*.

Double value—Distress Act, 1689 (c. 5), s. 4.]—*See sub-sect. 6, post.*

B. Irregular Distress.

(a) In General.

1284. Liability of landlord or broker.]—*CHILD v. CHAMBERLAIN*, No. 640, *ante*.

*levied—Nominal damages.]—*In for illegal distress, pltf. is entitled to succeed on showing that there was no such appraisal as the law directs, even though but for nominal damages.—*MAQUIRE v. POST* (1835), 5 O. S. 1.—**CAN.**

h. Distress levied off premises—Value of goods.]—Part of pltf.'s goods having been distrained for rent off the premises:—*Held*: he might recover their value either in trespass or trover.—*HUSKINSON v. LAWRENCE* (1867), 26 U. C. R. 570.—**CAN.**

k. Whether damages awarded will be reduced as excessive.]—In trover & trespass for goods taken under an illegal distress, the value of the goods seized was proved to be about \$450, but the jury gave a verdict for \$700:—*Held*: upon the facts stated in the report of the case, the damages were not excessive.—*WALCOTT v. STOLICKER* (1866), 16 C. P. 555.—**CAN.**

l. —.]—Where in an action for illegal distress damages were assessed by the trial judge generally in favour of several pltf.s., whose rights & interests were distinct, & were apportioned equally between them by the Div. Ct., the Ct. of Appeal, while holding that one pltf. only was entitled to recover, reduced the damages apportioned to him, being of opinion that such damages were excessive; it appearing moreover, that in the

general assessment matters had been taken into consideration of which he was not entitled to complain.—*EDMONDS v. HAMILTON PROVIDENT & LOAN SOCIETY* (1890), 18 A. R. 347.—**CAN.**

m. —.]—Action for illegal distress. Deft. had procured a transcript of a div. ct. execution to be issued in pltf.'s county & a pretended seizure made thereunder. He then had his bailiff seize pltf.'s goods, claiming rent was due by reason of an acceleration clause in the lease providing that should the tenant's goods be seized & taken in execution, the next ensuing year's rent should immediately become due & payable. Judgment was entered for pltf. for \$764 damages & costs, upon the findings of the jury. The Div. Ct. reduced amount of damages to \$464, with costs on High Ct. scale; at option of pltf. he was given right to take a reference as to the amount of damages.—*JARVIS v. HALL* (1912), 23 O. W. R. 282; 4 O. W. N. 232; 8 D. L. R. 412.—**CAN.**

n. —.]—Where power was given in a lease to the lessor to distrain for rent seven days in arrear, & the lessor distrained for rent only six days in arrear, & the lessee in an action for damages for illegal distress obtained the verdict of a jury for \$75, on a motion for nonsuit & to set aside the verdict:—*Held*: the express power in the lease impliedly negatived the com-

1285. Proof of authority by landlord.]

In an action for an irregular distress, the only evidence at all affecting K., the landlord, was that all defts. appeared by the same attorney, & deft.'s attorney had given pltf. notice to produce the notice of distress for rent due to K.; & the managing clerk of deft.'s attorney, when he served it, had offered £10 to settle the action:—*Held*: this was not evidence to go to the jury as against K.—*CRABB v. KILLICK* (1834), 6 C. & P. 216.

1286. — Possession taken of premises.]—*ETHERTON v. POPPLEWELL*, No. 752, *ante*.

1287. Pleading—Name of person to whom rent due.]—In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; & a variance in this respect is fatal.—*IRELAND v. JOHNSON* (1834), 1 Bing. N. C. 162; 4 Moo. & S. 706; 3 L. J. C. P. 303; 131 E. R. 1080.

Annotation:—Refd. Yates v. Tearle (1844), 6 Q. B. 282.

1288. Double costs—Distress for Rent Act, 1737 (c. 19), s. 21.]—(1) Where two defts. in trespass sever in pleading, but plead the same pleas, all going to the whole action, & one succeeds upon all the issues, the other upon one only, such deft. is entitled to his separate costs of the issues on which he has succeeded, & an aliquot part of the joint costs, unless the master is satisfied that, by reason of special circumstances, less ought to be allowed to either. Defts. in such a case having appeared by separate attorneys & counsel, but the attorneys being members of the same firm, & the briefs & evidence substantially the same, the master taxed the costs as if the parties had appeared by the same attorney. Admitted, that the taxation, in that respect, could not be disturbed.

(2) A landlord sued in trespass for an irregular distress, & obtaining judgment against pltf. may recover double costs under above Act, though he has pleaded specially.—*GAMBRELL v. FALMOUTH (EARL)* (1836), 5 Ad. & El. 403; 2 Har. & W. 287; 6 Nev. & M. K. B. 859; 111 E. R. 1218.

Annotations:—As to (1) *Appld. Cain v. Adams & Stanton* (1836), 2 Har. & W. 288; *Bartholomew v. Stevens & Edwards* (1839), 7 Dowl. 808; *Norman v. Clinenson* (1842), 4 Man. & G. 243.

mon-law right in the lessor to distrain for rent immediately it was in arrear, & the distress levied was therefore illegal; & although the lessee had suffered no material damage by reason of the illegal distress, the damages assessed by the jury were not excessive.—*LESLIE v. STEVENS* (1908), 27 N. Z. L. R. 973.—**N.Z.**

o. Sale under wrongful seizure—Value of goods sold—Though subject to charge in favour of third person.]—In an action for an illegal distress pltf.s. are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mtge. to secure a compromise which pltf.s. have made with their creditors. *Semble*: an unlawful sale of deft.'s goods by pltf.s., which goods defts. were using in a particular way, gives defts. the right to demand the return of the proceeds by way of damages.—*CLARK v. GREEN* (1906), 1 E. L. R. 552; 37 N. B. R. 525.—**CAN.**

PART II. SECT. 19, SUB-SECT. 5.—

B. (a).

p. Liability of landlord or broker—Sale by mistake of third person's goods—How liability established.]—Where there has been any irregularity in a distress, & the chattels of a third person have, by the mistake of the agent selling, been sold, though they had not been seized, the landlord is not liable to such third person, unless he authorised such

(b) *Measure of Damages.*

See, generally, DAMAGES, Vol. XVII., pp. 130-136, & Distress for Rent Act, 1737 (c. 19).

1289. Special damage necessary—Sale within five days.]—In an action for selling goods distrained before the expiration of five days, pltf. is not entitled to a verdict unless he proves actual damage.

Qu.: whether under a count for taking an excessive distress under the statute of Marlbridge, pltf. can show that the amount of rent due was less than that distrained for. In an action for an excessive distress not averring that the sum distrained for was not due, with a count for selling before the expiration of five days, pltf. at the trial applied to amend by adding a count for distraining & selling goods to satisfy more rent than was due. The judge refused to allow the amendment on the ground that it was not a matter in dispute at the time of the commencement of the action:—*Held*: the amendment was properly disallowed.—LUCAS v. TARLETON (1858), 3 H. & N. 116; 27 L. J. Ex. 246; 30 L. T. O. S. 369; 22 J. P. 228; 157 E. R. 409.

—.]—See No. 893, *ante*, No. 1296, *post*.

1290. Value of goods less rent due.]—ROCKE v. HILLS, No. 773, *ante*.

1291. — Sale without appraisement.]—Where a distress is sold without the previous appraisement directed by Distress Act, 1689 (c. 5), s. 2, the party distrained on can only recover the value of the goods, minus the amount of rent due; but may recover the special damage sustained by such illegal sale.—BIGGINS v. GOODE (1832), 2 C. & J. 364; 149 E. R. 155; *sub nom.* BRIGGINS v. GOODE, 2 Tyr. 447; 1 L. J. Ex. 129.

Annotation:—*Refd.* Rodgers v. Parker (1856), 18 C. B. 112.

1292. — —.]—In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage.

The measure of the damages to be recovered by pltf. is the difference between the amount of the rent discharged by the sale & the fair value to the tenant of the goods which have been sold. If the landlord sell fairly, for the best price which can be obtained, he will be protected if all his proceedings are regular, although the full value of the goods may not be obtained; but until an appraisement is made, the landlord has no right to sell, but only to keep; &, until sale, the tenant has a right to come in at any time & redeem his goods (PARKE, J.).—KNOTTS v. CURTIS (1832), 5 C. & P. 322.

1293. — —.]—(1) In case for selling goods

sale, or accepted the proceeds, with full knowledge of what had been done. Where pltf. in an action for irregular distress is not deft.'s tenant, he must prove special damage.—PECK v. SMITH (1878), 4 V. L. R. 16.—AUS.

PART II. SECT. 19, SUB-SECT. 5.—
B. (b).

q. Special damage necessary—Distress abandoned before goods removed.]—A distress of pltf.'s goods was irregular in a number of particulars, among others as including goods which were not distrainable, & omission to give the notice required by the statute, but none of the articles were removed from the premises; pltf. continued to use them as before, & the distress was abandoned before anything had been sold:—*Held*: to entitle pltf. to damages on account of the irregularities committed, some substantial hurt or injury must be shown, resulting from the irregular proceeding, & in the absence of proof of actual damage, the trial

judge erred in awarding damages to pltf., & his decision on this point must be reversed with costs.—BECKHAM v. HICKEY (1905), 38 N. S. R. 55.—CAN.

1291 i. Value of goods less rent due—Sale without appraisement.]—A mtge. contained the usual statutory covenants & a special clause provided for a tenancy at will at an annual rent equal to the interest. The mtgor. remained in possession upon the execution of the mtge., had the right under the provision for quiet possession until default, to enjoy the premises, but for no determinate period, & his tenancy thereunder was a tenancy at will, & such provision was, therefore, not inconsistent with an express tenancy at will at a half-yearly rent. There being a tenancy at will at a fixed rent, there was, as incident to it, the right to distrain, & the covenant for quiet enjoyment must be read as subject to such right. After the mtgor. had made default, his continuance in possession was still as tenant at will. After default, the

distrained for rent without appraisement, the measure of damages is the real value of the goods sold, minus the rent due.

(2) If a judge at *Nisi Prius* does not inform the jury what is the proper measure of damages on an issue on which it is admitted that pltf. is entitled to a verdict & to damages, the ct. will direct a new trial, although the point was not taken by pltf.'s counsel at the trial.—KNIGHT v. EGERTON (1852), 7 Exch. 407; 155 E. R. 1007.

Annotation:—*Mentd.* Perren v. Monmouthshire Ry. (1853), 11 C. B. 855.

—.]—See, now, Law of Distress Amendment Act, 1888 (c. 21).

1294. — Selling without notice of distress.]—WHITWORTH v. MADEN, No. 718, *ante*.

1295. Sale of growing crops—Sale void.]—A tenant, whose standing corn & growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action under Distress Act, 1689 (c. 5), s. 28, against the landlord or his bailiffs for selling same before five days, or a reasonable time, have elapsed after the seizure, such sale being wholly void.—OWEN v. LEIGH (1820), 3 B. & Ald. 470; 106 E. R. 734.

Annotations:—*Consd.* Rodgers v. Parker (1856), 18 C. B. 112. *Refd.* Proudlove v. Twemlow (1833), 2 L. J. Ex. 111; Beck v. Denbigh (1860), 29 L. J. C. P. 273. *Mentd.* Catchpole v. Ambergate, etc. Ry. (1852), 1 E. & B. 111.

1296. — Full value obtained.]—Where a landlord seized & sold, under a distress for rent, growing crops, which were afterwards taken away by purchaser, & it appeared the crops were sold for the full value they would have fetched if sold at the proper time, & the rent proved to be due exceeded the amount for which the crops sold. In an action of trover brought by the tenant:—*Held*: he was entitled to nominal damages only.—PROUDLOVE v. TWEMLOW (1833), 1 Cr. & M. 326; 3 Tyr. 260; 2 L. J. Ex. 111; 149 E. R. 424.

Annotations:—*Apld.* Attack v. Bramwell (1863), 3 B. & S. 520. *Refd.* Rodgers v. Parker (1856), 18 C. B. 112; Chandler v. Doulton (1865), 3 H. & C. 553.

1297. — —.]—RODGERS v. PARKER, No. 893, *ante*.

1298. Wrongful impounding—Impounding of Distress Act, 1554 (c. 12).]—ANON. (1560), Benl. 14; 73 E. R. 941.

1299. — —.]—PATRIDGE v. EMSON (1601), Noy, 62; 74 E. R. 1030; *sub nom.* PARTIDGE v. NAYLOR, Moore, K. B. 453; Cro. Eliz. 480; Gouldsb. 145.

Annotations:—*Mentd.* Child v. Sands (1693), 1 Salk. 31; R. v. King (1712), 1 Salk. 182; Hardyman v. Whitaker (1748), 2 East, 573, n.

1300. Consent of tenant to irregularity.]—BISHOP v. BRYANT, No. 739, *ante*.

mtgor., at the instance of the mtgee., assigned his equity or redemption to his wife, & she took possession & agreed to apply the proceeds of the land to the payment of the mtge.:—*Held*: (1) this operated as a new tenancy at will with the wife, who became liable for the payment of the rent as the assign of her husband with the assent of the mtgees., & her goods were, therefore, distrainable for the rent. So the goods of the husband might also be distrained as it was a case of real tenancy; (2) defts. were liable for selling the distress without appraisement or valuation: & the measure of damages was the real value of what was sold, minus the rent due.—PEGG v. INDEPENDENT ORDER OF FORESTERS (1901), 21 C. L. T. 158; 1 O. L. R. 97.—CAN.

r. Goods seized but not removed for five days—Subsequent seizure & sale—Special damage.]—Trespass lies for a seizure & sale of goods where they have been left on the premises after a

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sect. 5, B. (b) & C. (a).]

1301. Set off—Arrears of rent against damages awarded.]—A landlord, by his bailiff, distrained upon his tenant for an arrear of rent; the tenant brought trespass against the landlord & his bailiff, for an irregularity in the distress & recovered damages; the bailiff being indemnified by the landlord in respect thereof. The landlord then brought an action against the tenant for the residue of the rent in arrear which greatly exceeded the damages & costs recovered by the tenant; but the action being defended could not be tried until the following assizes:—*Held*: the landlord & his bailiff could sustain a bill to have the damages & costs recovered by the tenant set off *pro tanto* against the arrear of rent due to the landlord & to restrain execution in the meantime.—*HAMP v. JONES* (1840), 9 L. J. Ch. 258.

C. Excessive Distress.

(a) In General.

See Statute of Marlbridge, 1267 (c. 4), & Law of Distress Amendment Act, 1908 (c. 53).

1302. Right of action—Not at common law.]—Trespass lies not for entering & taking an excessive distress.—*LYNE v. MOODY* (1729), Fitz. G. 85; 94 E. R. 665; *sub nom.* *LYNNE v. MOODY*, 2 Stra. 851; *sub nom.* *LISNE v. MOODY*, 1 Barn. K. B. 184.

Annotations:—*Distd.* *Moir v. Munday* (1755), Say. 181. *Consd.* *Hutchins v. Chambers* (1758), 1 Burr. 579. *Refd.* *Gates v. Bayley* (1766), 2 Wils. 313.

1303. — Under Statute of Marlbridge, 1267 (c. 4).]—An information does not lie against the lord of a manor for taking unreasonable distress; but the remedy is by action on the above statute.—*R. v. LEGINHAM* (1670), 2 Keb. 697; 84 E. R. 439; *sub nom.* *R. v. LESINGHAM*, 1 Lev. 299; T. Raym. 205; *sub nom.* *R. v. LEDGINHAM*, 1 Mod. Rep. 71, 288; 1 Vent. 104.

Annotation:—*Mentd.* *R. v. Carlile* (1831), 9 L. J. O. S. K. B. 250.

1304. — — —.]—In trespass for taking an excessive distress:—*Held*: (1) pltf.'s remedy was in case, on the above statute; (2) *averia carucae* may be distrained for a poor rate.—*HUTCHINS v. WHITAKER* (1758), 2 Keny. 204; 96 E. R. 1156; *sub nom.* *HUTCHINS v. CHAMBERS*, 1 Burr. 579.

Annotations:—*As to* (1) *Folld.* *Durrant v. Boys* (1796), 6 Term Rep. 580. *Consd.* *Owens v. Wynne* (1855), 4 E. & B. 579. *Refd.* *Crowthor v. Ramsbottom* (1793), 7 Term Rep. 654; *Hudd v. Ravenor* (1821), 5 Moore, C. P. 542; *Burge v. Mawby* (1853), 8 Exch. 641; *Grunnell v. Welch*, [1905] 2 K. B. 650. *As to* (2) *Apld.* *McGregor v. Clamp*, [1914] 1 K. B. 288; *McCreagh v. Cox & Ford* (1923), 92 L. J. K. B. 855. *Refd.* *Nargett v. Nias* (1859), 1 E. & E. 439. *Generally*, *Refd.* *R. v. Newcomb* (1791), 4 Term Rep. 368; *R. v. Wilson* (1835), 5 Nev. & M. K. B. 119. *Mentd.* *Cortis v. Kent Water-Works Co.* (1827), 7 B. & C. 314.

1305. — Barred by recovery in replevin.]—A recovery in replevin is a bar to an action for an excessive distress.—*PHILLIPS v. BERRYMAN* (1783), 3 Doug. K. B. 286; 99 E. R. 658.

Annotations:—*Mentd.* *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180.

distress longer than five days, no person being in charge of them the seizure & sale for which the action is brought being subsequent to the five days after the first seizure; but in such case the full value of the goods cannot be recovered, but only special damages.—*THOMPSON v. MARSH* (1832), 2 O. S. 355.

PART II. SECT. 19, SUB-SECT. 5.— C. (a).

1302. Right of action—Not at common

law.]—The declaration in an action for excessive distress alleged that pltf. held land as tenant to deft. at a certain rent; that deft. wrongfully seized goods on the premises as a distress for arrears of rent alleged to be due, viz., \$311, & sold the same for the alleged arrears, whereas a small part only of the alleged rent, viz. \$70, was in arrear. There was no allegation that more goods were taken or sold than were necessary to produce the rent actually due:—*Held*: the declaration disclosed no cause of

1306. — Not barred by agreement for sale of distress.]—(1) Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized.

(2) When a landlord is about to make a distress he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that & the sum for which he is entitled to take it (*BAYLEY, J.*).—*WILLOUGHBY v. BACKHOUSE* (1824), 2 B. & C. 821; 4 Dow. & Ry. K. B. 539; 2 L. J. O. S. K. B. 174; 107 E. R. 587.

Annotations:—*As to* (1) *Refd.* *Baylis v. Usher* (1830), 4 Moo. & P. 790. *Mentd.* *Roe v. Mutual Loan Fund Assocn.* (1887), 56 L. T. 631.

1307. — — —.]—(1) In an action for an excessive distress for rent, pltf. need not allege or prove the precise amount of rent due.

(2) It is no bar to such an action, that between distress & sale of the goods distrained, the parties come to an arrangement respecting the sale.—*SELLS v. HOARE* (1824), 1 Bing. 401; 8 Moore, C. P. 451; 2 L. J. O. S. C. P. 56; 130 E. R. 162.

Annotations:—*As to* (2) *Apld.* *Willoughby v. Backhouse* (1824), 4 Dow. & Ry. K. B. 539. *Distd.* *Glynn v. Thomas* (1856), 11 Exch. 870.

1308. — — —.]—In an action for an excessive distress, with counts for selling without an appraisal & for less than the value, & for not leaving over the surplus proceeds in the hands of the sheriff, according to the statute, there being no count for not paying the money over to pltf., nor for detaining it an unreasonable time, nor for money had & received to his use; & the jury finding that the rent for which the distress was made was due, but that defts. seized to an unreasonable amount, but that pltf. had authorised deft. to seize & sell the whole; & the defence being, that the surplus having been paid over to a judgment creditor of pltf.'s under a garnishment order for the attachment of the money obtained by the creditor in consequence of an intimation of the distress given to him by deft., & the jury finding that this was a juggle, & under the direction of the judge, giving a verdict for pltf. for the amount of the surplus proceeds; the *postea* was afterwards altered by entering a verdict for pltf., with nominal damages, on the first count, & for deft. on the others; the payment over to the creditor under the garnishment order being held to have been a legal justification. The judge having entered the verdict for pltf. for nominal damages, the ct. discharged cross rules to enter it for deft., or for substantial damages.—*CROSS v. AYRES & HORNCastle* (1858), 1 F. & F. 187, N. P.

1309. — Not barred by previous action for trespass—In respect of the same distress.]—In an action for an excessive distress, evidence that pltf. has, in respect of the same distress, brought trespass & obtained a verdict, is not admissible under the plea of general issue by statute, nor seems admissible under any form of plea.—*BAINBRIDGE v. BOURNE* (1846), 8 L. T. O. S. 185.

1310. — Not against auctioneer—Return of goods before sale.]—A., a tenant, owed rent to B.,

action; some rent being due, the distress itself was not a wrong, & the mere distraining & selling on a claim of more than was due was not actionable.—*PRESTON v. SIMONDS* (1850), 1 Han. 44.—CAN.

1302 II. — — —.]—Distraining for a greater amount of rent than is due is not *per se* actionable.—*WARBURTON v. ST. LEDGER* (1903), 37 L. L. T. 47.—IR.

his landlord; B. distrained for more rent than was due, & removed the goods to the auction rooms of C.; A. gave C. notice not to sell, & C. delivered the goods back to the person from whom he received them:—*Held*: as some rent was due from A. to B., C. was not liable to A. in an action of trover.—*WHITWORTH v. SMITH* (1832), 5 C. & P. 250; 1 Mood. & R. 193, N. P.

Annotation:—*Distd. Russell v. Rider* (1834), 6 C. & P. 416.

1311. — Goods seized—Owner not deprived of their use.—*BAYLISS v. FISHER*, No. 1337, *post*.

1312. — Not sold.—Where in a distress for £9 9s., goods to the value of £30 are seized:—*Semble*: pltf. can maintain an action of trespass, even though the goods were not sold, for the mere act of seizing so much more than was sufficient to satisfy his claim for rent.—*HOOPER v. ANNIS* (1838), 2 J. P. 695.

1313. — Sale after action brought.—In an action for excessive distress, & for seizing & taking pltf.'s goods, it was proved, that in the notice of distress certain figures, as well as other effects, were stated to have been distrained for rent; & it was also proved that defts. had published a handbill containing a notice of sale by them of the whole of the effects, including fixtures, on the premises. Pltf. offered evidence of the sale; but as the sale had not taken place until after action brought:—*Held*: the evidence was not admissible, although produced to show the intention of defts. to take the fixtures at the time of making the distress, since no such intention would alone constitute a cause of action.—*BECK v. DENBIGH* (1860), 29 L. J. C. P. 273; 2 L. T. 154; 6 Jur. N. S. 998; 8 W. R. 392.

Annotation:—*Refd. Pole v. Cetcovich* (1860), 9 C. B. N. S. 430.

1314. — Measure of excess.—*WILLOUGHBY v. BACKHOUSE*, No. 1306, *ante*.

1315. ——*Semble*: an action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears.—*WILKINSON v. TERRY* (1834), 1 Mood. & R. 377, N. P.

Annotations:—*N.F. Taylor v. Henniker* (1840), 12 Ad. & El. 488. *Refd. Tancred v. Leyland* (1851), 16 Jur. 394.

1316. ——In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, pltf. is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due.—*CROWDER v. SELF* (1839), 2 Mood. & R. 190, N. P.

Annotations:—*Folld. Tancred v. Leyland* (1851), 16 Q. B. 669. *Refd. Lucas v. Tarleton* (1858), 30 L. T. O. S. 369.

1317. ——Where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due; & it is no defence that, after distress & notice thereof, & before the sale, the landlord served a second notice on the tenant, stating the amount really due, & that the distress was taken for that amount only, & would be sold unless that amount was paid.—*TAYLOR v. HENNIKER* (1840), 12

1314 i. Measure of excess.—Trespass will not lie against a landlord for distraining for more rent than is due, unless the goods seized & sold are excessive with reference to the amount, due.—*DE GROUCHY v. SIVRET* (1890), 30 N. B. R. 104.—*CAN.*

1314 ii. ——Defts. distrained on pltf.'s goods for an amount largely in excess of the amount due. Pltf., having paid the excessive amount demanded, sued to recover it back with damages:—*Held*: pltf., having paid

the excessive amount demanded, was entitled to recover it back with some damages, less the amount of rent actually due & expenses of the distress.—*NETTING v. HUBLEY, HUBLEY v. NETTING* (1894), 26 N. S. R. 497.—*CAN.*

1314 iii. ——When the amount produced at the sale of goods distrained for rent, is slightly in excess of the rent due, it is not an excessive distress, & no action will lie therefor.—*FITZGERALD v. LONGFIELD* (1854), 7 Ir. Jur. 21.—*IR.*

Ad. & El. 488; 4 Per. & Dav. 242; 9 L. J. Q. B. 383; 4 Jur. 719; 113 E. R. 897.

Annotations:—*Overd. Tancred v. Leyland* (1851), 16 Q. B. 669. *Refd. Stevenson v. Newnham* (1853), 17 Jur. 600. *Mentd. Pryce v. Belcher* (1846), 3 C. B. 58.

1318. ——*TANCRED v. LEYLAND*, No. 731, *ante*.

1319. ——A count alleged that pltf. held a workshop as tenant to deft. at a certain rent, & that deft. wrongfully seized divers goods of pltf., of the value of £30 as a distress for £13 10s., rent claimed by deft. to be in arrear, & deft. afterwards wrongfully sold the goods for the alleged arrears of rent, & costs; whereas in fact only £9 of the pretended arrears of rent so distrained for was in arrear:—*Held*: the count disclosed no cause of action.—*FRENCH v. PHILLIPS* (1856), 1 H. & N. 564; 26 L. J. Ex. 82; 2 Jur. N. S. 1169; 156 E. R. 1327; *sub nom. PHILLIPS v. FRENCH*, 5 W. R. 114, Ex. Ch.

1320. ——*GLYNN v. THOMAS*, No. 584, *ante*.

1321. — Allegation of malice.—*STEVENSON v. NEWNHAM*, No. 735, *ante*.

1322. — Plaintiff must establish title to goods.—*WARNER v. CABELL* (1850), 16 L. T. O. S. 151.

1323. — Where sale does not realise rent due.—*SMITH v. ASHFORTH*, No. 756, *ante*.

1324. By whom action maintainable—Lodger.—*FISHER v. ALGAR*, No. 887, *ante*.

1325. ——A lodger, whose goods are taken under a distraint for rent, may maintain an action for an excessive distress, & the remedy given by Statute of Marlbridge, 1267 (c. 4), is not confined to the tenant.—*DAVY v. BUDKIN* (1849), 13 L. T. O. S. 214.

1326. ——Goods of a tenant's lodger being distrained along with the tenant's, & sold first, after notice from the lodger, & the tenant's goods turning out to be sufficient to satisfy rent & charges:—*Held*: the lodger was entitled to sue for an excessive distress.

When a distress is sold, the seller must stop when he has sold enough to cover rent & reasonable charges (*MARTIN, B.*).—*WILKINSON v. IBBETT* (1860), 2 F. & F. 300.

1327. — Stranger—Joint action.—In an action for an excessive distress for taking the goods of pltf., it appeared that of the goods taken, part belonged to pltf. & part to a third party:—*Held*: the declaration might be amended by stating the illegal distress to have taken place with respect to the goods of pltf. & of the third party, & pltf. would be entitled to recover some amount of damages, & the other party whose goods were taken would also be entitled to maintain an action & recover damages.

Semble: no joint action for excessive distress could be brought by pltf. & the third party.—*BAIL v. MELLOR* (1850), 19 L. J. Ex. 279.

1328. — Person having use of goods—Without legal or equitable ownership.—Pltf. was tenant & deft. landlord of a house occupied by the former, his wife, & a trustee. Goods therein had been assigned to the trustee on trust for pltf.'s wife.

ii. — Necessity for tender of amount due.—The count alleged that H. held premises as tenant to defts. at a certain rent; that pltf.'s goods being there, defts. wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, \$401, then claimed by defts., & afterwards sold the same for such arrears & costs, whereas only \$38 was really due, for which one-fifth of the goods would have sufficed, & the tenant's goods alone would have been more than

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Rent being in arrear to the amount of £9 only, debt., by his bailiff, distrained for £18 & costs, seizing £100 worth of the goods. The rent actually due was tendered to the bailiff, with expenses, but refused, & he remained in possession until an undertaking was given on behalf of pltf. for payment of the whole demand, & a part amounting to £2 7s. was paid, whereupon the distress was withdrawn. Pltf. having brought an action for an excessive distress, & on the money counts, was nonsuited when the deed of assignment was produced at the trial:—*Held*: although he was neither the legal nor the equitable owner of the goods distrained, yet he had from his mere enjoyment of the use of them, a special property which entitled him to maintain the action.—*FELL v. WHITTAKER* (1871), L. R. 7 Q. B. 120; 41 L. J. Q. B. 78; 25 L. T. 880; 20 W. R. 317.

Liability of landlord.—*See Sect. 10, sub-sect. 2, E., ante.*

1329. Injunction to restrain execution by tenant on judgment—On ground of subsequent rent & claim for dilapidations.—A landlord, against whom his tenant has obtained judgment in an action for excessive distress, is not entitled to an injunction to restrain proceedings upon the judgment on the ground that rent & dilapidation money have subsequently become due from the tenant in respect of the farm leased.—*MAW v. ULYATT* (1861), 31 L. J. Ch. 33; 5 L. T. 251; 26 J. P. 196; 7 Jur. N. S. 1300; 10 W. R. 4.

1330. Costs—Double costs under Distress for Rent Act, 1737 (c. 19), s. 21.—Neither a certificate from the judge, nor a suggestion on the roll, is necessary to entitle a debt. to double costs, under the above sect.—*FINLAY v. SEATON* (1808), 1 Taunt. 210; 127 E. R. 813.

Annotations:—*Apprvd.* *Maberly v. Titterton* (1841), 7 M. & W. 540. *Consd.* *Reeve v. Gibson*, [1891] 1 Q. B. 652. *Refd.* *Dunbar v. Hitchcock* (1814), 1 Marsh. 382; *Wells v. Ody* (1835), 2 Cr. M. & R. 184; *North Metropolitan Tram. Co. v. L. C. C.*, [1898] 2 Ch. 145.

—*See, also*, No. 1288, *ante*.

(b) Measure of Damages.

See, generally, DAMAGES, Vol. XVII., pp. 130–136.

1331. Whether actual damage necessary—To recover nominal damages.—In an action for an excessive distress pltf. is entitled to nominal damages, although he proves no actual damage.—*CHANDLER v. DOULTON* (1865), 3 H. & C. 553; 5 New Rep. 335; 34 L. J. Ex. 89; 11 L. T. 639; 11 Jur. N. S. 286; 159 E. R. 648.

Annotation:—*Mentd.* *The Walter D. Wallet*, [1893] P. 202.

1332. Nominal damages—If distress only sufficient to cover rent due.—*CLARKE v. HOLFORD*, No. 122, *ante*.

1333. Substantial damage—Irregularity in addition to excess.—*SMITH v. ASHFORTH*, No. 756, *ante*.

1334. Value of goods seized—Test of value.—*WELLS v. MOODY*, No. 1102, *ante*.

sufficient:—*Held*: the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, & though pltf. could make no tender, he could avail himself of one made by the tenant: & if for excessive distress, it should have alleged distinctly that the distress was excessive & unreasonable, or that the proceeds were more than reasonably sufficient.—*HUSKINSON v. LAWRENCE* (1865), 25 U. C. R. —CAN.

action for training for more rent than is due cannot be maintained without a tender of the sum which is really due, & the excess paid cannot be recovered back as money had & received.—*OWEN v. TAYLOR* (1876), 39 U. C. R. 358.—CAN.

a. ———.—Damages cannot be recovered for a for an excessive claim without a tender of the amount actually due.—*McDOUGALL v. KERR* (1908), 8 W. L. R. 528.—CAN.

1335. Growing crops seized.—*PIGGOTT v. BIRTLES*, No. 355, *ante*.

1336. Extra costs of replevin.—In an action for a vexatious & excessive distress where pltf. received the taxed costs of his replevin on the distress:—*Held*: he was not entitled to recover, as damages, the extra costs occasioned to him by the replevin.—*GRACE v. MORGAN* (1836), 2 Bing. N. C. 534; 1 Hodg. 398; 2 Scott. 790; 5 L. J. C. P. 180; 132 E. R. 208.

Annotations:—*Mentd.* *Doe v. Filliter* (1844), 13 M. & W. 47; *Howard v. Lovegrove* (1870), 23 L. T. 396.

1337. Owner not deprived of use of property.—In an action on the case for an excessive distress, it appeared that debt. had put a broker in possession, but that still pltf. had not been deprived of the control of the property. The jury having returned a verdict for pltf. for £15, the ct. refused to set it aside.—*BAYLISS v. FISHER* (1830), 7 Bing. 153; 131 E. R. 59; *sub nom.* *BAYLIS v. USHER*, 4 Moo. & P. 790; 9 L. J. O. S. C. P. 43.

Annotations:—*Refd.* *Hooper v. Annis* (1838), 2 J. P. 695; *Chandler v. Doulton* (1865), 3 H. & C. 553. *Mentd.* *Mudhun Mohun Doss v. Gokul Doss* (1866), 10 Moo. Ind. App. 563.

D. Statutory Defences.

See Distress for Rent Act, 1737 (c. 19), s. 21, & R. S. C., Ord. 19, r. 12, & Ord. 21, r. 19.

1338. “Not guilty by statute”—Effect of plea.—The plea of not guilty “by statute,” pleaded under Distress for Rent Act, 1737 (c. 19), s. 21, in an action for an excessive distress, puts in issue, not only the matter of justification, but the tenancy, & ownership of the goods.—*WILLIAMS v. JONES* (1841), 11 Ad. & El. 643; 113 E. R. 558.

Annotation:—*Consd.* *Nash v. Lucas* (1867), 16 L. T. 610.

1339. ———.—*EAGLETON v. GUTTERIDGE*, No. 132, *ante*.

1340. ———.—*NASH v. LUCAS*, No. 1273, *ante*.

When plea available—Distress on goods removed from premises.—Where goods are taken by way of distress for rent of the premises, chargeable with the rent, & an action of trespass is brought for the taking, debt. must plead the special matter in justification, & cannot give it in evidence under the general issue, under Distress for Rent Act, 1737 (c. 19).—*VAUGHAN v. DAVIS* (1794), 1 Esp. 256, N. P.

1342. ———.—(1) Whether a landlord can follow & distrain upon goods fraudulently removed from the premises the night before the rent became due, for the purpose of avoiding a distress?

(2) In trespass for taking goods where the defence is that they were taken as a distress for rent, having been clandestinely removed from the premises, this must be specially pleaded.—*FURNEAUX v. FOTHERBY & CLARKE* (1815), 4 Camp. 136, N. P.

Annotations:—*As to* (1) *Consd.* *Rand v. Vaughan & Duffield* (1835), 3 Nev. & M. M. C. 154. *Refd.* *Harris v. Thirkell* (1852), 20 L. T. O. S. 98.

1343. ———.—*POSTMAN v. HARRELL*, No. 1002, *ante*.

1344.

—In trespass for taking

PART II. SECT. 19, SUB-SECT. 5.—C. (b).

1337 i. Owner not deprived of use of property.—Where a pltf. in an action for excessive distress has not been deprived of the use of the goods distrained, he can only recover nominal damages.—*ROACH v. MARTIN* (1875), 1 V. L. R. 41.—AUS.

1337 ii. ———.—*NICOL v. BRASHER* (1883), 9 V. L. R. 270.—AUS.

goods, the defence under Distress for Rent Act, 1837 (c. 19), s. 3, that the goods had been seized after having been fraudulently removed to prevent a distress for rent, cannot be gone into unless specially pleaded; but where, in trespass against a landlord & his broker for taking goods, there was no evidence against the landlord, & this defence was opened but could not be gone into, as Not guilty "by statute" was the only plea, the judge would not certify, under 8 & 9 Will. 3, c. 11, s. 1, that there was reasonable cause for making the landlord a deft., in order to deprive him of his costs.—*SPENCER v. HARRISON* (1846), 2 Car. & Kir. 429, N. P.

Annotation:—*Refd.* *Wakeman v. Lindsey* (1850), 14 Q. B. 625.

1345. ———.]—Trespass for breaking & entering pltf.'s house & seizing his goods. Plea, that T. held a house as tenant to P., that the rent was in arrear, that the goods being the goods of T. were fraudulently & clandestinely carried off by him from his house to prevent a distress, & were with pltf.'s consent placed in pltf.'s house, whereupon deft. as bailiff of P. seized the goods as a distress. Replication, that the goods were not the goods of T., nor were they fraudulently & clandestinely carried off by him, etc.:—*Held*: the replication was good.—*THOMAS v. WATKINS* (1852), 7 Exch. 630; 21 L. J. Ex. 215; 19 L. T. O. S. 95; 155 E. R. 1101.

Fraudulent removal generally, see Sect. 17, *ante*.

1346. ——— *Effect of plea on costs.*]—*GAMBRELL v. FALMOUTH (EARL)*, No. 1288, *ante*.

SUB-SECT. 6.—ACTION FOR DOUBLE VALUE.

See Distress Act, 1689 (c. 5), s. 4, & Distress for Rent Act, 1737 (c. 19).

1347. General rule.]—In case upon the Distress Act, 1689 (c. 5), s. 4, for double value, for distraining, no rent being due, the jury ought to be directed, if they find for pltf., to give damages to double the amount of the value of the goods.—

PART II. SECT. 19, SUB-SECT. 6.

1347 i. General rule.]—In an action for wrongful distress, where the goods seized were the goods of pltf., & not those of the lessee:—*Held*: pltf. came within 2 Will. & Ma., sess. 1, c. 5, s. 5, & was entitled to recover double the value of the goods seized, & damages would be assessed on that basis.—*CHODERKER v. HARRISON* (1910), 15 W. L. R. 687; 20 Man. L. R. 727.—**CAN.**

b. ——— Rent must be reserved.]—Deft. leased certain land to pltf. for a term, during which the latter was to make improvements, & at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. Deft. having distrained for rent claimed to be due:—*Held*: there being no fixed rent agreed upon, there was no right of distress, & deft. was therefore merely a trespasser & liable in damages to the actual value of the goods, but not to double their value, as it was not a case within 2 Will. & Ma., sess. 1, c. 5, s. 5, which refers to the wilful abuse of the power of distress. *Semble*: that although there may be no rent in arrear until the same is fixed by arbitration, there cannot be said to be none due.—*MITCHELL v. McDUFFY* (1880), 31 C. P. 266.—**CAN.**

c. ———.]—In an action for illegal distress, in which the judge who tried the case found that pltf. occupied the premises in question under an agreement with deft., by the terms of

which no rent was payable by pltf. to deft., & that the distress was therefore illegal, upon which pltf. claimed double the value of the goods as damages, under 2 Will. & Ma., sess. 1, c. 5, s. 5:—*Held*: sect. 5. of the Act by reference to sect. 2, does not extend to a holding of land where there is no rent reserved, & pltf. was not entitled to double value.—*MCCASKILL v. RODD* (1887), 14 O. R. 282.—**CAN.**

d. ——— Must be both seizure & sale.]—The service by the tenant, after distress but before sale, of a notice of set-off, pursuant to R. S. O. 1887, c. 143, s. 29, of an amount in excess of the rent to which the tenant is entitled, does not make the distress illegal, & the landlord is not liable for "double value" for selling, under 2 Will. & Ma., sess. 1, c. 5, s. 5, which requires both seizure & sale to be unlawful.—*BRILLINGER v. AMBLER* (1897), 28 O. R. 368.—**CAN.**

e. Jury must be left to find double damages.]—In an action for distraining when no rent was due, where the case was left to the jury as an ordinary case, without being expressly left to them to find double damages, & without their being apprised of the provisions of the statute, the ct. refused to increase the verdict to double the value of the goods distrained.—*SHIPMAN v. GRAYDON* (1856), 5 C. P. 465.—**CAN.**

PART II. SECT. 19, SUB-SECT. 7.

1354 i. Liability for conversion—Prevention of removal of goods by landlord.]—Pltf. had quitted possession of deft.'s

MASTERS v. FARRIS (1845), 1 C. B. 715; 135 E. R. 723.

1348. When maintainable—Distress made after unsatisfied judgment for rent—Test of value.]—*POTTER v. BRADLEY & CO.* (1894), 10 T. L. R. 445.

1349. Against whom maintainable—Not against holder of bill of sale—Removing goods comprised in bill with tenant's consent.]—*TOMLINSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN.*, No. 1008, *ante*.

1350. By whom maintainable—Only by owner of goods distrained.]—*CHANCELLOR v. WEBSTER*, No. 560, *ante*.

SUB-SECT. 7.—ACTION FOR TROVER OR DETINUE.

See Distress for Rent Act, 1737 (c. 19), s. 19, & generally, TROVER & DETINUE.

1351. Liability for conversion.]—If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer.—*SHIPWICK v. BLANCHARD* (1795), 6 Term Rep. 298; 101 E. R. 563.

Annotation:—*Mentd.* *Foulds v. Willoughby* (1841), 1 Dowl. N. S. 86.

1352. ——— Retention of goods after rent & charges paid.]—*WEST v. NIBBS*, No. 602, *ante*.

1353. ——— Sufficient tender before impounding.]—*LORING v. WARBURTON*, No. 594, *ante*.

1354. ——— Prevention of removal of goods by landlord.]—*ENGLAND v. COWLEY*, No. 460, *ante*.

1355. ——— Purchase by landlord of goods distrained.]—*PLASYCOED COLLIERIES CO., LTD. v. PARTRIDGE, JONES & CO., LTD.*, No. 900, *ante*.

1356. Whether demand & refusal necessary.]—Where goods are distrained which are not liable, an action of trover may be brought by the owner without a demand & refusal.—*WARD v. VENTOM* (1797), Peake, Add. Cas. 126, N. P.

1357. Action of trover—For irregular distress.]—*WALTER v. RUMBALL*, No. 719, *ante*.

1358. ——— For excessive distress.]—*WHITWORTH v. SMITH*, No. 1310, *ante*.

farm, of which he had been the tenant, though his term had not expired, & there had been no legal surrender of it, but he had given notice of his intention to go, & deft., it appeared, was willing to get rid of him. Having removed a portion of his goods, he subsequently returned for some more of them which were locked up in a barn on the place, of which he had the key, & on finding the outer gate of the farm locked, went to deft. who was close by, & requested him to open it & allow him to enter & get his goods, but deft. refused either to open the gate or allow him on the farm, & although he did not in express terms refuse to give up possession of the goods, the jury found that such was his intention, & that pltf. so understood him:—*Held*: this was not sufficient to constitute a conversion of the goods by deft. so as to support an action of trover, & therefore replevin would not lie.—*SMALLEY v. GALLAGHER* (1876), 26 C. P. 531.—**CAN.**

f. Action of trover.]—Trover will lie against a landlord for goods seized under a distress for rent.—*RUDDELL v. FALLAN* (1841), 1r. Cir. Rep. 61.—**IR.**

1358 i. ——— Excessive distress.]—Trespass or trover will not lie upon a distress where there is some rent due. The action should be upon the case for excessive distress, or for not accounting for the surplus moneys realised or for not returning the balance of the goods unsold. After distress any surplus moneys should be paid to the sheriff, & unsold goods returned or placed in

Sect. 19.—Illegal, irregular, and excessive distress and the remedies therefor: Sub-sects. 7, 8, 9, 10 & 11. Sect. 20. Part III. Sect. 1: Sub-sect. 1.]

1359. — For irregular sale.]—(1) Trover will not lie for goods irregularly sold under a distress, Distress for Rent Act, 1737 (c. 19), s. 19, having declared that the party selling should not be deemed a trespasser *ab initio*, & having given an action on the case to the party grieved by such sale.

(2) The five days allowed before a distress can be sold, are inclusive of the day of sale.—**WALLACE v. KING** (1788), 1 Hy. Bl. 13; 126 E. R. 9.

Annotations:—As to (1) Foll. Lyon v. Weldon (1824), 2 Bing. 334. *Consd. Whitworth v. Smith* (1832), 5 C. & P. 250. *Apld. Rodgers v. Parker* (1856), 18 C. B. 112. *Refd. Beggins v. Goode* (1832), 2 Cr. & J. 364; *King v. England* (1864), 4 B. & S. 782. *As to (2) Refd. Wilson v. Nightingale* (1845), 5 L. T. O. S. 51; *Smith v. Wright* (1861), 6 H. & N. 821.

Detinue in distress damage feasant.]—See Part VII., Sect. 12, ante.

SUB-SECT. 8.—INJUNCTION TO RESTRAIN DISTRESS.

See, generally, INJUNCTION.

1360. Terms upon which granted—General rule.]—The ct. ought not to interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the ct. had not interfered (**LORD COTTENHAM, C.**).—**SANXTER v. FOSTER** (1841), Cr. & Ph. 302; 41 E. R. 506, L. C.

1361. — Payment of rent into court.]—(1) An injunction to restrain a landlord from exercising the legal right of distress, will be granted only upon such terms & conditions as the ct. shall think just, under Jud. Act, 1873 (c. 66), s. 25, sub-sect. 8.

(2) The terms & conditions which the ct. thought just & imposed on tenants who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, & continued only if the rent was paid into ct.—**SHAW v. JERSEY (EARL.)** (1879), 4 C. P. D. 359; 28 W. R. 142, C. A.

Annotations:—As to (1) Refd. Quartz Hill Consolidated Gold Mining Co. v. Beall (1882), 20 Ch. D. 501; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

1362. — Rent payable in advance—Agreement for lease.]—WALSH v. LONSDALE, No. 63, *ante*.

1363. — Hire purchase agreement—Engine affixed to premises.]—ENGLISH & AMERICAN MACHINERY CO. v. CLARK & DEAN (1900), 44 Sol. Jo. 739.

1364. Party molested by distress—While action for land pending.]—KIDNER v. HARRISON (1560), Cary, 48; 21 E. R. 26.

1365. Not granted—When grant would involve stay of proceedings.]—NICHOLS v. PHILIPS (1795), 3 Anst. 636; 145 E. R. 991.

1366. — The common injunction to stay proceedings at law does not extend to distress

for rent.—HUGHES v. RING (1820), 1 Jac. & W. 392; 37 E. R. 425, L. C.

1367. — Against assignee—Parol agreement between assignor & tenant—To apply rent towards debt for assignor.]—GALE v. CURRIE (1836), Donnelly, 13; 47 E. R. 194.

1368. — Distress by sub-lessor—After determination of interest.]—Pltf. demised a number of small leasehold houses to deft., who, having committed a forfeiture, pltf. re-entered & determined the lease.

Deft. thereupon distrained on the tenants, & prevented pltf. taking possession & repairing, & pltf. apprehended a forfeiture.

Deft. had also, being insolvent, received the rents; & in consequence of his conduct, the property had become greatly depreciated, & some of the houses had been abandoned by the tenants.

The bill prayed an account of the rents, an injunction to restrain deft. from receiving the rents & distraining, & the right might be determined under the ct.:—**Held**: a general demurrer should be allowed.—**ALDIS v. FRASER** (1852), 15 Beav. 215; 51 E. R. 519.

1369. — At instance of purchaser of land—Against vendor landlord—For arrears accrued since assignment.]—Where a vendor has executed a legal assignment of property to a purchaser, the Ct. of Chancery will not, on application of the latter, interfere by injunction, to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment.—BEST v. DRAKE (1853), 11 Harc. 369; 21 L. T. O. S. 193; 1 W. R. 229; 68 E. R. 1318; *sub nom.* **DRAKE v. WEST**, 22 L. J. Ch. 375.

1370. — Where legal right to distress exists—Collateral agreement not binding—On mortgagee of reversion without notice.]—A. agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, & provided that A. should put the premises in repair. B. alleged that, prior to the agreement being signed, A. promised, verbally, that if B. would take the farm the buildings should be put into a thorough state of repair, & that no rent should be demanded till this was done, & that on the faith of this promise, B. took the farm. A. afterwards mortgaged the premises to C., who gave to B. notice of the mtge., & that the principal & interest were in arrear & directed him to pay the rent to C. B. then set up the alleged collateral agreement, of which C. was previously unaware. C., after notice, distrained for the rent reserved by the written agreement, & due before & after the date of his mtgee. In an action by B. against C. for an injunction to restrain him from holding or selling the goods, & damages for improperly distraining, & against A. & C. for specific performance of the written agreement & the alleged parol agreement, the judge granted an interlocutory injunction restraining C. from remaining in possession & from selling for a certain time:—Held**: the injunction ought not to have been granted, for that, assuming that the parol agreement existed, the mtgee. of the reversion, without notice, was not bound by it. *Semle*: a ct. of equity will not interfere with the legal**

some convenient place, with notice to the tenant.—**PETIT v. KERR** (1889), 5 Man. L. R. 359.—**CAN.**

g. — Goods returned after action brought—Evidence of damages admissible.]—In detinue if deft. plead the return, & acceptance of the goods after action brought, evidence on the part of pltf. to show their damaged state after the commencement of the

action is admissible.—**M'GRATH v. BOURNE** (1876), 1 R. 10 C. L. 160.—**IR.**

PART II. SECT. 19, SUB-SECT. 8.

h. (General rule.)—An injunction may be granted to restrain a landlord from distraining under a lease.—**SHARPE v. ARONEY** (1919), 19 S. R. N. S. W. 96.—**AUS.**

k. When granted—Distress illegal.]

—In an action for illegal distress by a landlord & his bailiffs of pltf.'s goods for rent:—Held: there was no rent due when the distress was made; & an *interim* injunction restraining defts. from proceeding upon the distress was made perpetual, nominal damages were awarded to pltf., & defts were ordered to pay his costs.—**WRIGHT v. FITZPATRICK** (1914), 27 W. L. R. 738.—**CAN.**

right of distraint by the owner of the reversion for the rent due to him on the contract of tenancy, even where the distraint is for more money than is due as rent. *Qu.*: whether evidence of a prior agreement that no rent shall be paid till a certain act has been done by the landlord can be given when there is a written agreement of tenancy reserving a rent at stated intervals.—*CARTER v. SALMON* (1880), 43 L. T. 490, C. A.

SUB-SECT. 9.—SUMMARY PROCEEDINGS IN SPECIAL CASES.

Within Metropolitan Police District.]—*See* Metropolitan Police Courts Act, 1839 (c. 71), s. 39.

Wearing apparel, etc., under £5.]—*See* Law of Distress Amendment Act, 1888 (c. 21), s. 4, & Sect. 5, *ante*.

Agricultural holdings.]—*See* Agricultural Holdings Act, 1923 (c. 9).

SUB-SECT. 10.—RESCUE.

See Nos. 2, 440, 586, 1044, 1052, 1053, 1056, *ante*.

SUB-SECT. 11.—RECAPTION.

See Nos. 1070, 1071, *ante*.

SECT. 20.—APPEAL.

1371. From county court—Agricultural Holdings Act, 1883 (c. 61), s. 46.]—An appeal lies from a decision of a county ct. judge in the matter of a dispute heard & determined by him under Agricultural Holdings Act, 1883 (c. 61), s. 46, under the general powers of appeal contained in County Courts Act, 1867 (c. 142), s. 13.—*HANMER v. KING* (1887), 57 L. T. 367; 51 J. P. 801; 3 T. L. R. 520, D. C.

Annotation:—*Expld.* *Wilkinson v. Jaggard* (1887), 58 L. T. 487.

See, now, Agricultural Holdings Act, 1923 (c. 9), s. 36.

Part III.—Distress for Rates.

SECT. 1.—POOR RATE AND SUMS RECOVERABLE AS POOR RATE.

SUB-SECT. 1.—POWER TO DISTRAIN.

See, generally, POOR LAW; RATES & RATING.

See Poor Relief Act, 1601 (c. 2); Poor Relief Act, 1743 (c. 38).

1372. Overseers — On goods of colleague.]—The goods of one churchwarden are liable to be seized under a distress made by order of the other churchwarden & the overseers for a poor rate due from him, where the rate has been legally demanded, & payment of it refused; but if such churchwarden has charged himself in his account with the rate as received, to apply it to parochial purposes, the justices, who act judicially in such cases, in the exercise of their discretion, may refuse to grant a warrant.

Where a party was elected to be assistant overseer of the poor of a parish by the vestry, under Poor Relief Act, 1819 (c. 12), s. 7, & was appointed assistant, by the warrant of two justices, to perform the duties of overseer, but the resolution of the vestry electing him did not specify the duties to be performed by him:—*Held*: this was an appointment within the statute; for though it did not in express terms yet it did by necessary implication, specify the duties to be performed, as it necessarily implied that the parishioners, by electing him, meant him to be assistant overseer, in all respects, & to perform all the duties of an overseer.

PART II. SECT. 20.

1. Defendant in replevin action successful—Whether court will stay proceedings pending appeal—Plaintiff endeavouring to prevent defendant—Obtaining return of vessel.]—Defts. having succeeded in replevin, brought against them for a schooner, pltf. served notice of appeal, & applied to stay proceedings for a month to perfect his security, so that defts. might not in the meantime obtain a return of the vessel. The ct. refused to interfere.—*SCOTT v. CARVETH* (1861), 20 U. C. R. 435.—CAN.

m. Identity of interest of sheriff & bailiff—Damages against officer at nominal sum—Whether new trial granted.]—A sheriff is identified in interest with his bailiff & liable for

whatever the latter does under colour of the writ. Pltf., assisting a person acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by deft. as sheriff's officer, & was arrested by deft.:—*Held*: the sheriff was liable for the act of his officer. The jury having assessed the damages against the officer at a nominal sum:—*Held*: a new trial would not be granted & judgment would be entered against his co-deft., the sheriff for a like amount.—*GORDON v. RUMBLE* (1892), 19 A. R. 440.—CAN.

PART III. SECT. 1, SUB-SECT. 1.

n. City corporation—For taxes due on its own land—Leased to tenant.]—*Held*: land owned by a city, but

A warrant of distress directed the officer to levy the sum of £28 5s. 5½d., the amount of a poor rate, & also the further sum 11s. 6d., for costs incurred, making in the whole the sum of £28 16s. 11½d., together with the reasonable charges of taking & recovering the said distress. The goods seized under the warrant were replevied, & defts. made cognisance, justifying the seizure of the goods only under Poor Relief Act, 1601 (c. 2), s. 19:—*Held*: the distress was not illegal, as defts. did nothing but what they could justify under the warrant of distress for the poor rate alone.—*SKINGLEY v. SURRIDGE* (1843), 11 M. & W. 503; 12 L. J. M. C. 122; 1 L. T. O. S. 147, 170; 7 J. P. 515; 7 Jur. 773; 152 E. R. 904.

Annotations:—*Mentd.* *Points v. Attwood* (1848), 6 C. B. 38; *R. v. Salop J.J.* (1864), 11 L. T. 416; *R. v. Shopley* (1888), 22 Q. B. D. 96.

1373. — Succeeding those making the rate—Recovery of arrears.]—Poor Relief Act, 1744 (c. 38), s. 11, does not restrict the power conferred by Poor Relief Act, 1601 (c. 2), s. 4, to overseers immediately succeeding those by whom a poor rate is made; but any overseers, subsequent to those making the rate, are still entitled to procure a distress warrant from justices to enforce payment of arrears of the rate by defaulters.—*EAST DEAN OVERSEERS v. EVERETT* (1861), 3 E. & E. 574; 30 L. J. M. C. 117; 3 L. T. 700; 25 J. P. 565; 7 Jur. N. S. 124; 9 W. R. 312; 121 E. R. 558.

1374. — — — Mistake in original demand.]—By Public Libraries Act, 1855 (c. 70),

leased to a tenant for his own private purposes, was liable to taxation, & the corpn. might distrain for such taxes.—*SCRAGG v. LONDON CITY* (1869), 28 U. C. R. 457.—CAN.

o. — — — Taxes not included in enforcement return.]—The town is entitled to proceed by way of distress to recover taxes properly assessed subsequently to & not included in the tax enforcement return.—*SMART HARDWARE CO. & SMART v. MELFORT* (1916), 34 W. L. R. 475; 10 W. W. R. 638.—CAN.

p. — — — Whether right passes to lessor—On payment of taxes payable by lessee.]—In a lease of land, a yearly rent was reserved, & the lessee covenanted to pay the rent & all taxes charged upon the demised premises

1. 1.—Poor rate and sums recoverable as poor rate: Sub-sects. 1 & 2.]

s. 13, the expenses of carrying the Act into execution in any parish are to be paid out of a rate to be made & recovered in like manner as a poor rate, except that persons occupying certain specified kinds of land, not including land used for the purposes of a railway, are to be rated in respect of one-third only of the net annual value. A rate having been made in pursuance of that sect. a railway co. occupying land in the parish were correctly rated in the rate book at their full net annual value, but owing to a mistaken belief on the part of the overseers that the co. had been incorrectly so rated, & that the land in question was within the exemptions in the Act, a demand note for one-third only of their full share of the rate was sent to the co., who paid no more than such third accordingly. In each of the three succeeding years, similar demand notes for one-third only were sent to & paid by the co., notwithstanding that they continued to be correctly rated in the rate book at the full net annual value. In the fifth year the then overseers discovered the mistake, & sought to recover from the co. the unpaid two-thirds for each of the four preceding years, as arrears under Poor Relief Act, 1744 (c. 38), s. 11:—*Held*: the money sought to be recovered was arrears within above sect., & the overseers were not estopped from recovering it by reason of the delivery of the incorrect demand notes by their predecessors.—*R. v. BLENKINSOP*, [1892] 1 Q. B. 43; 61 L. J. M. C. 45; 66 L. T. 187; 56 J. P. 246; 40 W. R. 272, D. C.

Annotation:—*Refd.* Gill v. Mellor (1923), 87 J. P. 190.

1375. — Appointment for several districts of a parish—Poor Law Relief Act, 1601 (c. 2).]—Though a parish had at no time antecedent to the years 1773–5 had the benefit of the above Act, but had always had five overseers of the poor appointed separately, two for one district, two for another, & one for a third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, & there having been but four overseers since that period who had been appointed for the whole parish:—*Held*: such agreement at the time, acted upon for thirty years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the above Act, & consequently a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal.—*LANE v. COBHAM* (1805), 7 East, 1; 3 Smith, K. B. 1; 103 E. R. 1.

1376. — Warrant executed by deputy.]—The overseer of the poor of a township may execute by deputy a warrant of justices directed to him to levy a rate.

To a declaration for breaking & entering pltf.'s house, & converting his goods, deft. pleaded that pltf.'s house was situate in a township in which a

poor rate had been made; that pltf. omitted to pay the rate, & that the churchwardens & overseers of the township applied to two justices, who issued a warrant to the overseers & constables of the township, directing them to levy the amount, & also 6s. costs incurred by the churchwardens & overseers. The plea then justified the trespasses under the warrant by servants of the overseers. Replication, a tender before distress of the amount of the rate, omitting the costs:—*Held*: (1) the replication was bad; (2) the plea was good, the justification by deft. as servant of the overseer being sufficient on general demurrer; (3) the costs of the churchwardens were properly inserted in the warrant, as they, together with the overseers, were the persons who had applied for the warrant, within Distress for Rates Act, 1849 (c. 14), s. 1.—*WALSH v. SOUTHWORTH* (1851), 6 Exch. 150; 2 L. M. & P. 91; 4 New Sess. Cas. 546; 20 L. J. M. C. 165; 16 L. T. O. S. 391; 15 J. P. 452; 155 E. R. 492.

Annotation:—*As to* (2) *Refd.* Baker v. Wicks (1904), 20 T. L. R. 382.

Privilege of servant of ambassador.]—See CONSTITUTIONAL LAW, Vol. XI., p. 540, No. 435.

1377. Liability of personal representative of deceased ratepayer.]—An administrator is not liable to pay the poor rate, for intestate; at least it is not distrainable without summons.—*STEVENS v. EVANS* (1761), 2 Burr. 1152; 1 Wm. Bl. 284; 97 E. R. 761.

Annotations:—*Expld.* Underhill v. Ellicombe (1825), M'Cle. & Yo. 450. *Refd.* Jones v. Bubb (1868), 1 Hop. & Colt. 128; Danby v. Watson (1877), 46 L. J. M. C. 179. *Mentd.* Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

1378. Agreement to refer assessment to arbitrator—Refusal to abide by award.]—A vestry, constituted under Vestries Act, 1831 (c. 60), but exercising powers under a local Act, which gave them all the authorities of a public vestry, made a poor rate whereby certain amounts were charged upon a railway co. in respect of various properties within the parish. By the local Act, a party aggrieved by any assessment might appeal to the vestry at any meeting within one month after demand of the rate, & they might give relief; & applt., if not satisfied with their determination, might, at any time within three months after it, appeal to the sessions. The co. appealed to the vestry under this clause; & by agreement, dated Sept. 14, 1850, between the co. & the vestry, who authorised their chairman to sign it, the question, whether or not the property had been overrated, was referred to an arbitrator, who was to have the powers of a ct. of quarter sessions on appeal; & the co. having paid the rate in question, it was agreed that, if the assessment should be reduced, the amount overpaid should be credited to them on account of the next rate; that the award should regulate the assessment to all future rates up to its date; & that all payments on such future rates should be credited to the co. in the same

He made an assignment for the benefit of creditors at a time when there was rent in arrear, & certain taxes which he ought to have paid were unpaid. Pltf., the lessor, was obliged to pay & did pay these taxes, & claimed a preferential lien upon the assets of the lessee in the hands of deft., the lessee's assignee, for the amount paid:—*Held*: pltf. did not, upon paying the taxes, become entitled to the municipality's right to distrain for taxes.—*BOONE v. MARTIN* (1920), 47 O. L. R. 205; 53 D.L.R. 25; 18 O. W. N. 265.—*CAN.*

q. Failure to Distrain—Effect of.]—Where there is sufficient distress on the property, & the municipality by its

own laches put it out of its power to distrain, R.S.O. 1877, c. 180, s. 100, does not avail to give the right to collect by action.—*CARSON v. VEITCH* (1885), 9 O. R. 706.—*CAN.*

r. — Enforcing payment in a subsequent year.]—Where during all the time the roll is in the collector's hands there are goods & chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year & then levied by distress upon the goods of the tax debtor.—*CASTON v. TORONTO CITY* (1900), 26 A. R. 459; 30 S. C. R. 390.—*CAN.*

s. School trustees — Improperly elected—Distress on property outside area—Validity.]—Action for damages & for a return of a horse seized for non-payment of school taxes. The school trustees who authorised the seizure were not empowered to distrain on property out of their area. Pltf. was not precluded by the school assessment ordinance or the school ordinance of his right to complain of distress by an unauthorised person:—*Held*: school trustees were improperly elected.—*MACDONALD v. BROWN* (1909), 12 W. L. R. 713.—*CAN.*

t. Collector—Discretionary power—Validity of.]—The insertion in a bye-

manner as the payment already made. Pending the reference a second rate was made on Sept. 21, 1850, & a third in Mar. following, both on the same ratable value as the first; & the co. paid the second. The parties attended before the arbitrator; & he made his award on Apr. 29, 1851, assessing the co.'s properties respectively at reduced values, & fixing the entire ratable value at an amount lower than that in dispute by £573. Taking the total as correct, the co. were creditors, upon the three rates, to the amount of £418; but, by an error of figures, the total stated in the award exceeded by a few pounds the aggregate of the sums assessable on the several properties according to the arbitrator's finding. The vestry clerk proposed to refer the matter back to the arbitrator. The co. objected but offered to discard the total sum & take the assessment according to the valuations on the several parcels. This was not agreed to; but no proceeding was taken to set the award aside. The vestry, of whom forty had come into office, in place of forty who retired, after the making of the award, refused to consider it as valid, & distrained upon the co. under a magistrate's warrant for the third rate on the original scale of assessment. The co. replevied, & afterwards moved this ct. that proceedings might be stayed & the replevin bond delivered up:—*Held*: whether the award was binding on the vestry or not, their proceeding by summons & distress was against good faith, the co. having, by their agreement with the vestry, been led into a course of proceeding which had deprived them of an appeal to sessions; & the proceedings of the co. in replevin might be stayed, & their bond given up, at their own instance.—*LONDON & NORTH WESTERN RY. CO. v. BEDFORD* (1852), 17 Q. B. 978; 18 L. T. O. S. 256; 16 J. P. Jo. 132; 117 E. R. 1555.

Annotations:—*Fold*. Leicester Waterworks Co. v. Cropstone Overseers & Churchwardens (1875), 44 L. J. M. C. 92. *Refd*. Shillito v. Hinchliffe, [1922] 2 K. B. 236. *Mentd*. Clode v. London County Council, [1914] 3 K. B. 852.

1379. ———.]—An assessment committee made a poor rate upon pltf.'s property in excess of the amount which pltf's. considered to be the ratable value. Pltf's. gave notice of appeal. Both parties then agreed to refer the matter to arbn. & to be bound by the decision of the umpire. The umpire did not make his award for three years, during which time pltf's. were compulsorily obliged to pay the poor rate. The umpire made his award & declared that pltf's. were overrated & that defts. should repay to them the sums in excess which they had been obliged to pay under compulsion. Defts. refused to consider the award as valid, & when the next rate was made distrained upon pltf. co. under a magistrate's warrant. The co. replevied, & afterwards moved that the replevin bond might be delivered up:—*Held*: the proceedings of defts. were against good faith, they having agreed to be bound by the award, & the replevin bond might be given up at pltf's. instance.—*LEICESTER WATERWORKS CO. v. CROPSTONE (OVERSEERS & CHURCHWARDENS)* (1875), 44 L. J. M. C. 92; 32 L. T. 567, 752; 40 J. P. 165, D. C.

Annotation:—*Refd*. Shillito v. Hinchliffe, [1922] 2 K. B. 236.

law of the discretionary power to the collector to distrain was improper & unauthorised.—*CHAMBERLAIN v. TURNER* (1881), 31 C. P. 460.—*CAN.*

a. ——— *Statutory powers—How exercised.*]—The power of distress & sale given to a rate collector under his general warrant by Irish Poor Relief Act, 1838, sect. 73, must be exercised in accordance with the provisions of

25 Geo. II., c. 13, s. 5 (Irish). Where a rate collector did not proceed before justices under the second part of Grand Jury (Ireland) Act, 1836, sect. 152 (applied to the collection of poor rate by Poor Relief Act, sect. 73), but upon a Saturday seized pltf.'s horse & harness under his power of distress & sale given to him by the first part of sect. 152 under his general warrant & sold the distress on Monday follow-

SUB-SECT. 2.—WHAT MAY BE DISTRAINED.

1380. Working tools.]—The tools of a cooper, or other mechanic, may be distrained for non-payment of the poor rate.—*EDGECOMB v. SPARKS* (1680), 2 Show. 126; 89 E. R. 836.

Annotation:—*Refd*. McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

1381. ———.]—*ANON.* (1696), 3 Salk. 136; 91 E. R. 737.

Annotations:—*Consd*. Hutchins v. Chambers (1758), 1 Burr. 579. *Refd*. McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

1382. Implements of husbandry.]—*ANON.* (1696), No. 1381, *ante*.

1383. Animals—Beast of plough.]—*HUTCHINS v. CHAMBERS*, No. 956, *ante*.

1384. ——— “Animals that gain the land.”]—The exemption of “beasts that gain the land” from liability to distress, in 51 Hen. 3, c. 4, does not apply to statutory distress, for example, distress for poor rates, founded on Poor Relief Act, 1601 (c. 2). There is no exemption of “beasts that gain the land” in that Act.—*MCCREAGH v. COX & FORD* (1923), 92 L. J. K. B. 855; 129 L. T. 567; 87 J. P. 133; 39 T. L. R. 481; 68 Sol. Jo. 40; 21 L. G. R. 344.

1385. Goods of stranger—Goods of intestate in hands of administrator.]—*STEVENS v. EVANS*, No. 1377, *ante*.

1386. Goods of a lodger—Local Act.]—(1) By a local Act, sect. 15 enacted that the rates directed by that Act to be made should & might, on refusal or neglect to pay the same by any person or persons liable thereto, be recovered in such manner as the rates made for the relief of the poor are directed to be recovered; & by sect. 17 it was provided, that any person, whether landlord or tenant, who should let out his or her house in separate apartments, or ready furnished to a lodger or lodgers, should be deemed to be the occupier thereof, & might be rated or assessed accordingly, & should be liable to the payment of the sum so rated. Sect. 18 enacted that the goods & chattels of each & every person renting or occupying any separate part or apartment in such house or building, or renting or occupying any ready-furnished house, or any part thereof, should be liable to be distrained & sold for the payment of the rates:—*Held*: under that Act, the goods of a lodger were liable to be distrained & sold for rates assessed upon & due from the landlord, under a warrant directing the churchwardens & overseers to take the goods of the landlord.

The warrant recited that the rates were due from D., the landlord; that they had been lawfully demanded, & refused to be paid; & that it had been fully proved to the justices on oath, that D. had been duly summoned before them to show cause why he had refused to pay the rates; but that he had not shown any sufficient cause; in an action against the constable for seizing the goods:—*Held*: (2) it was not any objection that there was no proof that the landlord had been duly summoned; (3) the action could not be maintained against the constable for anything done under the warrant, without a demand of a perusal & copy of the warrant, unless he were guilty of any excess, in

ing:—*Held*: the distress was bad, & pltf. was entitled to recover damages for the seizure.—*M'KEOWN v. M'KEE* (1911), 45 I. L. T. 249.—*IR.*

PART III. SECT. 1, SUB-SECT. 2.

b. Implements of husbandry—When not protected from distress.]—Deft., a poor-rate collector, under a magistrate's warrant authorising him to levy distress & sale for poor rate &

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sects. 2 & 3, A. & B.]

which case he would be liable for such excess, without such a demand.

(4) The constable having entered the house of D. & there distrained the goods of a lodger, placed a person in possession of the goods in the room in which they were, saying that, unless the money were paid, he should remain there five days; he remanded in possession eight hours, until the lodger paid the amount to redeem the goods:—*Held*: this was not an impounding, but it was a question for the jury whether he had remained an unreasonable time for the removal of the goods under the warrant.—*PEPPERCORN v. HOFMAN* (1842), 9 M. & W. 618; 12 L. J. Ex. 270; 6 J. P. 137; 152 E. R. 261.

Annotations:—*As to* (4) *Reid*. *Tennant v. Field* (1857), 6 W. R. 11.

1387. Goods under equitable charge—Debentures—Effect of possession by receiver.]—The existence of an equitable charge on goods does not protect them from distress for poor rate.

Where an order is made appointing a receiver & manager of co.'s business, but not directing delivery up of possession to him, & thereupon the receiver & manager enters upon the co.'s premises for the purpose of managing & carrying on the business there is no change of occupation within Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 16, & accordingly under Poor Relief Act, 1601 (c. 2), s. 2, & Metropolis Management Act, 1855 (c. 120), s. 161, the co.'s goods are liable to distress for the whole of the parish rates made for the half year in which the order has been made; & this right of distress vested in the churchwardens & overseers of the parish prevails as against the equitable charge created by debentures charging in the usual form, all the property of the co. where there is no assignment of chattels in the covering deed.

Qu.: whether possession taken by a receiver appointed under an order directing the co. to deliver up possession to him creates a change of occupation within Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 16.—*Re* *MARRIAGE, NEAVE & CO., NORTH OF ENGLAND TRUSTEE, DEBENTURE & ASSETS CORPN. v. MARRIAGE, NEAVE & CO.*, [1896] 2 Ch. 663; 65 L. J. Ch. 839; 75 L. T. 169; 60 J. P. 805; 45 W. R. 42; 12 T. L. R. 603; 40 Sol. Jo. 701, C. A.

Annotations:—*Appld.* *Re* *Crosbie, Johnson & Hughes v. Crosbie* (1909), 74 J. P. 25. *Consd.* *National Provincial Bank v. United Electric Theatres* (1915), 85 L. J. Ch. 106. *Mentd.* *Whitney v. Moss S.S. Co.*, [1910] 2 K. B. 813.

1388. ———.]—Goods belonging to a co., but covered by debentures issued by the co. & in the possession of a receiver appointed by the trustee of the covering deed securing the debentures under a power contained in such deed are not distrainable for payment either of a poor rate assessed against the co., or of a general district rate assessed against the co., which rates the co. has left unpaid.—*RICHARDS v. KIDDERMINSTER OVERSEERS, RICHARDS v. KIDDERMINSTER CORPN.*, [1896] 2 Ch. 212; 65 L. J. Ch. 502; 74 L. T. 483; 44 W. R. 505; 12 T. L. R. 340; 4 Mans. 169.

Annotations:—*Consd.* *Re* *Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. v. Marriage, Neave*, [1896] 2 Ch. 663; *National Provincial Bank v. United Electric Theatres* (1915), 85 L. J. Ch. 106.

costs due by plff., seized plff.'s horse while at work:—*Held*: the exemption of instruments of husbandry from a

distress for rent does not extend to cases where a distress is given in the nature of an execution by a particular

SUB-SECT. 3.—JURISDICTION OF MAGISTRATES.

A. In General.

See, generally, MAGISTRATES.

1389. Whether acting ministerially.]—A rule was granted for a mandamus to justices, that they give order to distrain for a poor rate, assessed upon a bishop.

The justices are only ministerial in this respect & whatever exemption the bishop claims is nothing to them (*per Cur.*).—*R. v. MIDDLESEX JJ.* (1757), 2 Keny. 163; 96 E. R. 1142.

1390. ———.]—A churchwarden taking a distress for a poor rate under a warrant of magistrates is entitled to the protection of Constables Protection Act, 1750 (c. 44), in having the magistrates made defts. with him in an action of trespass. The granting of such warrant by the magistrates is a judicial & not a ministerial act; & they ought first to summon the party, & hear what he has to say in his defence.—*HARPER v. CARR* (1797), 7 Term Rep. 270; 101 E. R. 1070; *subsequent proceedings*, 7 Term Rep. 448.

Annotations:—*Consd.* *Fletcher v. Wilkins* (1805), 6 East. 283; *Re* *Hammersmith Rent-charge* (1849), 4 Exch. 87. *Reid.* *Bristol Poor Governors v. Wait* (1834), 1 Ad. & El. 264; *Skingley v. Surrledge* (1843), 12 L. J. M. C. 122; *It. v. Darlington School* (1844), 6 Q. B. 682; *Ex p. Kinning* (1847), 4 C. B. 507; *Ormerod v. Chadwick* (1847), 16 M. & W. 367; *Pedley v. Davis* (1861), 10 C. B. N. S. 492; *R. v. Marsham* (1883), 50 L. T. 142. *Mentd.* *Dunbar v. Hitchcock* (1814), 1 Marsh. 382; *Painter v. Liverpool Oil Gas Light Co.* (1836), 3 Ad. & El. 433; *Attwood v. Joffe* (1847), 2 New Mag. Cas. 367; *Bonaker v. Evans* (1850), 16 Q. B. 162; *Ex p. Story* (1852), 12 C. B. 767.

1391. ———.]—*R. v. SURREY JJ.*, *Ex p. TAUNTON*, No. 1460, *post*.

1392. ———.]—The Summary Jurisdiction Act, 1879 (c. 49), does not affect or apply to proceedings for the recovery of poor rates & other rates recoverable in the same manner as poor rates; & a distress warrant in respect of such rates may be issued as before the Act.

In granting a distress warrant for a rate justices Act ministerially under Poor Relief Act, 1601 (c. 2), s. 4, & not as a ct. of summary jurisdiction (*COCKBURN, C.J.*).—*R. v. PRICE* (1880), 5 Q. B. D. 300; 49 L. J. M. C. 49; 42 L. T. 439; 44 J. P. 248; 28 W. R. 615, D. C.

Annotations:—*Distd.* *Sandgate L. B. v. Pledge* (1885), 49 J. P. 342. *Consd.* *R. v. London Lord Mayor & Brown* (1887), 57 L. T. 491; *Re* *Allen*, [1894] 2 Q. B. 924; *Atkins v. Hutton* (1910), 103 L. T. 514. *Reid.* *Southwark & Vauxhall Water Co. v. Hampton T. C.*, [1899] 1 Q. B. 273; *R. v. Lincolnshire JJ.*, [1912] 2 K. B. 413.

1393. ———.]—A co. acquired land for the purposes of an exhibition, & erected thereon buildings & laid out the rest as pleasure gardens. During the winter months the exhibition was closed, & a certain portion of the property was not in use. The co. was assessed to the poor rate under the Metropolis Valuation Act, 1869 (c. 67), on the whole of the property. The co. refused to pay rates for the winter months in respect of that part of the property which was not in use during such time, & contended that there was then no occupation. The overseers thereupon took out a summons & applied for a distress warrant. The magistrates refused to grant this, being of opinion that there was no beneficial occupation of such part of the property during the winter months:—*Held*: the assessment committee having decided on what basis the co. should be rated, it was not for the justices to enter into the question whether their occupation was beneficial or not; their duty was purely ministerial, namely, to issue their

statute. Distress under a warrant is in the nature of an execution.—*SWAN v. SLOAN* (1895), 29 L. L. T. 109.—*IR.*

warrant.—*R. v. SINCLAIR, LONDON J.J. & LONDON EXHIBITION Co.* (1896), 60 J. P. 551; 12 T. L. R. 466; 40 Sol. Jo. 622, D. C.

Annotations:—*Refd.* Kershaw, Leese v. Stockport Overseers, [1923] 2 K. B. 129. *Mentd.* Shepherd's Bush Improvements v. Hammersmith B. C. (1910), 102 L. T. 819.

1394. —.]—*R. v. WEBBER & ST. THOMAS' UNION, Ex p. WHEATON* (1899), 16 T. L. R. 1; 43 Sol. Jo. 826, D. C.

1395. — **Whether court of summary jurisdiction—With power to state case.**—Under two local Acts of Parliament, by which the rates of a parish were regulated, an appeal was given against any rate to the next quarter sessions, & it was to be enforced by summons before two justices, who were to order the payment, & if necessary, grant a warrant of distress, if the person summoned "did not prove to them that he was not chargeable with or liable to pay such rate":—*Held*: this only gave the justices a power similar to that in enforcing a poor rate, & they had no jurisdiction to inquire into the validity of a rate, good on the face of it, & they had no jurisdiction to "determine" anything "in a summary way," within Summary Jurisdiction Act, 1857 (c. 43), s. 2, so as to give them power to state a case under that Act.—*Ex p. MAY* (1862), 2 B. & S. 426; 31 L. J. M. C. 161; 26 J. P. 340; 121 E. R. 1132.

Annotations:—*Refd.* *R. v. Roberts* (1863), 3 B. & S. 495; *Wilson v. Sunderland Churchwardens* (1864), 11 L. T. 342; *Sweetman v. Guest* (1868), L. R. 3 Q. B. 262; *Sandgate L. B. of Health v. Pledge* (1885), 33 W. R. 565.

1396. — — —.]—Under Interpretation Act, 1889 (c. 63), s. 13 (11), which repeals & re-enacts Summary Jurisdiction Act, 1884 (c. 43), s. 7, justices sitting to hear an application for the issue of a distress warrant for the non-payment of poor rates are not necessarily exercising a ministerial duty, but are authorised to inquire into the validity of the objections taken by the party summoned, & to state a case for the opinion of the High Ct.—*FOURTH CITY MUTUAL BUILDING SOCIETY v. EAST HAM (CHURCHWARDENS & OVERSEERS)*, [1892] 1 Q. B. 661; 56 J. P. 440, D. C.

Annotations:—*Distd.* *R. v. Webber & St. Thomas' Union, Ex p. Wheaton* (1899), 43 Sol. Jo. 826. *Refd.* *Dixon v. Blackpool & Fleetwood Tramroad Co.*, [1909] 1 K. B. 860; *Blackpool & Fleetwood Tramroad Co. v. Bispham-with-Norbeck U. D. C.* (1910), 8 L. G. R. 149.

1397. **Appeal on case stated.**—*SEAMAN v. BURLEY*, No. 1603, *post*.

B. Validity of Rate.

See, generally, RATES & RATING.

1398. **Rate good on face of it.**—*Ex p. MAY*, No. 1395, *ante*.

1399. — **Rate not appealed against.**—A rate was made for the parish of K. in Feb., & was afterwards, in May, quashed on appeal; but the parish officers continued to collect the amount due from the ratepayers under it. Another rate was made in June, & in it P., the occupier of a house, was rated, & paid the rate, his house not having been assessed in the Feb. rate, as it was then unoccupied. A third rate was made in Oct., one moiety of which was for the purpose of enabling the overseers to allow a deduction on account of the money which had been paid on the void Feb. rate. P. was called

upon to pay the whole amount to which he was assessed upon the Oct. rate, & claimed to be allowed an abatement of one-half. The parish officers proceeded against him by summons, but the justices refused to grant a distress warrant:—*Held*: there having been no appeal against the rate, the justices were wrong, & the parish officers were entitled to have a rule made absolute to levy the whole sum against P.—*R. v. KINGSTON J.J. & PHILIPS* (1858), E. B. & E. 256; 27 L. J. M. C. 199; 31 L. T. O. S. 162; 6 W. R. 551; *sub nom.* *R. v. KINGSTON-UPON-THAMES J.J., Re PHILLIPS*, 23 J. P. 5; *sub nom.* *R. v. MASON & PHILLIPS*, 4 Jur. N. S. 758.

Annotations:—*Apld.* *Luton L. B. of Health v. Davis* (1860), 2 E. & E. 678; *R. v. Bradshaw & Newsam* (1860), 29 L. J. M. C. 176. *Consd.* *Bates v. Plumstead Overseers* (1895), 64 L. J. M. C. 127. *Refd.* *Wilson v. Sunderland Churchwardens* (1864), 11 L. T. 342; *Cheney v. Tallowin*, [1904] 2 K. B. 763. *Mentd.* *R. v. Worksop L. B. of Health* (1864), 28 J. P. 596.

1400. — — —.]—*MANCHESTER OVERSEERS v. HEADLAM*, No. 1415, *post*.

1401. — — —.]—D., the liquidator of a co., was inserted in the rate book as owner & occupier, & did not appeal against the rate, & did not pay:—*Held*: as the rate was good on the face of it, the justices were right in issuing a distress warrant against him.—*DENT v. COMMONDALE OVERSEERS* (1891), 56 J. P. 519, D. C.

1402. — **Objection that rate retrospective.**—If a poor rate is made after the commencement of a half-year to meet the expenses of the whole half-year, the objection that the rate is in part retrospective is not one that can be taken on the hearing of an application for a distress warrant.—*CHENEY v. TALLOWIN*, [1904] 2 K. B. 763; 73 L. J. K. B. 913; 91 L. T. 552; 68 J. P. 528; 2 L. G. R. 1338; *Konst. Rat. App.* 163, D. C.

Annotations:—*Mentd.* *Brighton-Shoreham Aerodrome v. Dell* (1917), 117 L. T. 272; *Cardiff Corpn. v. Isaacs*, *Same v. Crosta* (1920), 37 T. L. R. 649.

1403. **Rate unenforceable—Made by one parish upon another—Justices no power to confirm.**—*NICHOLS v. WALKER & CARTER* (1635), Cro. Car. 394; W. Jo. 356; 79 E. R. 914.

Annotations:—*Refd.* *Webb v. Batchelor* (1675), Freem. K. B. 396; *Penney v. Slade* (1839), 7 Scott, 285; *Morrell v. Martin* (1841), 3 Man. & G. 581; *Newbould v. Coltman* (1850), 16 L. T. O. S. 488; *Pedley v. Davis* (1861), 10 C. B. N. S. 492. *Mentd.* *Groenvelt v. Burwell* (1699), 1 Ld. Raym. 454; *Perkin v. Proctor & Green* (1768), 2 Wils. 382; *R. v. Worcestershire J.J.* (1838), 1 Will. Woll. & H. 432; *R. v. Worcestershire J.J.* (1840), 3 Per. & Dav. 465; *R. v. Clayton* (1849), 13 Q. B. 354; *R. v. Sharpley* (1854), 23 L. T. O. S. 172.

1404. — **Want of statutory publication.**—If a poor rate be not published in the church on the Sunday next after, it is a nullity; & payment under it cannot be enforced, though there be an appeal to the sessions, which was dismissed.—*R. v. NEWCOMB* (1791), 4 Term Rep. 368; 100 E. R. 1069.

Annotations:—*Consd.* *Benson v. Derby Overseers* (1903), 89 L. T. 47. *Refd.* *Le Fèvre v. Miller* (1857), 8 E. & E. 321; *R. v. Kingston J.J. & Philip's* (1858), E. B. & E. 256. *Mentd.* *R. v. Fordham* (1839), 11 Ad. & El. 73.

1405. — — —.]—By a local Act a corpn. were empowered instead of themselves making, assessing, & levying any general district rate, to order such rates to be made, assessed, & levied as

PART III. SECT. 1, SUB-SECT. 3.—B.

c. **Rate unenforceable—On non-resident.**—School trustees, & collectors under their warrants, have no power to levy on the property of a non-resident of the school section for rates assessed in respect of property within that section.—*Re CHAPMAN v. THRASHER* (1869), 20 C. P. 259.—CAN.

d. — — —.]—Bank stock not assessable, because owned out of the

province, was assessed, & such assessment was confirmed. In replevin for goods distrained:—*Held*: the defect of want of jurisdiction was not cured.—*NICKLE v. DOUGLAS* (1874), 35 U. C. R. 126; 37 U. C. R. 63.—CAN.

e. — — —.]—**Want of statutory authority.**—Under Public Schools Act, 1874 (O.), no power is given to form a union school section out of sections in different townships. Where such sec-

tion was formed & a rate levied therein for which pltf.'s goods were seized:—*Held*: such rate was illegal.—*HALPIN v. CALDER* (1876), 26 C. P. 501.—CAN.

f. — — **Collector's roll imperfect.**—Deft. held two rolls, each headed "Collector's Roll for the town of Belleville," one being also headed "Town Purposes," the other, "School Purposes." In the first, the column headed "Town or Village Rate,"

1.—*Poor rate and sums recoverable as poor rate: Sub-sect. 3, B., C. & D.]*

a borough rate, & to enforce payment from the overseers in the same manner as a borough rate, & if such order were made such rates were to be made, assessed, & levied by the overseers in the same manner & under the same provisions as in the case of the poor rate, & the overseers were to recover & enforce the poor rate in the same manner as the general district rate under Public Health Act, 1875 (c. 55). A rate which comprised both poor rate & general district rate was duly made by the corpn. under the Act & was duly allowed by two justices, but was not published:—*Held*: “publication” was essential to the validity of the rate, as in the case of a poor rate under Poor Rate Act, 1743 (c. 3), s. 1, the defence of non-publication could be raised in answer to a summons for a distress warrant for non-payment of the combined rate, as in the case of a distress warrant for non-payment of a poor rate.—*BEESON v. DERBY OVERSEERS* (1903), 89 L. T. 47; 67 J. P. 282; 1 L. G. R. 624; Ryde & K. Rat. App. 328, D. C.

C. Liability of Person to pay Rate.

1406. Extent of jurisdiction—Whether person rated is occupier.]—*R. v. BRADSHAW*, No. 1413, *post*.

1407. ———.]—A person summoned before justices to show cause why a warrant of distress should not issue for non-payment of poor rates has a right to call evidence to show that, although his name appears on the rate book as occupier of the premises rated, he is, in fact, a mere caretaker.—*R. v. SIMMONDS* (1893), 62 L. J. M. C. 106; 5 R. 546; 57 J. P. Jo. 324; Ryde, Rat. App., [1891-93] 310, D. C.

Annotation:—*Consd. R. v. Bagshawe JJ.* (1896), 75 L. T. 513.

1408. ———.]—On a summons before justices to enforce a poor rate of a parish, the justices have jurisdiction, before issuing a warrant of distress, to inquire whether the person affected by the rate is in reality the principal person in occupation of the rated property.—*R. v. BAGSHAW, ETC. JJ.* (1896), 75 L. T. 513, D. C.

1409. ———.]—Resp. had a lease of three structures, called “wharves” in the lease & known locally in one case as a wharf & in the other two cases as quays. The lessor, in exercise of a reservation in the lease, made a considerable use of the demised structures. Resp. was rated for the property, the description in the rate book being “quay & wharves.” On a complaint against resp. for the amount of the rate, he contended that, though he occupied a quay elsewhere, he did not, for the purpose of this particular assessment, occupy anything which could be called a quay, & that, as the assessment included property which he did not occupy, the rate was bad, & also that he had no sufficient exclusive occupation, but that, as the assessment included both property in his occupation & property to satisfy the description in the rate book without including property which was not in resp.’s occupation, the rate was bad:—*Held*: the justices were right in finding that resp. had sufficient exclusive occupation, & the terms “quay” & “wharf” were used interchangeably, & the property in resp.’s occupation

answered the description in the rate book, & the justices should issue a distress warrant for the amount of the rate.—*VERNON v. CASTLE* (1922), 127 L. T. 748; 86 J. P. 213; 20 L. G. R. 580, D. C.

1410. Whether person rated within jurisdiction.]—A railway co. acquired certain land under a railway Act upon which buildings formerly existed but had been pulled down before the railway co. had acquired any interest in the land:—*Held*: (1) the railway co. were not liable to be rated in respect of these buildings under sect. 69 of the Act; (2) as the objection raised by resps. as to their liability went to the jurisdiction to rate, that objection could be entertained by the justices upon an application for a distress warrant.

If the objection raised in answer to the application for a distress warrant is, “You have no jurisdiction to make us liable in respect of this rate at all,” that is an objection which can be taken, but if, on the other hand, it is, “You ought not to have assessed us in respect of this property at this amount,” or on some other ground which is a ground for an appeal, that cannot be taken (*LORD ALVERSTONE, C.J.*).—*ST. STEPHEN (CHURCHWARDENS) v. GREAT NORTHERN & CITY RY. CO.* (1902), 86 L. T. 390; 66 J. P. 373; 50 W. R. 395; 18 T. L. R. 350; 46 Sol. Jo. 299, D. C.

1411. ——— Whether rated premises occupied by servants of the Crown—Territorial & Reserve Forces Act, 1907 (c. 9).]—(1) Houses acquired by a county assocn. under the above Act for use, & in fact used, as residences for officers of the Territorial Force, are occupied by servants of the Crown for the purposes of the Crown, & are therefore exempt from ratability to the poor rate.

(2) This exemption is a matter which may be raised before & considered by justices on an application for a distress warrant to enforce a rate made upon such an officer in respect of a house so acquired. *Qu.*: whether such an officer is the occupier of a house so acquired.

(3) Justices are not bound to issue a distress warrant if on the undisputed facts before them it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought not to have been inserted in the rate-book.—*WIXON v. THOMAS, LAMBERT v. THOMAS, BURROWS v. THOMAS*, [1911] 1 K. B. 43; 80 L. J. K. B. 104; 103 L. T. 731; 75 J. P. 58; 8 L. G. R. 1042; Konst. & W. Rat. App. 236, D. C.; *on appeal*, [1912] 1 K. B. 690, C. A.

Annotations:—*As to (2) Refd.* *Whenman v. Clark*, [1916] 1 K. B. 94. *As to (3) Apld.* *Whenman v. Clark*, [1916] 1 K. B. 94. *Refd.* *Shillito v. Hinchliffe*, [1922] 2 K. B. 236.

1412. Whether person liable to be rated. Upon an application to a ct. of summary jurisdiction for an order for payment of a general district rate under Public Health Act, 1875 (c. 55), s. 256, the ct. has jurisdiction to entertain the question whether the occupier is exempt under the provisions of a public Act from being rated, the facts not being in dispute. Upon such an application the justices have jurisdiction to hear & determine any defence alleging that deft. ought not to have been rated at all, or that if he was ratable at all, he ought not to have been rated upon the full ratable value, when the material

contained nothing, but in that headed “Total Taxes, Amount,” \$40 was inserted. In the other that column had nothing, but \$16 was in the column headed “General School Rate”:—*Held*: insufficient, for there was nothing to show for what purpose the sum not specified to be for school

rate was charged.—*COLEMAN v. KERR* (1867), 27 U. C. R. 5.—*CAN.*

PART III. SECT. 1, SUB-SECT. 3.—C.

g. Intending purchaser—Agent for mortgagees.]—Pltf. agreed with mortgagees in possession of the mortgaged land to purchase it at a sum

equal to principal, interest & costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, & in the meantime that he should, as their agent, manage the property:—*Held*: pltf., who had not been assessed for the property in question, & was not

facts are not in dispute.—*WHENMAN v. CLARK*, [1916] 1 K. B. 94; 85 L. J. K. B. 424; 114 L. T. 116; 80 J. P. 128; 60 Sol. Jo. 174; 14 L. G. R. 149, C. A.

Annotations:—*Consd. Shillito v. Hinchliffe*, [1922] 2 K. B. 236. *Mentd. Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

1413. — Not whether occupation beneficial.]—Upon application for a distress warrant against N. to levy a poor rate, it appeared that N., as exor., had put a person into possession of the house, which was to be let unfurnished, or to be sold, for the purpose of showing it to appcts.; & the justices, being of opinion that N. had no beneficial occupation, declined to issue a warrant:—*Held*: N. being in occupation, the justices were bound to issue their warrant, the question, whether the occupation was beneficial or not, being a question to be tried by appeal to the quarter sessions.—*R. v. BRADSHAW* (1860), 2 E. & E. 836; 29 L. J. M. C. 176; 6 Jur. N. S. 629; 8 W. R. 435; 121 E. R. 313; *sub nom. R. v. WARWICKSHIRE J.J.*, 2 L. T. 233; 24 J. P. 727.

Annotations:—*Appld. R. v. Hannam* (1886), 34 W. R. 355. *Distd. R. v. Simmons* (1893), Ryde Rat. App., [1891-93] 316. *Consd. Baglan Bay Tin Plate Co. v. John* (1895), 72 L. T. 805. *Appld. R. v. Bagshawe J.J.* (1896), 75 L. T. 513. *Refd. Mersey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board* (1865), 20 C. B. N. S. 56; *R. v. Marsham* (1883), 50 L. T. 142; *R. v. Gillespie* (1903), 73 L. J. K. B. 106; *Whenman v. Clark*, [1916] 1 K. B. 94. *Mentd. Empson v. Metropolitan Board of Works* (1861), 25 J. P. 677.

1414. — Not whether defect in valuation list.]—On the hearing of an application for a distress warrant for non-payment of rates the justices have no jurisdiction to entertain a defence alleging that the ratepayer is not liable on the ground that the rate is bad by reason of flaws in the valuation list on which the rate is based.—*SHILLITO v. HINCHLIFFE*, [1922] 2 K. B. 236; 91 L. J. K. B. 730; 127 L. T. 367; 86 J. P. 110; 20 L. G. R. 492, D. C.

Annotation:—*Refd. Kershaw, Leese v. Stockport Overseers*, [1923] 2 K. B. 129.

D. Amount of Rate.

1415. Extent of jurisdiction—General rule.]—Upon a summons before justices to enforce a poor rate against a railway co. it appeared that property occupied by the co. had been assessed by the description "offices & land with rails" but that in estimating the amount of the rate the overseers had treated certain buildings as being in the occupation of the co. which were not in fact in their occupation. The co. had not appealed against the rate:—*Held*: the objection being matter of appeal & the rate good on the face of it the justices were bound to issue a distress warrant.—*MANCHESTER OVERSEERS v. HEADLAM* (1888), 21 Q. B. D. 96; *sub nom. R. v. HEADLAM & LONDON & NORTH WESTERN RY. CO.*, 57 L. J. M. C. 89; 52 J. P. 517; 4 T. L. R. 579, D. C.

Annotations:—*Consd. R. v. Bagshawe J.J.* (1896), 75 L. T. 513. *Appld. Westminster Corpn. v. Army & Navy Auxiliary Co-op. Supply*, [1902] 2 K. B. 125. *Consd. Langford v. Cole* (1910), 102 L. T. 808. *Appld. Margate Corpn. v. Pettman* (1912), 106 L. T. 101; *Vernon v. Castle* (1922), 127 L. T. 748. *Refd. Davis v. Woodfield* (1900), 81 L. T. 782; *Percy v. Hall* (1903), 1 L. G. R. 613.

1416. — —.]—*ST. STEPHEN (CHURCHWARDENS) v. GREAT NORTHERN & CITY RY. CO.*, No. 1410, *ante*.

1417. — —.]—On the application for a distress warrant to recover the balance of a rate

made by applts. upon resps., it was contended that, as applts. had failed to give resps. notice of the increase in the ratable value of their premises as required by Valuation (Metropolis) Act, 1869 (c. 67), s. 9, the valuation list was not the valuation list for the time being in force in regard to them, & that they were only, therefore, liable in respect of a rate based on the ratable value of their premises as appearing on the previous valuation list:—*Held*: this was not an objection which could be taken on the application for the distress warrant, but must be raised by an appeal against the valuation list or against the rate.—*WESTMINSTER CORPN. v. ARMY & NAVY AUXILIARY CO-OPERATIVE SUPPLY, LTD.*, [1902] 2 K. B. 125; 71 L. J. K. B. 546; 87 L. T. 78; 66 J. P. 727; 50 W. R. 631; 46 Sol. Jo. 501; *Ryde & K. Rat. App.* 288, D. C.

Annotations:—*Refd. Beeson v. Derby Corpn.* (1903), 1 L. G. R. 624; *Percy v. Hall* (1903), 88 L. T. 830; *Whenman v. Clark*, [1916] 1 K. B. 94; *Kershaw, Leese v. Stockport Overseers*, [1923] 2 K. B. 129.

1418. — Person liable for less than full amount—Distress warrant issuable for portion only.]—

Applt. was summoned on a complaint preferred on behalf of the overseers to show cause why he had not paid a certain poor rate. The rate was allowed by the justices on Oct. 21, 1898, & was intended for the period from Sept. 29, 1898, up to Mar. 25, 1899. The premises, in respect of which applt. was rated were occupied by him from before Sept. 29, 1898, up to Nov. 30, 1898, & the complaint was in respect of the proportion of the rate from Sept. 29 to Nov. 30, 1898. It was contended by applt. that he was only liable to pay the proportion of the rate from Oct. 21 to Nov. 30, 1898, & not the proportion from Sept. 29 to Nov. 30, 1898. The magistrates were of opinion that their duties were ministerial only, & that they had no jurisdiction to inquire what excess had been charged, & they directed a distress warrant to issue for the whole amount claimed—viz., from Sept. 29 to Nov. 30, 1898:—*Held*: the contention of applt. was right, & he was only liable to pay the proportion from Oct. 21 to Nov. 30, 1898.—*DAVIS v. WOODFIELD* (1900), 81 L. T. 782; 64 J. P. 215; 44 Sol. Jo. 197, D. C.

Annotations:—*Distd. Dixon v. Blackpool & Fleetwood Tramroad Co.*, [1909] 1 K. B. 860. *Refd. Cheney v. Tallowin*, [1904] 2 K. B. 763; *Mansel v. Ithen Overseers*, [1906] 1 K. B. 221.

1419. — —.]—*WHENMAN v. CLARK*, No. 1412, *ante*.

1420. — Irregular increase of assessment.]—A rate was made based upon the valuation list then in force, & a demand note for the rate was served upon a ratepayer. He gave notice of objection to the assessment committee under Union Assessment Committee Act, 1864 (c. 39), that the assessment in the valuation list of the premises in respect of which he was rated was too high. The assessment committee heard the objection &, instead of merely refusing him relief, raised the assessment & amended the valuation list accordingly. They gave notice of the amendment to the overseers, who accordingly altered the current rate & served upon the ratepayer a fresh demand note for a larger sum based upon the increased assessment. The ratepayer paid the amount of the original demand note, but refused to pay more. On a complaint for non-payment of the balance the magistrate refused to issue his

an "owner" of the premises within Assessment Act, R. S. O. 1897, c. 224, s. 35, sub-s. 3, & such taxes could not be levied upon his goods.—*LLOYD v. WALKER* (1902), 4 O. L. R. 112; 1 O. W. R. 383.—*CAN.*

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PART III. SECT. 1, SUB-SECT. 3.—D.

*h. Land not assessed at average value—Notice too late.]—*Upon replevin to recover goods seized for taxes, plffs. contended that their land was not as-

1 at the average value of land in the vicinity; that no proper notice was given of the assessment; & that the roll was not completed within the proper time:—*Held*: the notice of assessment, under which plffs.' land

D D

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 3, D. & E.; sub-sect. 4, A., B. & C. (a).]

distress warrant:—Held: the assessment committee had no power to raise the ratepayer's assessment; the amended rate was consequently a nullity, & the magistrate was right in dismissing the complaint.—**HUDSON v. RHODES**, [1909] 1 K. B. 85; 78 L. J. K. B. 128; 99 L. T. 967; 73 J. P. 66; 7 L. G. R. 159, D. C.

Annotation:—Refd. Redheugh Colliery v. Gateshead Union Assmt. Com. (1923), 40 T. L. R. 169.

E. Commitment in Default of Distress.

See Part VI., Sect. 3.

SUB-SECT. 4.—LEVYING THE DISTRESS.

A. The Demand.

See Poor Relief Act, 1814 (c. 170), s. 12, & Poor Law Amendment Act, 1868 (c. 122), s. 39.

1421. Necessity for demand.]—SKINGLEY v. SURRIDGE, No. 1372, *ante*.

1422. — Payment by instalments—Written demand for full amount—Oral demand for instalment.]—Where an occupier after having been served with a demand in writing for the full amount of a rate claims to pay such rate by instalments under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 2, a distress warrant may be issued for non-payment of any such instalment upon proof that it was orally demanded by the overseers. — **WALTON-ON-THE-HILL OVERSEERS v. JONES**, [1893] 2 Q. B. 175; 62 L. J. M. C. 123; 69 L. T. 319; 57 J. P. 552; 42 W. R. 32; 5 R. 422, D. C.

1423. — Termination of occupation during period of rate—Fresh demand for sum apportioned.]—A poor rate having been made & duly demanded of a ratepayer, he subsequently during the currency of the half-year for which the rate was made went out of occupation, & thereby became liable to pay only so much of the rate as was proportionate to the time of his occupation. No fresh demand for a proportion of the rate was made upon him, but he neither paid nor tendered any portion of it. On a summons for non-payment of the rate the justices ascertained the proportion which was due & forthwith issued their distress warrant for that amount:—**Held:** they had jurisdiction to do so.—**MANSEL v. ITCHEN OVERSEERS**, [1906] 1 K. B. 221; 75 L. J. K. B. 232;

had been assessed at £10 per acre, while the average value of the land in the locality was £1 10s., being served after the time for the revision of taxes had expired, was too late.—**GREAT WESTERN RY. CO. v. FERMAN** (1859), 8 C. P. 221.—**CAN.**

PART III. SECT. 1, SUB-SECT. 4.—A.

k. Necessity for demand—In case of non-residents.]—A statement & demand of taxes are not a condition precedent to a distress in the case of non-residents.—**DE BLAQUIERE v. BECKER** (1858), 8 C. P. 167.—**CAN.**

l. — Sufficient if made of one of several joint devisees.]—Where several devisees & exors. were rated to a school rate in respect of the property of their testator, as "J. A. & brothers":—**Held:** a demand made by the collector on pltf. "J. A." named in the roll was sufficient to bind all pltf's.—**APPLEGARTH v. GRAHAM** (1858), 7 C. P. 171.—**CAN.**

m. — Before time fixed for payment.]—Where taxes were not due until June 4:—**Held:** no demand

could be made until that date, & therefore the leaving a tax bill before that date, even if otherwise a demand, could not be deemed to be such.—**CHAMBERLAIN v. TURNER** (1881), 31 C. P. 460.—**CAN.**

n. — After time fixed for payment.]—Sale held to be bad on the ground that no demand had been made by the collector after the time fixed by the bye-laws of a city for payment of the taxes.—**GOLDIE v. JOHNS** (1889), 16 A. R. 129.—**CAN.**

o. Validity of—Portion of amount demanded not chargeable.]—Defts. treasurer served a demand for payment of taxes, upon pltf. A portion of the total amount demanded was not properly chargeable, but one of the items was legally due, & appeared separately & clearly specified:—**Held:** there was no sufficient demand, even for the item specified.—**FOOTE v. BLANCHARD MUNICIPALITY** (1887), 4 Man. L. R. 460.—**CAN.**

p. — Not affected by subsequent demands.]—It was proved that deft. duly demanded the taxes distrained

94 L. T. 320; 70 J. P. 148; 54 W. R. 456; 22 T. L. R. 228; 4 L. G. R. 279; 2 Konst. Rat. App. 399; *sub nom.* **MONSEL v. ITCHEN OVERSEERS**, 50 Sol. Jo. 208, D. C.

Annotations:—Distd. Dixon v. Blackpool & Fleetwood Tramroad Co., [1909] 1 K. B. 860. Refd. Kershaw, Leese v. Stockport Overseers, [1923] 2 K. B. 129. Montd. Brighton-Shoreham Aerodrome v. Dell (1917), 117 L. T.

1424. For what amount—Precise sum due.]—In an action of replevin for taking pltf.'s goods, deft. avowed, as overseer of the poor, under Poor Relief Act, 1601 (c. 2) by virtue of a warrant of distress for £104 17s. due for several rates, one of which was quashed on the ground that pltf. was not an occupier within the parish where he was rated:—**Held:** as one of the rates was quashed, the warrant was void, & the precise sum due for poor rates should have been demanded from pltf. previous to the issuing of such warrant.—**HURRELL v. WINK** (1818), 8 Taunt. 369; 2 Moore, C. P. 417; 129 E. R. 425.

Annotations:—Distd. Skingley v. Surridge (1843), 11 M. & W. 503. Expld. Davis v. Burrell (1851), 10 C. B. 821. Apld. Tucker v. Maitland (1854), 24 L. T. O. S. 111. Consd. Mansel v. Itchen Overseers, [1906] 1 K. B. 221. Refd. Bristol Gdns. v. Wait (1834), 1 Ad. & El. 264; R. v. Gloucestershire JJ. (1859), 24 J. P. 39; Bavin v. Hutchinson (1862), 10 W. R. 807.

1425. — Fraction of farthing in sum due.]—Where the amount of a poor rate at so much in the pound on the assessable value of premises involves the fraction of a farthing, a demand by the overseer of the whole farthing is an excessive & illegal demand.—**MORTON v. BRAMMER** (1860), 8 C. B. N. S. 791; 29 L. J. M. C. 218; 2 L. T. 600; 25 J. P. 216; 7 Jur. N. S. 211; 141 E. R. 1377.

Annotation:—Consd. Bavin v. Hutchinson (1862), 31 L. J. M. C. 229.

1426. — —.]—**BAVIN v. HUTCHINSON**, No. 1496, *post*.

1427. By whom made—Collector.]—A demand of payment of a poor rate by a collector, appointed by the overseers & assistant overseer for the purpose of assisting in collecting the poor rate:—**Held:** sufficient to entitle the collector to proceed by summons before a magistrate, to enforce payment in the usual mode of distress.—**YEWDALE v. CRAVEN** (1864), 11 L. T. 368; 29 J. P. 197.

B. The Summons.

See Distress for Rates Act, 1849 (c. 14), s. 5.

1428. Necessity for.]—**R. v. BENN & CHURCH**, No. 1431, *post*.

1429. — Against personal representative.]—**STEVENS v. EVANS**, No. 1377, *ante*.

for:—Held: this demand was sufficient to warrant the distress, & the fact that deft. several times afterward demanded the same taxes did not affect the validity of the first demand.—**LEWIS v. BRADY** (1889), 17 O. R. 377.—**CAN.**

Must contain schedule rules.]—It is essential to the validity of a notice or demand under R. S. O. c. 224, s. 134 (1), that it should, as required by sub-s. (2) contain a schedule specifying the different rates, etc.—**McKINNON v. McTAGUE** (1901), 1 O. L. R. 233.—**CAN.**

r. Evidence of—Delivery of statement of taxes due.]—The mere delivery to a ratepayer, in places other than cities & towns, of the statement of taxes due, is not sufficient evidence of the demand required to be made for the payment thereof, unless a bye-law has been passed under Consolidated Assessment Act, 1892, s. 123, sub-s. 2, empowering the collector to take that course.—**McDERMOTT v. TRACHSEL** (1894), 26 O. R. 218.—**CAN.**

1430. Inclusion of several rates—Due from same person—Poor Rates Recovery Act, 1862 (c. 82), s. 1.]—*R. v. GLOVER, Ex p. HORNSEY DISTRICT COUNCIL* (1900), 35 L. Jo. 269.

1431. Grant of mandamus to issue.]—(1) The ct. will not grant a *mandamus* to magistrates to order them to issue warrants of distress to levy a poor rate on certain persons who have refused to pay, unless those persons have been previously summoned by the justices. But the ct. will grant a *mandamus* to the justices to receive complaints, etc. against the persons who refuse to pay, etc. & to proceed thereupon to levy, etc.

(2) A summons must precede a warrant of distress, which is in the nature of an execution. It is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard (*LORD KENYON, C.J.*).—*R. v. BENN & CHURCH* (1795), 6 Term Rep. 198; 101 E. R. 509.

Annotations:—As to (1) Consd. R. v. Sussex JJ. (1834), 3 Nev. & M. K. B. 263. *As to (2) Follid. Harper v. Carr* (1797), 7 Term Rep. 270; *R. v. Hughes* (1835), 3 Ad. & El. 425; *Painter v. Liverpool Gas Co.* (1836), 3 Ad. & El. 433. *Refd. Capel v. Child* (1832), 2 Cr. & J. 558; *Attwood v. Jolliffe* (1848), 3 New Sess. Cas. 116; *Re Hammersmith Rentcharge* (1849), 4 Exch. 87; *Bonaker v. Evans* (1850), 16 Q. B. 162; *Mansel v. Itchen Overseers* (1906), Konst. Rat. App. (1904-08), 399. *Generally, Mentd. R. v. Darlington School* (1846), 6 Q. B. 682; *R. v. Cheshire Lines Com.* (1873), 42 L. J. M. C. 100.

1432. — Insertion of name after rate made.]—Where a poor rate was made for a parish, & the name of a party who occupied lands for which he was rated in another parish, was inserted after the rate was made, the ct. refused to grant a *mandamus* to magistrates to issue a summons & grant a distress warrant for non-payment of the rates.—*R. v. CARDIGANSILIRE JJ.* (1835), 1 Har. & W. 274.

1433. Form of summons—Courts (Emergency Powers) Act (c. 78), 1914.]—A landlord agreed with his tenant to pay the rates of the premises, & on non-payment the local authority distrained on the tenant. The tenant sued the landlord in the county cts. for damages for breach of the agreement, & the landlord denied liability, alleging that the distress was illegal, as the local authority had contravened the above Act. The local authority had appended to the summons for a distress warrant the following note: "The Courts (Emergency Powers) Act, 1914. Take notice that on the occasion of the hearing of the summons herein for non-payment of the said rate it is intended to make without any further notice an application to the court under the Courts (Emergency Powers) Act, 1914, for a warrant of distress, & for the leave of the court to proceed to execution thereof." A further note stated the effect of the provisions of the above Act in regard to levy of distress, but did not follow the identical terms of Form 11 in the sched. to Cts. (Emergency Powers) Rules, 1914. The county ct. judge gave judgment for pltf. on the ground that, whether the distress was or was not illegal, doft. was liable for the breach of his contract:—*Held*: the judgment was right, & although a summons had not been taken out in the terms of Form 11, & the note on the summons did not follow the note of that form in identical terms, yet having regard to r. 7 this was not a fatal objection & the distress was not illegal.

By r. 14 proceedings under the Act are within the Summary Jurisdiction Act, 1848 (c. 43), s. 1, whereby no objection is to be taken or allowed to summonses on the ground of variance (*AVORY, J.*).—*ISAACS v. ARLIDGE* (1917), 87 L. J. K. B. 347; 82 J. P. 289; 34 T. L. R. 102; 62 Sol. Jo. 142; 16 L. G. R. 73.

C. The Warrant.

(a) In General.

See Distress for Rates Act, 1849 (c. 14), ss. 3, 4, & Criminal Justice Administration Act, 1914 (c. 58), s. 33.

1434. Authority of overseers.]—*JACKSON'S CASE*, No. 1510, *post*.

1435. Validity of—Signed by justice not duly qualified.]—The acts of a justice of the peace, who has not duly qualified, are not absolutely void; & therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers.—*MARGATE PIKE CO. v. HANNAM* (1819), 3 B. & Ald. 266; 106 E. R. 661.

Annotations:—Refd. Morrell v. Martin (1841), 3 Man. & G. 581. *Mentd. R. v. London Corpn.* (1829), 9 B. & C. 1; *R. v. Humphery* (1839), 10 Ad. & El. 335; *Marks v. Frogley* (1898), 67 L. J. Q. B. 605; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

1436. — Rate not published.]—Where some poor rate had not been duly published on the Sunday following the allowance, according to 17 Geo. 2, c. 3, s. 1, & a warrant of distress issued for a single sum, made up of these rates & of others which were regular:—*Held*: the warrant was wholly bad, & replevin lay for a distress taken under it.—*SIBBALD v. RODERICK* (1839), 11 Ad. & El. 38; 3 Per. & Dav. 106; 9 L. J. M. C. 76; 113 E. R. 326.

Annotations:—Follid. Re North Staffordshire JJ. (1853), 23 L. J. M. C. 17. *Refd. Skingley v. Surridge* (1813), 11 M. & W. 503; *Le Feuvre v. Miller* (1857), 8 E. & B. 321. *Mentd. Fox v. Davies* (1848), 6 C. B. 11.

1437. — Partial invalidity—Whether void in toto.]—(1) Poor Relief Act, 1601 (c. 2), s. 4, which gives a remedy for the levying of money assessed for poor rates, does not extend to costs; & 18 Geo. 3, c. 19, s. 1, under which justices have power to award costs in such a case, limits the period for which the defaulter can be imprisoned to the term of one month.

A warrant issued by two justices of the county of S., after reciting the making of a rate, the assessment of pltf. in the sum of £17 thereto, & his refusal to pay the same, & that H. & W., two justices, etc. had issued their warrant to levy the said sum of £17 19s. 6d., & the further sum of 6s. for costs incurred in the premises, making in the whole the sum of £18 5s. 6d., by distress, etc., commanded the constable to apprehend & take pltf. to the house of correction, there to remain "until payment of the said sum":—*Held*: the warrant was bad *in toto*; & an action of trespass lay against the justices & the constable for the arrest & imprisonment under it.

(2) The backing of the warrant under 24 Geo. 2, c. 55, s. 1, by a justice is purely ministerial, & the justice who issues the warrant is responsible for an arrest under it, although it be backed & executed in a county other than that in which it was issued.

PART III. SECT. 1, SUB-SECT. 4.— C. (a).

14371. Validity of—Partial invalidity—Whether void in toto.]—Where a warrant for the collection of a single sum for rates for several years included the amount of an assessment which did

not appear to be either against the owner or the occupier of the property:—*Held*: the inclusion of such assessment would vitiate the warrant.—*FLANAGAN v. ELLIOTT* (1886), 12 S. C. R. 435.—*CAN.*

s. — *Whether affected by seizure under another warrant—Made at same*

*time.]—*That seizure was made under another warrant at the same time will not make the seizure null or irregular.—*ROBERTSON v. HOOPER* (1909), 12 W. L. R. 5; 2 Sask. L. R. 365.—*CAN.*

t. *Necessity for—Burden of proof on collector.]—*The question whether

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 4, C. (a) & (b).]

(3) A demand of the copy & perusal of the warrant, signed by pltf.'s attorney, was left by his clerk:—*Held*: a sufficient demand under Constables Protection Act, 1750 (c. 44), s. 6.

(4) Where pltf. had obtained a copy of the warrant previously to a demand thereof:—*Held*: the constable was not thereby excused from complying with the demand.

(5) The mere fact of the justices being joined in the action against the constable does not entitle the constable to a verdict under Constables Protection Act, 1750 (c. 44), s. 6, which sect. only protects him in case he has complied with the demand of a copy & perusal of the warrant.

(6) A party having been arrested under the foregoing warrant, & having paid under protest the money specified in it:—*Held*: he was entitled to recover back the whole of the money so paid, although the £17 19s. 6d. was really due from him in respect of the rate.—*CLARK v. WOODS* (1848), 2 Exch. 395; 3 New Mag. Cas. 30; 3 New Sess. Cas. 213; 17 L. J. M. C. 189; 11 L. T. O. S. 225; 12 J. P. 489; 154 E. R. 545.

Annotation:—*As to* (6) *Folld.* Norton v. Monckton (1895), 43 W. R. 350.

1438. Several warrants—Some good some bad—Joint distress under all not invalid.—(1) If a party is assessed to the poor rate for premises which he occupies, & other distinct premises which he does not occupy, & his goods are distrained for the several rates jointly, he is not confined to the remedy by appeal, but may bring an action.

(2) If a joint distress be made under four several warrants, for four several rates, of which one is bad, the distress is not therefore void.

(3) If a party enter & make a joint distress for four several rates, being furnished for that purpose with four warrants, one of which is bad, he may, in an action of replevin for such distress, justify under the good warrants, & abandon the bad one; & if the causes of taking are distinct, & the avowries separate, he will be entitled to a return of all the goods.

(4) Where some of the avowries justified the whole taking under good warrants only, & pltf. alleged, in answer to each of the avowries, that the whole distress was taken jointly under four warrants, of which one was bad, & deft. did not, on the record, contradict this allegation:—*Held*: nevertheless, deft. was entitled to judgment, & a return of all the goods.—*BRISTOL POOR GOVERNORS v. WATT* (1834), 1 Ad. & El. 264; 6 C. & P. 591; 3 Nev. & M. K. B. 359; 2 Nev. & M. M. C. 254; 3 L. J. M. C. 71; 110 E. R. 1207.

Annotations:—*As to* (1) *Folld.* Charleton v. Alway (1840), 11 Ad. & El. 993; Rhymney Ry. v. Price (1867), 16 L. T. 394. *Distd.* R. v. Twopeny, etc. (Kent J.J.) & Twenty-four Ratepayers of Milton next Sittingbourne (1867), 17 L. T. 266; Manchester Overseers v. Headlam (1888), 21 Q. B. D. 96. *Refd.* Debney v. Corbett (1837), 5 Dowl. 704; R. v. Bradshaw (1860), 6 Jur. N. S. 629; Freeman v. Read (1863), 4 B. & S. 174; Baglan Bay Tin Plate Co. v. John (1895), 72 L. T. 805. *As to* (3) *Refd.* Phillips v. Whitsea (1860), 2 E. & E. 804. *Generally, Mentd.* Crease v. Sawle (1842), 11 L. J. M. C. 62; Barwick v. S. E. & C. Ry., [1921] 1 K. B. 187.

1439. Form of—Mis-recital of date of rate.—(1) A warrant of distress for poor rates need not in terms state that the refusal to pay the rate was proved

upon oath; it is enough to state that it was duly proved.

(2) The mis-recital, in a warrant of distress for poor rates, of the date of the rate, is not material.—*ORMEROD v. CHADWICK* (1847), 16 M. & W. 367; 2 New Mag. Cas. 55; 2 New Sess. Cas. 697; 16 L. J. M. C. 143; 8 L. T. O. S. 343; 11 J. P. 138; 153 E. R. 1321.

Annotations:—*As to* (1) *Consd.* Ramshottom v. Duckworth (1847), 1 Exch. 506. *As to* (2) *Refd.* R. v. Stutfield (1863), 2 New Rep. 180. *Generally, Mentd.* R. v. Shipperbottom (1847), 2 New Sess. Cas. 641; R. v. Preston, R. v. Longbottom (1848), 12 Q. B. 816; R. v. Mills (1851), 17 L. T. O. S. 164.

1440. — Recital of refusal to pay.—*ORMEROD v. CHADWICK*, No. 1439, *ante*.

1441. Execution of—By deputy of overseer.—*WALSH v. SOUTHWORTH*, No. 1376, *ante*.

1442. — By overseer—Or constable.—A justices' warrant of distress for rates, which was addressed in the statutory form to the overseers & constables, was handed by one of the overseers to the assistant overseer, who was empowered by the terms of his appointment to perform all the duties of an overseer. The assistant overseer, purporting to act in the execution of the warrant, was guilty of an illegal & excessive distress:—*Held*: the overseers were not responsible for the act of the assistant overseer.

It was the duty [of the police] to execute it & had they discharged that duty this trouble would never have arisen (*LORD ALVERSTONE, C.J.*).—*BAKER v. WICKS*, [1904] 1 K. B. 743; 73 L. J. K. B. 410; 90 L. T. 706; 68 J. P. 263; 52 W. R. 556; 20 T. L. R. 382; 48 Sol. Jo. 385; 2 L. G. R. 1155.

Annotation:—*Refd.* McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

1443. Against whom available—Tenants in common—Joint assessment.—A distress warrant may issue against any one of a number of tenants in common refusing to pay the amount of a rate assessed on all of them.—*PAYNTER v. R.* (1847), 10 Q. B. 908; 16 L. J. M. C. 136; 13 J. P. 457; 11 Jur. 973; 116 E. R. 344, Ex. Ch.

1444. — Not owner of tithe rentcharge.—Poor rate assessed upon the owner of tithe rentcharge under Tithe Act, 1837 (c. 69), s. 8, is not recoverable by distress warrant against such owner.—*LAMPLUGH v. NORTON* (1889), 22 Q. B. D. 452; 58 L. J. Q. B. 279; 53 J. P. 389; 37 W. R. 422; 5 T. L. R. 304, C. A.

Annotation:—*Mentd.* Woolley & Woolley v. Broad (1892), 66 L. T. 680.

(b) Issue of Warrant.

1445. Whether compellable—Rate legal—Though oppressive.—If a rate be legal, & a party refuse to pay it, the magistrates are bound to issue their warrant of distress, however inconvenient & oppressive the mode of rating may appear to them; & after summons of the person to pay the rate before the justices, & they refusing to issue their warrant, because they consider the mode of rating oppressive, this ct., however inconvenient the mode of rating may be, & however much they may be convinced that the object of the overseers in pursuing that mode of rating, was to harass the party refusing to pay it, will grant a *mandamus* to the justices to issue a warrant of distress.—*R. v. SUSSEX J.J.* (1834), 3 Nev. & M. K. B. 263;

the collector has such "good reason to believe" a ratepayer is about to remove his goods as would justify him in obtaining a magistrate's warrant of distress is one for the jury, the onus being upon the collector to prove that he had.—*McKINNON v.*

(1901), 1 O. L. R. 233.—**CAN.**
a. *Execution of—By high sheriff—Jurisdiction of magistrates to order.*—On a complaint by a rate-collector in respect of the non-payment of poor rate, justices made an order that deft.

should pay, & in default that the rate & costs should be levied by distress & sale of deft.'s goods:—*Held*: the justices had no jurisdiction to direct the warrant to the high sheriff for execution.—*R. (HYNES) v. CLARE J.J.*, [1912] 2 I. R. 57.—**IR.**

2 Nev. & M. M. C. 236; *sub nom.* R. v. HASLER, 3 L. J. M. C. 56.

1446. ————.]—Where, by an Act of Parliament, power is conferred upon justices to issue a distress warrant, "if they shall think fit" they must not refuse to issue it merely because they think the Act of Parliament does an injustice in giving such power in the particular case. Therefore, where the overseer of a parish, which had been an extra-parochial place but had been duly annexed to a union, was ordered by the board of guardians of the union to pay certain money towards the common fund, & he refused to pay such money:—*Held*: (1) justices could not refuse to issue their warrant, under Poor Rate Act (c. 84), s. 1, to distrain the goods of the overseer, merely because they thought it unjust that such extra-parochial place should be compelled to contribute to the common fund of the union; (2) the discretion given to the justices by the Act was a "legal" discretion &, as the magistrates had not acted in the exercise of such a discretion, the ct. would compel them to issue their warrant.—R. v. BOTELER (1864), 4 B. & S. 959; 3 New Rep. 505; 33 L. J. M. C. 101; 28 J. P. 453; 10 Jur. N. S. 798; 12 W. R. 466; 122 E. R. 718.

Annotations:—As to (1) *Mentd.* R. v. Oxford Bp. (1879), 4 Q. B. D. 525; Davies v. Evans (1882), 9 Q. B. D. 238; R. v. London Bp. (1889), 21 Q. B. D. 213; Sharp v. Wakefield, [1891] A. C. 173; R. v. Bros. (1901), 85 L. T. 581. As to (2) *Refd.* R. v. Adamson (1875), 1 Q. B. D. 201. *Mentd.* R. v. L. G. Board (1908), 6 L. G. R. 665.

1447. ———— **Refusal of applicant to give indemnity.**—When the ct. has decided that a rate is valid, the magistrates cannot refuse an application for distress warrants against the parties liable, on the ground that further litigation is contemplated, & that the parties making the application decline to give them indemnity against the consequences.—R. v. MIDDLESEX JJ. (1842), 2 Dowl. N. S. 385; 12 L. J. M. C. 36; 6 J. P. 772; 7 Jur. 259.

Annotation:—*Folld.* R. v. Handsley (1881), 7 Q. B. D. 398.

1448. ———— **Fraud of assistant overseer—Collection of rate made.**—An assistant overseer who collected the rates of a parish which were made half-yearly, in Apr. 1910, fraudulently & without the knowledge or authority of the overseers sent to resps., ratepayers in the parish, a demand for payment of a sum in respect of a rate purporting to have been made on Apr. 7, & allowed by two justices, while in fact no such rate had been made, & resps. sent a cheque for the sum claimed to the assistant overseer, who paid the same into his private account at the bank, & on the same day drew a cheque on his private account for about the same amount & appropriated the proceeds to arrears of previous rates paid by ratepayers which he had misappropriated. A rate was afterwards made in June, 1910, for the period ending in Sept. 1910, & the rate made upon resps. was the same amount which they had previously paid to the assistant collector in Apr., but after the making of this rate no payment had been made by resps. in respect thereof. Justices refused to issue a distress warrant for the rate:—*Held*: as there was no rate made at the time the payment was made by resps. to the assistant overseer, such payment was not a payment of the rate subsequently made, & as it was not shown that the overseers had received the money in respect of that rate, there was no evidence upon which the justices could refuse to issue the distress warrant.—HORNCHURCH OVERSEERS v. LONDON, TILBURY & SOUTHEND RY. CO (1912), 107 L. T. 293; 76 J. P. 385; 10 L. G. R. 731, D. C.

1449. ———— **Rate illegal—Rate not authorised by**

justices.—Where, inadvertently, the overseers signed & the justices allowed a rate at the bottom of a page of the rate-book, the words used by the justices being "We allow the foregoing rate," & another rate then followed the signature & allowance:—*Held*: the rate so following was not allowed; & the justices could not be called upon to enforce it by distress.—*Re* STAFFORD JJ., *Ex p.* SKELTON OVERSEERS (1853), 2 C. L. R. 130; Bail. Ct. Cas. 211; 2 W. R. 80.

1450. ———— **No publication of rate.**—R. v. STAFFORDSHIRE JJ. (1882), 46 J. P. Jo. 324.

1451. ———— **Assessment increased—Contrary to Telegraph Act, 1868 (c. 110), s. 22.**—In 1870 the Postmaster-General, under above Act, purchased premises for a telegraph office, which were then assessed at £280 a year. By above sect. premises so bought were to be assessed to the poor rate at a sum not exceeding their ratable value when bought. In 1878, the Postmaster-General ceased to occupy them as a telegraph office & underlet them to different private occupiers, who paid on the assessment of £280. In 1880, upon a general reassessment, the aggregate ratable value was raised to £680. Upon one of the occupiers refusing to pay poor rates on the increased assessment, complaint was made to the city justices for a distress warrant, which, however, they refused to grant, but stated a case:—*Held*: the justices were right in so refusing.—ST. GABRIEL, FENCHURCH OVERSEERS v. WILLIAMS (1885), 16 Q. B. D. 649; 55 L. J. M. C. 14; 54 L. T. 270; 50 J. P. 533; 31 W. R. 256; 2 T. L. R. 138, D. C.

1452. **Discretion of magistrates—How exercised.**—R. v. BOTELER, No. 1446, *ante*.

1453. ———— **Warrant for part or whole of the rate—Tender of part.**—A rate having been duly made in a parish, a ratepayer tendered to the overseers a portion of the sum that he was liable to pay in respect of the rate, but refused to pay the balance. The overseers refused to accept part-payment of the rate, & preferred a complaint before the magistrate against the ratepayer for a refusal to pay the rate. At the hearing the ratepayer again tendered in ct. a portion of the sum due from him, which was again refused; whereupon the magistrate refused to issue a distress warrant for more than the amount of the balance:—*Held*: under the circumstances the magistrate was not bound to issue his distress warrant for the whole amount of the rate.—R. v. GILLESPIE, [1904] 1 K. B. 174; 73 L. J. K. B. 106; 52 W. R. 367; *sub nom.* R. v. GILLESPIE, *Ex p.* WEST HAM OVERSEERS, 90 L. T. 15; 68 J. P. 11; 20 T. L. R. 113; 48 Sol. Jo. 131; 2 L. G. R. 59; Ryde & K. Rat. App. 350, D. C.

Annotations:—*Expld.* *Re* Wiles (1903), 90 L. T. 225. *Folld.* Mansel v. Itchen Overseers (1906), 75 L. J. K. B. 232. *Refd.* Cheney v. Tallowin (1904), 73 L. J. K. B. 943; Hornchurch Overseers v. L. T. & S. Ry. (1912), 107 L. T. 293; McCragh v. Cox & Ford (1923), 92 L. J. K. B. 855.

1454. ————.]—Where upon a summons for a distress warrant for a poor rate the person liable to pay the same tenders a part of the rate in ct. before the justices, the justices have notwithstanding such tender in ct., jurisdiction to issue a distress warrant for the whole amount of the rate, &, in default of sufficient distress to satisfy the whole amount, to issue a warrant of commitment in respect of the whole amount, notwithstanding a subsequent tender of part.—*Ex p.* WILES (1903), 90 L. T. 225; 20 T. L. R. 150; 2 L. G. R. 103; 20 Cox. C. C. 602; *sub nom.* *Re* WILES, 73 L. J. K. B. 112, n.; *sub nom.* *Ex p.* WYLES, 68 J. P. 13, D. C.

1455. ———— **Occupation for part of period—Special agreement between owner & overseers.**—

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 4, C. (b) & D.; sub-sect. 5, A.

R. v. TEMPEST, ETC. JJ. & CUTTS, Ex p. TOWNEND (1898), 14 T. L. R. 199, D. C.

Annotation:—Refd. Cheney v. Tallowin, [1904] 2 K. B. 763.

1456. — Agreement to suspend payment of increase—Pending new valuation.]—In Sept. 1839, a poor rate was made for the township of T., against which an appeal was entered at the Jan. sessions, 1840, & respited on the terms that a new valuation should be made, & that in the meantime the payments should be made according to the last effective rate, & the balance either for or against appls. be afterwards paid by or allowed to them. These terms were agreed to by appls. & S., the assistant overseer, & the appeal was respited from time to time till the Michaelmas sessions, 1843, when the new valuation was completed, & the rate reduced. Pending this appeal the assistant overseer died, & a new rate made in May, 1840, in which appls. were rated as in the rate appealed against, & on their refusal to pay were summoned before the petty sessions, who made an order that they should pay according to the agreement; that is, according to the last effective rate. They paid the amount ordered on that rate, & the like amount on four other rates, made between that time & Michaelmas, 1843. In Apr. 1844, they were summoned by the overseers to pay in full, & the justices at special sessions were applied to for, & refused, distress warrants to compel such payment. On an application for a *mandamus* to the justices for this purpose:—*Held*: after so long a time the township must be taken to have acquiesced in the agreement made by S., & the ct. refused to issue the writ.—*R. v. ROYDS (1811), 1 New Sess. Cas. 456; 4 L. T. O. S. 193; 9 J. P. 118.*

1457. — To delay execution.]—Justices in issuing a distress warrant for the recovery of poor rates have no power to order that there shall be any delay in the execution of the warrant.—*R. v. HANDSLEY (1881), 7 Q. B. D. 398; D. C.*

Annotations:—Distd. R. v. Bagshawe JJ. (1896), 75 L. T. 513. Refd. Kershaw, Leese v. Stockport Overseers, [1923] 2 K. B. 129.

1458. — Wrongful inclusion in rate-book.]—*WIXON v. THOMAS, LAMBERT v. THOMAS, BURROWS v. THOMAS, No. 1411, ante.*

1459. — Winding up scheme approved by court—Providing for payment of rates.]—When a person assessed in a valuation list gives notice of objection to the sum at which he is therein assessed, & the valuation list, & consequently, the rate, are altered as a result of the objection, the rate does not become due & payable by such person until it has been so altered.

A petition to wind up a co. having been presented, a scheme was sanctioned by the ct. which provided (*inter alia*) for the payment in a certain way of rates due from the co.:—*Held*: magistrates, on an application for a warrant of distress for non-payment of the rates, were entitled to consider the effect of the scheme as a defence to the application, although this could not have been set up on appeal against the rate, & their duties were not merely ministerial.—*KERSHAW, LEESE & CO. v. STOCKPORT OVERSEERS, [1923] 2 K. B. 129; 92 L. J. K. B. 784; 129 L. T. 563; 21 L. G. R. 452.*

1460. Certiorari to quash warrant—Summons not issued.]—(1) A *certiorari* to bring up a warrant of distress for a poor rate, on the ground that the party had not been previously heard or summoned, refused.

(2) The remedy in such a case must be by appeal or action.

(3) *Semble*: the warrant is not a judicial act, & would not be evidence of the facts stated in it.—*R. v. SURREY JJ., Ex p. TAUNTON (1831), 1 Dowl. 54; 9 L. J. O. S. M. C. 120.*

Annotation:—Refd. R. v. Webber (1899), 16 T. L. R. 1.

1461. Mandamus to compel.]—Where a rate was made in part of a parish, in an outlying district, by authority of the Metropolitan Board of Works; & the overseers refused to comply with the precept, & the justices declined to issue a distress warrant, the ct. will interfere by *mandamus*.—*METROPOLITAN BOARD OF WORKS v. GLOSSOP (1863), 1 New Rep. 372.*

1462. Objection to issue of warrant—Non-appearance on summons.]—G., by a local Act authorising agents for owners of small tenements to be rated, was summoned as agent for H. for non-payment of poor rates, but took no notice of the summons, & did not attend, & the justices, on proof of the rate, the agency of G., & service of the summons, issued their distress warrant, & afterwards, warrant of commitment against G.:—*Held*: G. was not entitled to have the warrants quashed on an affidavit stating that he was neither owner nor occupier of the premises, & the overseers knew who was owner, for G. ought to have appeared before the justices & shown cause against the issuing of the warrants.—*R. v. TOMPKINS (1867), 31 J. P. 470.*

D. Impounding.

See Part II., Sect. 11, sub-sect. 1, ante.

SUB-SECT. 5.—COSTS, EXPENSES, AND DAMAGES.

A. Costs and Expenses.

(a) In General.

See Distress Costs Act, 1817 (c. 93); Distress Costs Act, 1827 (c. 17); Distress for Rates Act, 1849 (c. 14); Divided Parishes & Poor Law Amendment Act, 1876 (c. 61).

1463. Costs—Whether treble costs recoverable—Poor Relief Act, 1601 (c. 2), s. 19.]—*OKELLY v. SALTER (1610), Noy, 137; Yelv. 176; 74 E. R. 1100.*

Annotations:—Folld. Butters v. Furber (1820), 1 Brod. & Bing. 517. Mentd. Valentine v. Fawcett (1735), 2 Stra. 1021; Moyse v. Cocksedge (1749), Willes, 636; Charrington v. Johnson (1845), 4 L. T. O. S. 398; Headland v. Coster (1904), 74 L. J. K. B. 210.

1464. — — — — —.]—A vovant in replevin on a distress for poor rates is only entitled to single costs, under the above sect.—*BUTTERTON v. FURBER (1820), 1 Brod. & Bing. 517; 4 Moore, C. P. 296; 129 E. R. 822.*

Annotation:—Folld. Charrington v. Meatheringham (1836), 2 M. & W. 142.

1465. — — — — —.]—A parish officer sued in trespass for distraining for poor rates is not entitled under 43 Eliz. c. 6, s. 19, or Poor Relief Act, 1662 (c. 12), s. 20, to treble costs when pltf. is non-suited.—*CHARRINGTON v. MEATHERINGHAM (1836), 2 M. & W. 142; 5 Dowl. 313; 2 Gale, 229; 6 L. J. Ex. 23; 150 E. R. 704; subsequent proceedings (1837), 2 M. & W. 228.*

1466. — Tender of rate without costs—Subsequent warrant for rate illegal.]—An order of magistrates being made upon a party to pay the amount of his poor rate, & the costs of a summons, he tendered the former without the latter to the overseer:—*Held*: a subsequent warrant of distress for the poor rate was illegal.—*COTTON v. KADWELL (1833), 2 Nev. & M. K. B. 399.*

1467. — Costs of summons—Not included in warrant.]—On a distress for arrears of a poor rate

under a local Act:—*Held*: although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it; & 1s. was a reasonable sum in that behalf.—*CLARKE v. PEDLEY* (1834), 4 Moo. & S. 321; 2 Nev. & M. M. C. 344; *sub nom.* *DAVIES v. PEDLEY*, 3 L. J. C. P. 120.

1468. — Discretion of justices—To include costs in warrant—Distress for Rates Act, 1849 (c. 14), s. 1.—Justices on issuing a distress warrant for poor rates under the above sect., have a discretion as to whether they will include in the warrant of distress any sum in respect of the costs of obtaining the warrant & this discretion is not fettered by the provision in sect. 6 that the person against whom proceedings have been taken may have the proceedings stayed by paying or tendering the rate, together with all costs & expenses up to that time incurred. Consequently, where a person who has been summoned for the poor rate has paid the rate, but not the costs, the justices, on the summons coming before them, can refuse to issue a distress warrant for the costs alone.—*R. v. BAKER, Ex p. GUILDFORD OVERSEERS* (1909), 100 L. T. 522; 73 J. P. 166; 7 L. G. R. 422; 22 Cox. C. C. 77; Konst. & W. Rat. App. 132, D. C.

1469. — To issue warrant for costs alone.—*R. v. BAKER, Ex p. GUILDFORD OVERSEERS*, No. 1468, *ante*.

1470. Expenses—Of distress & sale—Reasonableness a question for jury.—*MOYSE v. COCKSEGE* (1749), Barnes, 459; Willes, 636; 94 E. R. 1003.

Annotation:—*Apprvd.* *Headland v. Coster*, [1905] 1 K. B. 219.

(b) Distress for Less than £20.

See Distress (Costs) Act, 1817 (c. 93), s. 1, sched.; Distress (Costs) Act, 1827 (c. 17), & Distress for Rates Act, 1849 (c. 14), s. 1.

1471. What charges are reasonable—Distress for Rates Act, 1849 (c. 14) s. 1.—(1) The schedule to Distress (Costs) Act, 1817 (c. 93), as applied by Distress (Costs) Act, 1827 (c. 17), to distress for poor rate, in so far as it prescribes a maximum limit in respect of the costs of sale of the distress, is impliedly repealed by Distress for Rates Act, 1849 (c. 14), s. 1, which gives the justices power to order that the levy shall include "the reasonable charges of taking, keeping & selling of the said distress."

(2) "Reasonable charges" may include a charge for a fee of an auctioneer on the sale.—*HILL v. PANNIFER*, [1904] 1 K. B. 811; 73 L. J. K. B. 556; 90 L. T. 511; 68 J. P. 261; 52 W. R. 588; 20 T. L. R. 324; 48 Sol. Jo. 313; 2 L. G. R. 381, D. C.

Annotations:—*As to* (1) *Overd.* *Headland v. Coster*, [1905] 1 K. B. 219. *Refd.* *R. v. Philbrick, Ex p. Edwards*, [1905] 2 K. B. 108; *Scott v. Denton*, [1907] 1 K. B. 456.

1472. ——The provisions of Distress (Costs) Act, 1817 (c. 93), as applied by Distress (Costs) Act, 1827 (c. 17), to distress for poor rate, still remain in operation, & are not impliedly repealed by Distress for Rates Act, 1849 (c. 14), s. 1; & therefore, in the case of a distress for poor rate in respect of an amount not exceeding £20, it is illegal to make any charge for the expenses of the distress in excess of the scale given in the schedule to Distress (Costs) Act (c. 93), 1817.

Hill v. Pannifer, No. 1471, *ante*, *overd.*—*COSTER v. HEADLAND*, [1906] A. C. 286; 75 L. J. K. B. 483; 94 L. T. 589; 70 J. P. 249; 22 T. L. R. 441; 4 L. G. R. 589, H. L.; *affg.* S. C. *sub nom.* *HEADLAND v. COSTER*, [1905] 1 K. B. 219, C. A.

Annotations:—*Consd.* *R. v. Philbrick, Ex p. Edwards*,

[1905] 2 K. B. 108. *Expld.* *Scott v. Denton*, [1907] 1 K. B. 456. *Consd.* *Walker v. Retter*, [1911] 1 K. B. 1103. *Refd.* *R. v. London County JJ., Ex p. St. George's, Strand & Westminster Unions Assessment Committee & Westminster City Council* (1907), 97 L. T. 247.

1473. — Not costs of swearing appraiser.—On a distress for poor rates for less than £20, a broker is not entitled to charge for a sum paid to a constable for swearing the appraiser.—*SMITH v. PARROTT* (1833), 3 L. J. M. C. 25.

1474. — Auctioneer's sale fee.—*HILL v. PANNIFER*, No. 1471, *ante*.

1475. — "Keeping possession"—By constable.—*SCOTT v. DENTON*, No. 933, *ante*.

1476. Distress levied by mistake—Only reasonable charges taken—Liability of distrainor for penalty.—Resp. being charged with a warrant of distress to enforce the amount of a church rate under £10 from applt., levied on his goods & sold them by private contract: but afterwards, *bonâ fide* thinking this course erroneous, he induced the purchaser to rescind the contract, & then sold the goods by auction, after appraisalment, etc. He retained, *inter alia*, the amount paid for appraisalment, under 6d. in the pound, & tendered the overplus to applt.:—*Held*: resp. was not liable to be convicted under Distress (Costs) Act, 1817 (c. 93), s. 2, for that, though he had been mistaken, he had acted *bonâ fide*, & had not taken other or greater charges than were allowed by the sched., nor charged for what was not really done.—*NOTT v. BOUND* (1866), L. R. 1 Q. B. 405; 14 L. T. 330; 30 J. P. 564.

Annotation:—*Appld.* *R. v. Philbrick, Ex p. Edwards*, [1905] 2 K. B. 108.

1477. Recovery of excessive charges—Action in county court.—Where a bailiff in distraining for a poor rate has retained out of the amount realised by the sale of the distress an unreasonable charge for the taking, keeping & selling of the distress, the remedy of the person aggrieved is not confined to an application to justices for an order under Distress (Costs) Act, 1817 (c. 93), s. 2. The county ct. has jurisdiction to try an action in which repayment is claimed of so much of the charge as is unreasonable.—*R. v. PHILBRICK, Ex p. EDWARDS*, [1905] 2 K. B. 108; 92 L. T. 571; 69 J. P. 221; 53 W. R. 527; 49 Sol. Jo. 461; 3 L. G. R. 679; *sub nom.* *R. v. BRIDPORT COUNTY COURT JUDGE, Ex p. EDWARDS*, 74 L. J. K. B. 164, D. C.

B. Damages.

See Poor Relief Act, 1601 (c. 2).

1478. Treble damages—How assessed—Action for trespass.—*OKELEY v. SALTER*, No. 1463, *ante*.

1479. — In replevin.—In replevin on a distress for a poor rate under Poor Relief Act, 1601 (c. 2), the treble damages given to deft. by sect. 19, are, thrice the amount of the damages found by the jury. The ct. refused to stay the proceedings on a judgment of *non pros.* in such an action, on payment of the single amount of the rate, thrice the charges of the levy, & the costs.—*NEWMAN v. BERNARD* (1833), 10 Bing. 274; 3 Moo. & S. 748; 2 Nev. & M. M. C. 350; 131 E. R. 909; *sub nom.* *SKINGLEY v. BARNARD*, 3 L. J. M. C. 19.

1480. Omission of jury to assess—Writ of inquiry.—The omission of the jury to inquire of damages on a non-suit in replevin may be supplied by a writ of inquiry.—*HARCOURT v. WEEKS* (1695), 5 Mod. Rep. 77; Holt, K. B. 192; 87 E. R. 529.

1481. ——Upon a nonsuit in replevin for distress for a poor rate, if the jury omit to inquire of damage, that may be supplied by writ afterwards.—*HERBERT v. WATERS* (1695), 1 Salk.

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 5, B.; sub-sect. 6, A. (a) i. & ii.]

205; Carth. 362; Comb. 344; 1 Ld. Raym. 59; 5 Mod. Rep. 118; 12 Mod. Rep. 85; 91 E. R. 183; *sub nom.* HERBERT'S CASE, Holt, K. B. 191; *sub nom.* HERBERT'S CASE, Skin. 595.

Annotations:—Consd. Valentino v. Fawcett (1735), Lee temp. Hard. 138. *Refd.* Phillips v. Jones (1850), 14 Jur. 1065. *Mentd.* Kynaston v. Shrewsbury Corp'n. (1736), 2 Stra. 1051.

1482. ———. ———.]—In replevin if the jury at the trial omit to assess deft.'s damages, a writ of inquiry will issue.—DEWELL v. MARSHALL (1773), 3 Wils. 442; 2 Wm. Bl. 921; 95 E. R. 1146.

SUB-SECT. 6.—ILLEGAL AND EXCESSIVE DISTRESS.

A. Remedies.

(a) For Illegal Distress.

i. Replevin.

See Common Law Procedure Act, 1860 (c. 126), s. 22; County Courts Acts, 1888 (c. 43), 1910, (c. 73), ss. 133, 131.

1483. **Replevy—General rule.**—43 Eliz., c. 2, gives the power of levying poor rates by distress & sale; & sect. 19, by implication gives the power to replevy for goods unlawfully distrained (LORD TENTERDEN, C.J.).—SABOURIN v. MARSHALL (1832), 3 B. & Ad. 440; 110 E. R. 158; *sub nom.* LABOURIN v. MARSHALL, 1 L. J. K. B. 151.

Annotation:—Refd. Rhymney Ry. v. Price (1867), 16 L. T.

1484. **Action of replevin—Non-occupation of premises rated—Rate confirmed on appeal.**—A distress for a poor rate for lands not in the occupation of pltf. may be replevied, notwithstanding the sessions, on appeal, had confirmed the rate; the determining that a man may be assessed for what he does not occupy being an excess of jurisdiction.—MILWARD v. CAFFIN (1779), 2 Wm. Bl. 1330; 1 Bott. 6th ed. 290; 96 E. R. 779.

Annotations:—Distd. Wilson v. Weller (1819), 1 Brod. & Bing. 57; Marshall v. Pitman (1833), 9 Bing. 595. *Consd.* Bristol Poor Governors v. Wait (1834), 1 Ad. & El. 264. *Appld.* Rhymney Ry. v. Price (1867), 16 L. T. 394. *Refd.* Morrell v. Martin (1841), 3 Man. & G. 581; Crease v. Sawle (1842), 11 L. J. M. C. 62; Skingley v. Surridge (1843), 11 M. & W. 503; R. v. Bradshaw (1860), 2 E. & E. 836; Manchester Overseers v. Headlam (1888), 21 Q. B. D. 96. *Mentd.* Bute v. Grindall (1793), 2 Hy. Bl. 265; Harper v. Carr (1797), 7 Term Rep. 270; Fletcher v. Wilkins (1805), 6 East, 283; Groome v. Forrester (1816), 5 M. & S. 314; Acland v. Buller (1848), 18 L. J. Ex. 51; Newbould v. Colman (1850), 16 L. T. O. S. 488; Metropolitan Board of Works v. Vauxhall Bridge Co. (1857), 7 E. & B. 964; Luton L. B. of Health v. Davis (1860), 2 E. & E. 678; Pedley v. Davis (1861), 10 C. B. N. S. 492; Freeman v. Read (1863), 4 B. & S. 174; R. v. Twopeny, etc. (Kent J.J.) & Twenty-four Ratepayers of Milton next Sittingbourne (1867), 17 L. T. 266; R. v. McCann (1868), 9 B. & S. 33; R. v. West Riding of Yorkshire J.J. (1876), 45 L. J. M. C. 97; R. v. Hannam (1886), 34 W. R. 355; Barwick v. S. E. & C. Ry., [1921] 1 K. B. 187.

1485. ———. ———.]—HURRELL v. WINK, No. 1424, *ante*.

1486. ———. ———.]—BRISTOL POOR GOVERNORS v. WAIT, No. 1438, *ante*.

1487. ———. ———.]—Pltfs., a railway co., were the owners of some stables situate within the fence of the station, to which access was obtained

through two gateways from the public roads. By the permission of pltfs., the stables were used by coal-owners, under agreements. Pltfs. had not in fact exercised any control over or used any of the stables during the currency of the agreements; & none of the bye-laws had any application to the stables. Pltfs. having been rated to the poor rate in respect of the stables:—*Held*: pltfs. were rightly rated as occupiers: for that, on the true construction of the agreement, looking at the situation of the stables, it was the intention of pltfs. to retain control over the stables, & not to part with the exclusive occupation to the coal-owners.—LONDON & NORTH WESTERN RY. CO. v. BUCKMASTER (1875), L. R. 10 Q. B. 444; 44 L. J. M. C. 180; 33 L. T. 329; 39 J. P. 692; 24 W. R. 16, Ex. Ch.

Annotations:—Appld. Rochdale Canal Co. v. Brewster, [1894] 2 Q. B. 852. *Refd.* Cory v. Bristow (1875), L. R. 10 C. P. 504; Smith v. Lambeth Assmt. Com. (1882), 10 Q. B. D. 327; Manchester Overseers v. Headlam (1888), 21 Q. B. D. 96; Holywell Union & Halkyn Parish v. Halkyn Drainage Co., [1895] A. C. 117; R. v. Bagshawe, etc., J.J. (1896), 75 L. T. 513; Vernon v. Castle (1922), 127 L. T. 748. *Mentd.* Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424; Martin v. West Derby Union Assmt. Com. (1883), 52 L. J. M. C. 66; M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdns. (1896), 60 J. P. 504; Percy v. Hall (1903), 88 L. T. 830; Mitchell v. Worksop Union Assmt. Com. (1904), 92 L. T. 62; Young v. Liverpool Assmt. Com., [1911] 2 K. B. 195; Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com. (1923), 21 L. G. R. 511.

1488. ———. **Rate not published—Warrant for legal & illegal rates.**—SIBBALD v. RODERICK, No. 1436, *ante*.

1489. ———. **Objection to assessment.**—Where a party having no stock in trade is rated as an inhabitant of a parish, his remedy is by appeal to the quarter sessions. Replevin does not lie for a distress under such a rate.—MARSHALL v. PITMAN (1833), 9 Bing. 595; 2 Moo. & S. 745; 1 Nev. & M. M. C. 270; 2 L. J. M. C. 33; 131 E. R. 737.

Annotations:—Consd. Bristol Poor Governors v. Wait (1834), 1 Ad. & El. 264. *Distd.* Rhymney Ry. v. Price (1867), 16 L. T. 394. *Refd.* Birmingham Churchwardens & Overseers v. Shaw (1849), 10 Q. B. 868; R. v. Bradshaw (1860), 2 E. & E. 836; Mersey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board (1865), 20 C. B. N. S. 56. *Mentd.* Le Feuvre v. Miller (1818), 8 E. & B. 321; R. v. Cooper (1854), 18 Jur. 899; Pedley v. Davis & Shipstone (1861), 26 J. P. 343; Baglan Bay Tin Plate Co. v. John (1895), 72 L. T. 805.

1490. ———. **Good & bad warrants—Joint distress.**—BRISTOL POOR GOVERNORS v. WAIT, No. 1438, *ante*.

1491. ———. **Exemption from rates—Occupation not beneficial.**—Where property has been rated to the poor rate, & it has been decided that such property is exempted by reason of the occupation not being beneficial, the party so rated cannot maintain an action of replevin for a levy made to enforce such rate, but he must seek his remedy by an appeal to the quarter sessions.—MERSEY DOCKS & HARBOUR BOARD v. CAMERON (1861), 9 C. B. N. S. 812; 4 L. T. 53; 25 J. P. 391; 9 W. R. 484; 142 E. R. 319; *sub nom.* MERSEY DOCKS & HARBOUR BOARD v. JONES, SAME v. CAMERON, 30 L. J. M. C. 185; *on appeal*, *sub nom.* MERSEY DOCKS v. CAMERON, JONES v. MERSEY DOCKS (1865), 11 H. L. Cas. 443, H. L.

Annotations:—Mentd. Secretary of State for India v. St. Mary, Lambeth Churchwardens (1865), 29 J. P. 292;

purposes.—HAACKE v. MARR (1859), 8 C. P. 441.—CAN.

d. ———. **Conditions precedent—When distress partly legal.**—A collector having legal authority for the collection of three sums, being the rates for three specific years due for taxes, distrained by his bailiff for the amount of them with other sums not properly collectable. Upon replevin:—*Held*:

PART III. SECT. 1, SUB-SECT. 6.—A. (a) i.

b. **Action of replevin—School rates—Whether notice of action necessary.**—Replevin may be brought upon a distress for school rates, & notice of action is not necessary.—APPLEGARTH v. GRAHAM (1858), 7 C. P. 171.—CAN.

c. ———. **Conditions requisite to support distress.**—A party avowing

for distress in the levying of a school rate, the bye-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request to have been made or such concurrence or consent obtained. Upon such avowry the vowant must set forth the conditions precedent required by law to be complied with before the passing of a bye-law to levy a rate for school

Severn Navigation Comrs. v. Tewkesbury Churchwardens (1865), 29 J. P. 823; Leith Harbour & Docks Comrs. v. Poor Inspector (1866), L. R. 1 Sc. & Div. 17; Mersey Docks Trustees v. Gibbs (1866), L. R. 1 H. L. 93; Colchester v. Kewney (1867), 36 L. J. Ex. 172; Lancashire JJ. v. Cheetham (1867), L. R. 3 Q. B. 14; Lincoln Corp'n. v. Holmes Common (1867), L. R. 2 Q. B. 482; R. v. St. Martin's, Leicester, R. v. Castle View, Leicester (1867), L. R. 2 Q. B. 493; R. v. Sherford (1867), L. R. 2 Q. B. 503; Greig v. Edinburgh University (1868), L. R. 1 Sc. & Div. 348; Londonderry Union Grdns. v. Londonderry Bridge Comrs. (1868), 19 L. T. 132; R. v. McCann (1868), L. R. 3 Q. B. 677; R. v. Metropolitan Board of Works (1868), 9 B. & S. 937; R. v. Oldham Corp'n. (1868), L. R. 3 Q. B. 474; R. v. Rhymney Ry. (1869), L. R. 4 Q. B. 276; A.-G. v. Dakin (1870), L. R. 4 H. L. 338; Magee College Trustees v. Valuation Comrs. (1870), 19 W. R. 328; Metropolitan Board of Works v. West Ham (1870), L. R. 6 Q. B. 193; A.-G. v. Black (1871), L. R. 6 Exch. 308; Morgan v. Crawshay (1871), L. R. 5 H. L. 304; R. v. Abney Park Cemetery Co. (1873), 42 L. J. M. C. 124; R. v. Postmaster-General (1873), 28 L. T. 337; R. v. West Derby (1875), L. R. 10 Q. B. 283; St. Thomas' Hospital v. Stratton (1875), L. R. 7 H. L. 477; Essenden Corp'n. v. Blackwood (1877), 2 App. Cas. 574; Hare v. Putney Overseers (1881), 7 Q. B. D. 223; *Re* Leslie, R. v. Curzon (1882), 46 L. T. 159; Coomber v. Berks JJ. (1883), 9 App. Cas. 61; Hicks v. Dunstable Overseers (1883), 48 J. P. 326; Martin v. West Derby Assmt. Com. (1883), 11 Q. B. D. 145; Mersey Docks v. Lucas (1883), 8 App. Cas. 891; Yates v. Chorlton-upon-Medlock Union, Almond v. Chorlton-upon-Medlock Union (1883), 48 L. T. 872; Mersey Docks & Harbour Board v. Lancillian Overseers (1884), 14 Q. B. D. 770; West Bromwich School Board v. West Bromwich Overseers (1884), 13 Q. B. D. 929; Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com. (1885), 16 Q. B. D. 585; Owens College v. Chorlton-upon-Medlock Overseers (1886), 55 L. T. 737; Dublin Corp'n. v. M'Adam (1887), 2 Tax Cas. 387; Tunnicliffe v. Birkdale Overseers (1888), 20 Q. B. D. 450; Bray v. Lancashire JJ. (1889), 22 Q. B. D. 484; Dillon v. Haverfordwest Corp'n., [1891] 1 Q. B. 575; Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531; Perry v. Eames, Salaman v. Eames, Mercers' Co. v. Eames, [1891] 1 Ch. 658; Showers v. Chelmsford Union Assmt. Com. (1891), 60 L. J. M. C. 55; L. C. C. v. Erith Parish Churchwardens & Dartford Union Assmt. Com., West Ham Parish Churchwardens, etc. v. L. C. C., St. George's Union Assmt. Com. v. L. C. C. [1893] A. C. 562; L. C. C. v. Lambeth Churchwardens, [1896] 2 Q. B. 25; Middlesex County Council v. St. George's Union Assmt. Com., [1897] 1 Q. B. 64; Worcester-shire County Council v. Worcestershire Union Assmt. Com. & St. Nicholas Overseers (1897), 66 L. J. Q. B. 323; Farnham Flint Co. v. Farnham Union (1900), 83 L. T. 660; Mersey Docks & Harbour Board v. Birkenhead Assmt. Com., [1901] A. C. 175; Glamorganshire Canal v. Merthyr Tydfil Union (1902), 1 L. G. R. 31; Oxford University v. Oxford Corp'n. (No. 1) (1902), Ryde & K. Rat. App. 87; Hackney Corp'n. v. Leo Conservancy Board, [1904] 2 K. B. 541; Lewis v. Durham Union (1904), 90 L. T. 383; Mary Clark Home Trustees v. Anderson (1904), 91 L. T. 457; Liverpool Corp'n. v. West Derby Union (1905), 92 L. T. 467; The Bearn, [1906] P. 48; Davies v. Seisdon Union, [1907] 1 K. B. 630; Newport Union v. Stead, Newport Union v. Green, [1907] 2 K. B. 460; Winstanley v. North Manchester Overseers, [1910] A. C. 7; Liverpool Corp'n. v. Chorley Union Assmt. Com., [1913] A. C. 197; City of London Corp'n. v. Associated Newspapers, [1915] A. C. 674; Port of London Authority v. Orsett Union Assmt. Com., [1920] A. C. 273; Roberts v. Poplar Assmt. Com., [1922] 1 K. B. 25.

the three legal distresses were separable from the illegal ones, & until the sums due on them were paid replevin would not lie.—*CORBETT v. JOHNSTON* (1861), 11 C. P. 317.—**CAN.**

e. — — — — ——Pltf. brought an action of replevin for goods seized under a warrant of distress for water rates claimed by the city, & the writ alleged an unjust detention, but contained no allegation of an unlawful taking. Deft. denied the detention, pleaded a second plea, justifying under a distress for water rates:—*Held*: as there was no complaint in the writ of an unlawful taking, & no proof of a demand of the goods by pltf., he could not recover.—*INGLIS v. GREENWOOD* (1881), 2 R. & G. 2.—**CAN.**

PART III. SECT. 1, SUB-SECT. 6.— A. (a) ii.

1. Action for damages — Collector authorised by county council — Liability.—Where a county council issues a

warrant to a rate collector authorising & directing him to levy a rate which is invalid, & the rate collector, in pursuance of the warrant, levies the rate by distress, in such manner that the distress would have been lawful had the rate been valid, the county council, as well as the rate collector, is liable to an action for damages in respect of the illegal seizure.—*O'NEILL v. DROHAN & WATERFORD COUNTY COUNCIL*, [1914] 2 I. R. 41, 495.—**IR.**

g. Action for trespass — Land not the property of person rated.—Deft., a municipal assessor, distrained for taxes assessed on three lots, standing in assessment roll in pltf.'s name. One of these lots was the separate property of pltf.'s wife. This objection was not pointed out to the assessor, although the pltf. claimed that the assessment was too high. The assessor, at pltf.'s request, seized certain cattle in preference to other articles:—*Held*: this did not amount

1492. — After unsuccessful appeal.—Applt., who has unsuccessfully appealed against a poor rate upon the ground that he has no ratable property, may maintain replevin if his goods are afterwards seized under a warrant in satisfaction of such poor rate. Pltfs. appealed against a poor rate, & at the hearing the sessions dismissed the appeal. Subsequently a warrant of distress was granted for the rate, under which the goods of pltfs. were seized, whereupon they brought replevin in the county ct. Upon an objection that no replevin would lie under the circumstances:—*Held*: the action was maintainable.—*RHYMNEY RY. CO. v. PRICE* (1867), 16 L. T. 394; 31 J. P. 391.

ii. Action for Damages.

1493. Action for trespass—Prospective rate.—If a person rated to the poor has any objection to the rate, *e.g.* that it is made for 6 months, he must appeal to the next sessions; & if he do not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate — *DURRANT v. BOYS* (1796), 6 Term Rep. 580; 101 E. R. 714.

Annotations:—*Refd.* *Cortis v. Kent Water-Works Co.* (1827), 7 B. & C. 314; *Weaver v. Price* (1832), 3 B. & Ad. 409.

1494. — Notice of action unnecessary.—Where the goods of A. were seized under two warrants for arrears of a highway rate & also for a poor rate, due from B., who had just before made a *bonâ fide* sale thereof to A., & A. thereupon brought an action of trespass in respect of such seizures against the broker:—*Held*: (1) deft. was entitled to 21 days' notice in respect of the goods seized under Highway Act, 1835 (c. 50), but not so for the goods seized for the poor rate; (2) though the goods were taken at the same time for both rates, & though deft. was entitled to notice in respect of the goods seized under one warrant, he could not call that defect in pltf.'s case in aid, so as to protect the trespass under the other warrant. — *LAMONT v. SOUTHAL* (1839), 5 M. & W. 416; 7 Dowl. 469; 3 J. P. 355; 151 E. R. 176.

Annotation:—*Generally, Mentd.* *Lamont v. Crook* (1810), 6 M. & W. 615.

1495. — Defence to—Defect in plaintiff's claim—Trespass for distress for other cause.—*LAMONT v. SOUTHAL*, No. 1494, *ante*.

1496. — Distress for wrong amount.—Pltf., being the owner of several small tenements, by a rate, valid upon the face of it, was rated at 11s. in respect of them. That sum was demanded of him, & in default of payment a distress warrant was issued for the amount at the instance of defts.

to leave & license, & pltf. was entitled to damages.—*VEDDER v. CHADBEY* (1884), 1 B. C. R. pt. 11, 76.—**CAN.**

h. — — Second levy for same rates—Validity of.—Deft., acting as a constable, levied upon goods of pltf. under a warrant for the collection of municipal rates. The articles were impounded on pltf.'s premises pending the return of the local assessor. Deft., failing to obtain possession of the goods, subsequently levied upon & sold other goods of the pltf. for the same rates. Pltf. brought an action for wrongfully depriving him of certain goods:—*Held*: (1) the burden of showing that the first levy was rendered ineffectual by some act or agency other than his own rested upon deft.; (2) the second levy & the sale made under it being a trespass, the form of action was sufficient; (3) the object of the warrant having been accomplished by the first levy, deft. was not justified in making a second

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 6, A. (a) ii. B. (a).]

In an action for illegal distress it appeared that pltf., instead of being rated at 11s., should have been rated at 10s. 11 $\frac{1}{2}$ d. & a fraction of a farthing:—*Held*: he might have appealed against the rate, but the action was not maintainable.—*BAVIN v. HUTCHINSON* (1862), 31 L. J. M. C. 229; 6 L. T. 504; 10 W. R. 807, Ex. Ch.

1497. Land not in occupation of person rated.]—The overseers of the poor of the parish of B. assessed a railway co. to a poor rate in respect of water pipes laid along a public highway by a water co. to supply the railway co.'s station with water, & distrained to recover the amount of the rate. Whereupon the railway co. proceeded against the overseers by action of trespass, & obtained a verdict against them, damages £35:—*Held*: (1) the railway co. were not the owners of the land in which the pipes were laid, & although they possessed ratable property within the parish, a rate assessed upon them in respect of land not in their occupation, cannot be recovered by distress; (2) the overseers were liable to action of trespass for a wrongful distraint, & the remedy of the co. was not limited to an appeal to sessions.—*LONDON & NORTH WESTERN RY. CO. v. GILES* (1869), 33 J. P. 776.

1498. Illegal distress by bailiff—Ratification by local authority—What amounts to.]—Pltf.'s goods were illegally seized under a warrant of distress handed by the vestry to a bailiff. Pltf. wrote to the vestry seeking reparation. The vestry replied stating that their solrs. would accept service of process:—*Held*: the reply of the vestry indicated that they stood by the act of the bailiff, & therefore there was evidence of ratification by defts. of the illegal distress which entitled pltf. to damages.—*CARTER v. ST. MARY ABBOTS, KENSINGTON VESTRY* (1900), 61 J. P. 548, C. A.

n:—*Apld.* *Becker v. Riebold* (1913), 30 T. L. R.

For

1499. Under Statute of Marlbridge, 1267 (c. 4).]—*HUTCHINS v. WHITAKER*, No. 1304, *ante*.

1500. Action against overseers—Whether demand of warrant necessary—Constables Protection Act, 1750 (c. 44), s. 6.]—Pltf. declared in case that defts. wrongfully & maliciously took his goods of the value of £700 as a distress for £141, alleged & pretended to be due for a poor rate, whereby they levied an unreasonable & excessive distress for the £141; & it was proved that defts., overseers, having a regular distress warrant for the rate, distrained cattle, etc., of pltf. to the value of more than £600:—*Held*: (1) pltf. was not bound to demand a copy of the warrant pursuant to the above sect. before commencing his action, as the overseers had not acted in obedience to the warrant & no action would have lain against the justices; (2) it was not a question to be left to the jury on these facts whether or not defts. acted maliciously;

levy without making reasonable efforts to regain possession of the goods.—*WHITFORD v. MILLS* (1894), 27 N. S. R. 223.—*CAN.*

k. — *Notice of Sale—Ten clear days necessary.]—*The provision in Assessment Act, s. 88, directing that the collector of taxes shall give at least ten days' public notice of the time & place of sale of goods for delinquent taxes, means "ten clear days," & the party making a distress on less notice becomes a trespasser *ab initio*. The notice of sale being bad, defts. in an action for illegal distress were trespassers *ab initio*, & the measure of

damages was the value of the goods, with additional moderate damages for the bare trespass.—*CANADIAN CANING CO. v. FAGAN* (1905), 12 B. C. R. 23; 3 W. L. R. 38.—*CAN.*

PART III. SECT. 1, SUB-SECT. 6.— A. (b).

*1. Injunction—Distress bad as to excess.]—*Where a village levied a tax at a rate in excess of what was proper under the Village Act & distrained for non-payment, an injunction was granted restraining the village from distraining for an amount more than sufficient to cover taxes payable at the

(3) the declaration, though it did not expressly admit any poor rate to have been due, on which ground it was objected that the action ought to have been trespass, was sufficient, at least after verdict.—*STURCH v. CLARKE* (1832), 4 B. & Ad. 113; 1 Nev. & M. K. B. 671; 1 Nev. & M. M. C. 473; 2 L. J. K. B. 9, M. C. 29; 110 E. R. 398.

Annotation:—*As to* (3) *Refd.* *Lear v. Caldecott* (1843), 4 Q. B. 123.

1501. Recovery of overplus—Necessity for demand before action.]—Pltf.'s goods were distrained for poor rates, & upon the sale produced £4 7s. more than was necessary to satisfy the levy. Defts. tendered to him £3 14s., which he refused to accept, saying that it was too late, but did not then or at any other time demand a settlement of the account & the payment of the overplus:—*Held*: 27 Geo. 2 (c. 20), prevented pltf. from recovering without making a demand before the commencement of the action, & the tender did not make such demand necessary.—*SIMPSON v. ROUTH* (1824), 2 B. & C. 682; 4 Dow. & Ry. K. B. 181; 2 Dow. & Ry. M. C. 193; 2 L. J. O. S. K. B. 163; 107 E. R. 536.

Annotations:—*Distd.* *Charrington v. Johnson* (1845), 4 L. T. O. S. 398. *Apld.* *Davis v. Cary* (1850), 15 Q. B. 418; *Ameer-oon-Nissa v. Moorad-oon-Nissa* (1855), 6 Moo. Ind. App. 211. *Mentd.* *Long v. Greville* (1824), 4 Dow. & Ry. K. B. 632.

1502. — After money paid over by overseer.]—In order to prevent a distress for the full amount of a rate, & to limit the right of an overseer to distrain to the sum assessed in the last effective rate, according to 41 Geo. 3 (c. 23), s. 2, the party rated, & intending to appeal, must give a regular notice of appeal before the levy. If he neglect to give such notice, & pay the whole amount, under a distress, to the overseer, who pays it over to a guardian of the poor, pursuant to 22 Geo. 3 (c. 83), s. 8, & on appeal, the rate is reduced, he cannot recover the excess in an action for money had & received against such overseer.—*PRIESTLEY v. WATSON* (1834), 2 Cr. & M. 691; 3 Nev. & M. M. C. 141; 4 Tyr. 916; 3 L. J. M. C. 113; 149 E. R. 938. *Annotation*:—*Mentd.* *R. v. Kingston-upon-Thames JJ.* (1858), 22 J. P. Jo. 36.

B. Proceedings against Magistrates and Officers. (a) In General.

See Public Authorities Protection Act, 1893 (c. 61).

1503. Magistrate—Warrant illegal.]—Trespass lies against magistrates for granting a warrant to levy poor rates if the party distrained upon has no land in the parish in which the rate was made.—*WEAVER v. PRICE* (1832), 3 B. & Ad. 409; 1 L. J. M. C. 90; 110 E. R. 147.

Annotations:—*Distd.* *Allen v. Sharp* (1848), 2 Exch. 352. *Refd.* *Bristol Poor Governors v. Walt* (1834), 1 Ad. & El. 264; *Morrell v. Martin* (1841), 3 Man. & G. 581; *R. v. Great Yarmouth JJ.* (1850), 4 New Sess. Cas. 313; *Pedley v. Davis & Shipstone* (1861), 26 J. P. 343. *Mentd.* *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768; *R. v. St. Giles & St. George's Bloomsbury Additional & General Income Tax Comrs.*, *Ex p. Hooper* (1915), 31 T. L. R. 565.

proper rate & the costs & expenses incidental thereto. The distress, being merely excessive, was held not wholly void but good as to taxes properly collectable.—*TRADERS TRUST CO. v. KRYDOR VILLAGE* (1920), 3 W. W. R. 345.—*CAN.*

PART III. SECT. 1, SUB-SECT. 6.— B. (a).

*m. Collector—Acting bonâ fide.]—*A. without giving 21 days' notice brought an action of trespass against B. a collector of poor rates, for seizing & selling his goods, and contended that B. had not sufficiently proved his

1504. ———.]—CLARK v. WOODS, No. 1437, *ante*.

1505. ———.]—Sect. 13 of a local Act empowered certain persons to make a rate upon the owners of Stratford Abbey Lands; & sect. 15 empowered a justice, on proof of demand & refusal to pay, to enforce payment by distress warrant; sect. 16 required the warrant to be directed to the collector; sect. 36 gave power of appeal against the rate to any person claiming exemption on the ground that the lands rated were not abbey lands; & by sect. 42 the decision of the quarter sessions on appeal was final. Pltf. having been rated & refusing to pay, D., a justice, issued a distress warrant directed to S., the collector, who executed it. Pltf. sued D. & S. in trespass, & the jury found that the land, in respect of which the rate was made, was not abbey land:—*Held*: (1) pltf. was not bound to appeal to the sessions, but might try the validity of the rate by an action of trespass; (2) D. had acted without jurisdiction, & was liable in such action, & not protected by Justices Protection Act, 1847 (c. 44); (3) S. being the person to whom the warrant was directed, & who was required to execute it, was an officer of the law, & protected by Constables Protection Act, 1750 (c. 44).—PEDLEY v. DAVIS (1861), 10 C. B. N. S. 492; 30 L. J. C. P. 374; 5 L. T. 253; 26 J. P. 313; 8 Jur. N. S. 263; 142 E. R. 544.

1506. ———.]—Previous judgment in replevin—Bar to recovery of damages.]—(1) Pltfs. were summoned before defts., who were justices of the peace, for non-payment of a church rate; they attended, & gave notice to defts. that they disputed the validity of the rate, but defts. decided that the dispute was not *bonâ fide*, & therefore made an order & issued a distress warrant, under which the goods of pltfs. were seized. Upon the trial of an action brought against defts. in respect of such seizure, the judge directed the jury, that if they believed that pltfs. *bonâ fide* intended to dispute, & did dispute, the validity of the rate in question, & gave notice thereof to defts., who, notwithstanding, determined to proceed, pltfs. were entitled to recover; but if the jury thought that pltfs.' assertion that they disputed the validity of the rate was a mere pretence for the purpose of evading payment & ousting the jurisdiction of the justices, they should find a verdict for defts.:—*Held*: this was a misdirection, inasmuch as the justices would not be liable unless they had acted without reasonable & probable cause in determining that pltfs. did not *bonâ fide* dispute the rate.

(2) After the seizure of the goods, pltfs. brought an action of replevin in the county ct., against the churchwardens at whose instance the warrant of distress was issued, for & in respect of the seizure, & the damages occasioned thereby to pltfs., & recovered damages & costs. Defts. pleaded these facts specially, & also pleaded not guilty:—*Held*: the judgment in the county ct. was a bar to the recovery of damages for the seizure; but, upon the plea of not guilty, pltfs. were entitled to

nominal damages of 1s., unless defts. elected to have the rule for a new trial made absolute on the ground of misdirection.—PEASE v. CHAYTOR (1863), 3 B. & S. 620; 32 L. J. M. C. 121; 8 L. T. 613; 27 J. P. 309; 9 Jur. N. S. 664; 11 W. R. 563; 122 E. R. 233.

Annotations:—As to (1) *Reid*. R. v. Huntsworth (1864), 13 W. R. 7; Polley v. Fordham (No. 2) (1904), 91 L. T. 525. As to (2) *Fold*. Gibbs v. Cruikshank (1873), 28 L. T. 735. *Generally, Mentd.* Bishopswearmouth Churchwardens v. Backhouse (1862), 7 L. T. 438; Colonial Bank of Australasia v. Willan (1874), L. R. 5 P. C. 417; R. v. Woodhouse, [1906] 2 K. B. 501; May v. Mills (1914), 30 T. L. R. 287.

1507. ———.]—Legality of appointment of overseers.]—Seven borough magistrates, including the mayor, assembled to appoint overseers. The mayor drew from his pocket two blank forms, with three seals ready attached, filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to himself, & on their being signed, immediately despatched them by a constable to be served. As soon as the constable had left the room, the four other magistrates, who had not observed the mayor's proceedings, requested him to nominate two other overseers, & upon his refusing to put the question, appointed them without his concurrence. The mayor afterwards caused a distress to be levied on pltf. for refusing to pay a rate made by the overseers appointed by the mayor. Pltf. having sued the mayor in trespass, the jury were directed that they might find for pltf., if they thought the mayor's appointment of overseers to be fraudulent. The jury having found it not fraudulent, the ct. refused a new trial, which was moved for on the ground, that whether the appointment were fraudulent or not, it was void, as being a judicial act done by the minority of the justices assembled, without opportunity of deliberation afforded to the entire body.—PENNEY v. SLADE (1839), 5 Bing. N. C. 319; 1 Arn. 539; 7 Scott, 285; 8 L. J. C. P. 200; 2 J. P. 304; 132 E. R. 1127.

Annotation:—*Mentd.* Lindsay v. Leigh (1848), 12 Jur. 286.

1508. ———.]—Backing warrant.]—CLARK v. WOODS, No. 1437, *ante*.

———.]—See, further, MAGISTRATES; PUBLIC AUTHORITIES.

1509. Vestry—Illegal act of bailiff ratified.]—CARTER v. ST. MARY ABBOTS, KENSINGTON VESTRY, No. 1498, *ante*.

1510. Overseers.—Within Constables Protection Act, 1750 (c. 44).]—The question is only whether the overseers are within the above Act. It never was made a question whether they acted pursuant to their warrant. If they exceeded their warrant there is an end of the statute; for the statute was made to protect those who acted under warrant: not those who acted without. They [the overseers] are certainly within the above Act, & if the doubt had been on the other point, the judge would have called for the justices' warrant. No justice is compelled to grant an illegal warrant; & every legal warrant he is bound to grant. The warrant is the authority under which the overseers act. To extend the benefit of the Statute of James was

authority:—*Held*: B., having believed that he was acting *bonâ fide* in pursuance of the authority of the statute, when he made the distress, was entitled to the protection afforded thereby; and he would have been equally protected, although the distress had not been valid.—MONNELLY v. SAVAGE (1852), 4 Ir. Jur. 318.—IR.

n. ———.]—GOLDIE v. JOHNS (1889), 16 A. R. 129.—CAN.

o. ———.]—Entitled to notice of action.]—A

collector of school rates who commits a trespass while acting under a warrant issued by a competent authority, is entitled to notice of action, & the action should be brought within six months.—SPRY v. MUMBY (1861), 11 C. P. 285.—CAN.

p. ———.]—Unauthorized to collect taxes.]—In an action against a collector & his bailiff for an illegal distress, it was shown that the distress had been made after the return of the roll; & no resolution authorising the collector to continue to collect the

taxes under R. S. O. 1877, c. 180, s. 102, was proved:—*Held*: the distress was illegal; & there was no presumption that the collector had received such authority merely because it was conceded that he acted as collector in directing the levy.—LANGFORD v. KIRKPATRICK (1879), 2 A. R. 513.—CAN.

q. ———.]—Venue of action.]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. 1887, c. 73, & under s. 15 of that

Sect. 1.—Poor rate and sums recoverable as poor rate: Sub-sect. 6, B. (a), (b) & (c); sub-sect. 7. 2.]

the intent of the above Act, & that all officers acting under a justice's warrant were included by it (LORD MANSFIELD, C.J.).—JACKSON'S CASE (1773), Lofft, 249; 98 E. R. 635.

1511. — Illegal act of assistant overseer.]—BAKER v. WICKS, No. 1442, *ante*.

1512. Churchwarden—Within Constables Protection Act, 1750 (c. 44).]—HARPER v. CARR, No. 1390, *ante*.

1513. Collector—Within Constables Protection Act, 1750 (c. 44).]—PEDLEY v. DAVIS, No. 1505, *ante*.

1514. Broker—Whether protected by local Act—Bona fides question for jury.]—In an action of trespass for breaking & entering pltf.'s house & seizing his goods, deft., a broker, justified that he had seized the goods under a warrant against the goods of one, T., & that the local Act under which the warrant issued required that no action should be commenced without a 21 days' notice in writing, & further, that any deft. appearing to have acted under the authority of the Act should be entitled to a verdict. The judge left the question to the jury, whether deft. had acted *bona fide*, & had honestly believed the goods to be the property of T. If not, he was not entitled to the protection of the statute. The jury found in the negative. On motion to set aside the verdict:—*Held*: the case was properly left to the jury; an officer is not entitled to the protection of the statute unless he himself believed he was acting under it; it is for the jury to decide as to his *bona fides*.—TARLINGTON v. SPENCER (1859), 32 L. T. O. S. 244; *sub nom.* TARLINGTON v. STAREY, 23 J. P. 56; 7 W. R. 188.

Constable.]—See Sub-sect. 6, B. (b), *post*.

(b) *Protection under Constables Protection Act, 1750 (c. 44), s. 6.*

See Constables Protection Act, 1750 (c. 44), ss. 6, 8, & Public Authorities Protection Act, 1893 (c. 61).

1515. When constable protected—Not in replevin action.]—FLETCHER v. WILKINS, No. 1109, *ante*.

1516. — Assisting overseer in levying distress.]—(1) A constable who assists a parish officer in levying a distress for poor rates, under a warrant of magistrates directed to such officer, is not liable to an action of trespass, although a demand was duly made on such constable in pursuance of Constables Protection Act, 1750 (c. 44), s. 6.

(2) The distress having been made on June 6, & the action not commenced till Dec. 6, following:—*Qu.*: whether it was brought within six calendar months after the act committed as required by sect. 8 of that statute.

(3) Deft. does not require the protection of Constables Protection Act, 1750 (c. 44), for pltf. had no cause of action against him as a constable, as he merely assisted a parish officer to whom a warrant of magistrates was directed, & who acted in obedience to it by levying for poor rates by way of distress, in pursuance of the terms of such warrant (RICHARDSON, J.).—CLARKE v. DAVEY (1820), 4 Moore, C. P. 465.

Annotation:—As to (2) *Reid*. Webb v. Fairmaner (1838), 6 Dowl. 549.

Act, & s. 4 of R. S. O., 1887, c. 55, a county ct. action against him for replevin of goods seized by him & for damages for malicious seizure, must be brought in the county where the seizure & alleged trespass took place.—HOWARD v. HERRINGTON (1893), 20 A. R. 175.—CAN.

PART III. SECT. 1, SUB-SECT. 6.— B. (b).

r. When constable protected—Re-
—Replevin will not lie against a constable for property seized by him under a warrant of distress for the non-payment of school rates,

1517. Illegal distress—Whether demand of copy of warrant necessary.]—Deft., a constable, seized, under a warrant of distress for poor rates, goods that were already in the custody of the landlord of the premises under a distress for rent:—*Held*: he was not within the protection of Constables Protection Act, 1750 (c. 44), s. 6, & consequently, a demand of the copy of the warrant was not necessary to enable the landlord to maintain trespass.—KAY v. GROVER (1831), 7 Bing. 312; 5 Moo. & P. 140; 1 Nev. & M. M. C. 231; 9 L. J. O. S. C. P. 112; 131 E. R. 120.

—CLARK v. WOODS, No. 1437, *ante*.

1519. Condition precedent to action—Whether demand of copy of warrant necessary—Goods of lodger seized.]—PEPPERCORN v. HOFMAN, No. 1386, *ante*.

1520. — Illegal entry of premises.]—Where defts., in order to levy a poor rate under a warrant of distress granted by two magistrates, broke & entered the house & broke the windows, etc.:—*Held*: they might be sued in trespass without a previous demand of the perusal & copy of the warrant according to Constables Protection Act, 1750 (c. 44), s. 6.—BELL v. OAKLEY (1814), 2 M. & S. 259; 105 E. R. 378.

Annotations:—*Distd.* Theobald v. Crichmore (1818), 1 B. & Ald. 227. *Apld.* Bell v. Robinson (1824), 2 L. J. O. S. K. B. 192. *Consd.* Whitley v. Roberts (1825), M'Cle. & Yo. 107. *Refd.* Smith v. Wiltshire (1821), 5 Moore, C. P. 322; Kay v. Grover (1831), 7 Bing. 312; Sturch v. Clarke (1832), 4 B. & Ad. 113.

1521. — Seizure of assigned goods.]—The occupier of a farm, upon the coming in of two executions & a distress for rent, notoriously assigned all his property, except a lease, to two persons in trust, to satisfy those executions & the distress, & to pay his creditors ratably, & all the rates & taxes, & in trust to pay the surplus, if any, to himself, whereupon the sheriff left his premises. The overseer & constable afterwards distrained for poor rates:—*Held*: the assignment was good in law, & in an action against the overseer & constable no demand of the warrant under Constables Protection Act, 1750 (c. 44), was necessary.—BELL v. ROBINSON (1824), 2 L. J. O. S. K. B. 192.

1522. — Excessive distress.]—STURCH v. CLARKE, No. 1500, *ante*.

1523. — Summoning of landlord—Necessity for proof of.]—PEPPERCORN v. HOFMAN, No. 1386, *ante*.

1524. Notice of action.]—CLARKE v. DAVEY, No. 1516, *ante*.

1525. Limitation of action.]—CLARKE v. DAVEY, No. 1516, *ante*.

1526. Demand for copy of warrant—Sufficiency of.]—CLARK v. WOODS, No. 1437, *ante*.

1527. — Plaintiff possessing other copy—Constable not excused from complying.]—CLARK v. WOODS, No. 1437, *ante*.

(c) *Protection under Public Authorities Protection Act, 1893 (c. 61).*

See PUBLIC AUTHORITIES.

SUB-SECT. 7.—IN BANKRUPTCY.

Effect of failure to prove for arrears of rate.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., p. 320, Nos. 3001, 3002.

under Revised Statutes, c. 60, s. 10, although such warrant be defective in not reciting that the collector had made the oath required to be made previous to the issue of such warrant, which oath, however, had in fact been made.—MCGREGOR v. PATTERSON (1862), 1 Old. 211.—CAN.

SECT. 2.—HIGHWAY RATE.

See Highway Act, 1835 (c. 50), s. 34.

1528. Action of replevin—Maintainable against constable—Levying distress under warrant.]—Pltf. having brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under Highway Act, 1773 (c. 78), s. 47, on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road, the ct. refused to set aside the proceedings.—*FENTON v. BOYLE* (1807), 2 Bos. & P. N. R. 399; 127 E. R. 683.

Annotation:—Folld. George v. Chambers (1843), 2 Dowl. N. S. 783.

1529. ————.]—Replevin by A. against B. for taking the goods of A. Plea, that after the passing of Highway Act, 1835 (c. 50), two justices made their warrant in writing, directed to the surveyors of the highways, waywardens, of H., & to the constable of that parish, reciting that by a certain rate, A., occupier of lands in H., was duly assessed to the repair of the highways of the said parish in a certain sum, which had been demanded, but that A. had refused to pay the same, & that he had been summoned & had not appeared, whereupon the waywardens were commanded to levy the amount by distress & sale of his goods. The plea then stated that deft. was constable, & that C. & D. were surveyors, waywardens of H., & that the warrant being delivered to C. & D. & to B., the latter, in aid of C. & D. & by virtue of the warrant, seized the goods of A.:—*Held*: the plea was neither in form nor in substance, a plea under the statute, & it was not a good plea at common law, inasmuch as it did not allege that the justices had jurisdiction over the subject-matter in respect of which the warrant was granted.—*MORRELL v. MARTIN* (1841), 3 Man. & G. 581; 4 Scott, N. R. 300; 11 L. J. M. C. 22; 133 E. R. 1273; *sub nom. MORELL v. MARTIN*, 6 J. P. 26.

Annotations:—Consd. R. v. Davies (1861), 8 Cox, C. C. 486. *Refd. George v. Chambers* (1843), 11 M. & W. 149; *Wilkinson v. Gray* (1844), 2 L. T. O. S. 348.

1530. Issue of warrant—Discretion of magistrate.]—The ct. will not compel a magistrate, by *mandamus*, to issue a distress warrant for a parish highway rate, under Highway Act, 1773 (c. 78), ss. 45, 67, made upon the occupier of lands within his district, if it appear that, in the magistrate's belief, & in fact, there is a legal doubt as to the occupier being liable to contribute to the repairs of the parish highways, & that the magistrate is likely to be sued if the warrant be granted & acted upon, & this, although the occupier has not appealed against the rate.—*R. v. GREAME* (1835), 2 Ad. & El. 615; 111 E. R. 237.

1531. ————.]—On motion for a *mandamus* to justices to grant distress warrant for levying a highway rate, it appeared that the rate was contested, on the following grounds:—(1) The lands in respect of which payment had been refused, were part of a district inclosed 35 years ago by Act of Parliament, having none but private roads, which were repaired by the landlords & never having been assessed to the highway rate; (2) no statute duty had been called for, in respect of these lands, before making the present rate; (3) the special session at which the order for making such rate was signed, had been convened without notice from the high constable; (4) the order was signed by two persons not stating themselves to be justices; (5) the rate was not dated. The occupier against whom the warrant was applied for had not appealed to the sessions, but he threatened the justices with an action if they granted

a warrant, & the opposite party made no express offer to indemnify them:—*Held*: a *mandamus* ought not to go, it being doubtful whether, upon some objection among those taken, the justices might not be liable to an action if they granted the warrant.—*R. v. MIREHOUSE* (1835), 2 Ad. & El. 632; 111 E. R. 244.

Annotation:—Refd. R. v. Browne (1849), 13 Q. B. 654.

1532. ———— Mandamus.]—After a highway rate for a parish has been regularly made & assessed, & an occupier of premises included in such rate has neglected to appeal within the time allowed by the statute for that purpose, he cannot afterwards successfully set up a claim to exemption from that particular rate; & under Justices Protection Act, 1848 (c. 44), s. 5, the ct. will grant a rule to compel the issuing of a distress warrant for the amount, where the justices applied to for that purpose refuse to issue their warrant after hearing the grounds of such exemption, even though the claim of exemption appear to be a substantial one.—*BLETCHINGDON SURVEYORS OF HIGHWAYS v. PEYTON* (1849), 6 Dow. & L. 288; *sub nom. R. v. OXFORDSHIRE JJ.*, 18 L. J. M. C. 222; 14 Jur. 575; 13 J. P. Jo. 361, 445; *sub nom. R. v. PEYTON*, 14 L. T. O. S. 66.

1533. ———— Irregularity in allowance of rate—Jurisdiction of magistrates.]—The signature of the surveyor, & allowance by justices, was by inadvertence inserted in the middle of a highway rate, instead of at the end:—*Held*: this was no allowance of the rate in respect of matters which followed such signature & allowance, & therefore the justices had no jurisdiction to enforce the rate by issuing a distress warrant for the amount of an assessment which appeared in a part of the rate subsequent to the signature & allowance.—*Re NORTH STAFFORDSHIRE JJ.* (1853), 23 L. J. M. C. 17; 18 J. P. 297; *sub nom. Ex p. SHELTON, STAFFORDSHIRE SURVEYOR OF HIGHWAYS*, 22 L. T. O. S. 136; 17 Jur. 1165.

1534. ———— Claim of exemption—Appeal not made.]—*BLETCHINGDON SURVEYORS OF HIGHWAYS v. PEYTON*, No. 1532, *ante*.

1535. ———— Costs of appeal against rate.]—Upon an application to justices to enforce payment of a highway rate pursuant to Quarter Sessions Act, 1849 (c. 45), s. 5, & Summary Jurisdiction Act, 1848 (c. 43), s. 27, notice of appeal was given under Highway Act, 1835 (c. 50), s. 105, & recognisances duly entered into. The appeal was entered, & upon the hearing the rate was confirmed, subject to a case; the clerk of the peace made a note in the minute book of the sessions, "Costs agreed to be taxed out of ct." The order of the sessions was afterwards confirmed, & the costs were at a subsequent time taxed & allowed at £33 7s. Nothing was said at the sessions about the costs; but, by a rule of sessions made in 1843, it was ordered that "the costs of every appeal tried should be taxed by the clerk of the peace during the same sessions, & be paid by the party against whom the ct. should decide such appeal, unless the ct. should then make any order to the contrary":—*Held*: the magistrates were justified in granting a distress warrant upon the certificate of the clerk of the peace that the costs had been demanded & were unpaid, although there was no express order of sessions for the payment of costs, such order being tacitly supplied by the rule of practice known to both parties; & it was not competent to applt. under the circumstances to object that the taxation had taken place out of sessions, that having been brought about by his own consent.—*FREEMAN v. READ* (1860), 9 C. B. N. S. 301; 30 L. J. M. C. 123;

Sect. 2.—Highway rate. Sect. 3.]

142 E. R. 118; *sub nom.* READ v. FREEMAN, 3 L. T. 369; 25 J. P. 87; 7 Jur. N. S. 546; *sub nom.* REED v. FREEMAN, 9 W. R. 141.

*Annotation:—*Reid. Southampton Gaslight & Coke Co. v. Southampton Grdns. (1877), 36 L. T. 548.

1536. Liability of official—Refusal to hand over surplus—Action for money had & received—Notice of action.]—Where a collector of highway rates refuses to hand over the surplus arising from a distress on demand, he is liable to an action at common law for money had & received & no notice of action need be given under 5 & 6 Vict. c. 50, s. 9. In such a case the demand ought to be personally made by pltf. or an agent having written authority to receive the surplus.—CHARRINGTON v. JOHNSON (1845), 13 M. & W. 856; 14 L. J. Ex. 299; 4 L. T. O. S. 398; 9 J. P. 279.

1537. ——— After demand made—Requisites of demand.]—CHARRINGTON v. JOHNSON, No. 1536, *ante*.

1538. ——— Levying illegal distress.]—In an action against the surveyor of highways of the parish of S. for distraining on the goods of pltf. for arrears of a highway rate, it appeared that pltf. was occupier of one of two farms in the tything of W. in that parish. The occupiers in W. had never paid highway rate for the parish of S. until 1857, though they had been rated to the poor rates of the parish, & they had always done the necessary repairs to the roads in W. Among other documents to prove that W. was a distinct tything, a parliamentary survey made in the time of the Commonwealth was admitted in evidence. In 1857 a highway rate, in which pltf. was assessed, was made for the parish, & affirmed, first by the quarter sessions, & afterwards by this ct. on a case stated by the sessions. In July, 1851, the rate in question was made, & pltf. was summoned before justices, who issued their warrant of distress in obedience to a rule of this ct. Notice of action was given to deft. on Apr. 28, 1862, & the action was commenced on May 29, following:—*Held*: (1) the action lay; (2) the parliamentary survey was admissible; (3) there was sufficient evidence of a legal exemption of the tything of W. from liability to contribute to the repair of the highways in the parish of S.; (4) the notice of action was given in due time.—FREEMAN v. READ (1863), 4 B. & S. 174; 2 New Rep. 320; 32 L. J. M. C. 226; 8 L. T. 458; 10 Jur. N. S. 149; 11 W. R. 802; 122 E. R. 425.

*Annotations:—*As to (2) *Reid*. R. v. Berger, [1894] 1 Q. B. 823. As to (3) *Consd.* R. v. Rollett (1875), L. R. 10 Q. B. 169; Ferrand v. Bingley U. C., [1903] 2 K. B. 445. *Reid*. Dawson v. Willoughby Surveyor of Highways (1864), 5 B. & S. 920; Heath v. Weaverham Township Overseers, etc., [1894] 2 Q. B. 108. As to (4) *Reid*. Quartermaine v. Selby (1889), 5 T. L. R. 223.

1539. Notice of appeal.]—The notice of appeal required by Highways Act, 1772 (c. 78), s. 80, against a distress for nonpayment of a highway rate, may be within six days after the levy, & need not be within six days after the granting of the warrant of distress. The notice of appeal need not disclose the grounds upon which applt. objects to the regularity of the distress.—R. v. DEVON JJ. (1813), 1 M. & S. 411; 105 E. R. 154.

*Annotation:—*Expld. R. v. London JJ., [1899] 1 Q. B. 532.

See, now, Summary Jurisdiction Acts, 1879 (c. 49), & 1884 (c. 43).

SECT. 3.—GENERAL DISTRICT RATE.

See, also, RATES & RATING; Public Health Act, 1875 (c. 55), ss. 209, 212, 231.

1540. Enforcement by warrant—Against overseers.]—Where the proceedings under Public Health Act, 1848 (c. 63), are regular, the local inspectors are entitled to a distress warrant from the justices against the overseers for the payment of money required for carrying out in the district the provisions of the Act. The ct. will interfere by rule or *mandamus* when justices will not decide upon the sufficiency of a rate. This ct. puts the justices in motion; & if the rate be not valid, there is a remedy.—R. v. SOUTHAMPTON JJ. (1854), 2 W. R. 231.

1541. ——— Validity of warrant—Rate partially void—Whole distress wrongful.]—TUCKER v. MAITLAND (1854), 3 C. L. R. 345; 24 L. T. O. S. 111; 18 J. P. Jo. 757.

1542. ——— Partial invalidity—Whether void in toto.]—A theatre was demised to a tenant under an agreement with the exception of the refreshment rooms, bars, cloak rooms, & wine cellars, which, by the agreement, were to remain the property of the landlord. The landlord had access to the portions reserved at all times when the outer doors of the theatre were open quite independently of the tenant, but he could not reach them without passing through one of the entrances to the theatre. The theatre was opened & closed at the unfettered discretion of the tenant. The tenant had no right to enter the parts reserved to the landlord, nor did he exercise any control over them. The refreshment rooms, bars, cloak rooms, & cellars were capable of being separately occupied & assessed from the remainder of the theatre premises. A distress warrant was served upon the tenant for the rates in respect of the whole of the theatre premises:—*Held*: the tenant was not in exclusive occupation of the whole of the theatre premises, & therefore he was not liable for the rates in respect of the whole of the theatre premises, & the distress warrant had been wrongly issued.—CURZON v. WESTMINSTER CORPN. (1916), 86 L. J. K. B. 198; 115 L. T. 823; 80 J. P. 468; 14 L. G. R. 1112, D. C.

1543. Validity of rate—Whether members of authority making rate duly elected.]—Three members of a local board of health consisting of nine members, ceased to be members under Public Health Act, 1848 (c. 63), s. 18, by reason of absence. On Jan. 4, the board met & declared that the three members should be the one-third in number of the members of the board who should go out of office, as required by sect. 13 of the Act, on Mar. 31, the day named in the Order in Council applying the said Act to this district. At the annual election held on that day, three persons were duly elected, the other six members remaining in office. In an action of replevin:—*Held*: the election on Mar. 31 was good, & a general district rate made by the board after such election was valid.—HOWITT v. MANFULL (1856), 6 E. & B. 736; 25 L. J. Q. B. 411; 27 L. T. O. S. 183; 2 Jur. N. S. 883; 4 W. R. 612; 20 J. P. Jo. 387; 119 E. R. 1039.

1544. ———.]—On an application for a distress warrant to enforce payment of a general district rate, under Public Health Act, 1848 (c. 63), deft. contended that the justices had no jurisdiction, because (1) the local board had not been duly elected, because under a local Act the notice of vestry was signed by a clerk to the local comrs. instead of a rector, churchwarden, etc., & not affixed on a church door; (2) that a poll was allowed while no poll had been formally demanded; (3) that no minute was made in the vestry book of a meeting being summoned for election of comrs.:—*Held*: these objections being cured by sect. 29,

the justices were right in issuing their distress warrant.—*BOWLING v. BAILEY* (1867), 31 J. P. 358.

1545. — Premises outside ratable area.—Admissibility of evidence.]—Where a person is summoned for the non-payment of a general district rate in respect of premises in his occupation, he is entitled to call evidence to show that the premises are not situated within the area for which the rate is made.—*BAGLAN BAY TIN PLATE CO., LTD. v. JOHN* (1895), 72 L. T. 805, D. C.

1546. Jurisdiction of magistrates—Rate *prima facie* valid.]—At the hearing, by justices, of a summons taken out by applts. against resp., for nonpayment of a special district rate to which he had been assessed by applts., a local board of health, under Public Health Act, 1848 (c. 63), s. 86, it appeared that the rate was good on the face of it, & had not been appealed against; & that resp. had failed, after due demand, to pay it. Resp., however, contended that the rate was bad, on the ground that it was made in order to pay off money borrowed by applts. for the execution of works not of a permanent nature; whereas, under sect. 86 of the Act, special district rates may be made, & under sect. 107, money may be borrowed, in respect of such works only. It further appeared that the General Board of Health had consented to the borrowing of the money by applts. on the credit of the special district rates, for the execution of the works in question; & had declared themselves satisfied that the works were of a permanent nature. The justices declined to issue a distress warrant to enforce the rate; & stated a case, under Summary Jurisdiction Act, 1857 (c. 43), for the opinion of this ct. whether, under the circumstances, they ought to have done so:—*Held*: the justices were bound to have issued the warrant, the rate being good on its face & unappealed against, & resp.'s objection, if well founded, being ground for an appeal against it, under sect. 135 to the quarter sessions which alone had jurisdiction to decide on the validity of the rate.—*LUTON LOCAL BOARD OF HEALTH v. DAVIS* (1860), 2 E. & E. 678; 29 L. J. M. C. 173; 2 L. T. 172; 24 J. P. 677; 6 Jur. N. S. 580; 8 W. R. 411; 121 E. R. 254.

Annotations:—*Consd.* *R. v. Bradshaw & Newsam* (1860), 29 L. J. M. C. 176; *Empson v. Metropolitan Board of Works* (1861), 3 L. T. 624.

1547. — — —.]—A special case may be stated by justices under Summary Jurisdiction Act, 1879 (c. 49), s. 33, upon an application to enforce payment of a general district rate under Public Health Act, 1875 (c. 55), s. 256. On an application under this sect. to enforce a general district rate good on the face of it, the justices may not refuse to make an order for payment of the rate on the ground that there is a concurrent rate made for the same purpose.—*SANDGATE LOCAL BOARD v. PLEDGE* (1885), 14 Q. B. D. 730; 52 L. T. 546; 49 J. P. 342; 33 W. R. 565, D. C.

Annotations:—*Expld. & Distd.* *Sheffield Waterworks Co. v. Sheffield Corpn.* (1885), 55 L. J. M. C. 40. *Consd.* *R. v. Hannam, etc. JJ. & Ramsgate Smackowners' Ice Co.* (1885), 2 T. L. R. 81; *R. v. London Lord Mayor & Brown* (1887), 57 L. T. 491; *Bates v. Plumstead Overseers*, (1895), 64 L. J. M. C. 127. *Refd.* *Dixon v. Blackpool & Fleetwood Tramroad Co.*, [1909] 1 K. B. 860; *Blackpool & Fleetwood Tramroad Co. v. Bispham with Norbreck U. C.*, [1910] 1 K. B. 592.

1548. — — —.]—On an application before justices for an order for payment of a general district rate under Public Health Act, 1875 (c. 55), s. 256, the rate being good on the face of it, & the property in respect of which the occupier is rated being within the district of the rating authority, the justices' duty is merely ministerial, & they have

no jurisdiction to inquire into the validity of the rate.—*R. v. HANNAM* (1886), 34 W. R. 355; 2 T. L. R. 234, C. A.

Annotations:—*Consd.* *Baglan Bay Tin Plate Co. v. John* (1895), 72 L. T. 805; *Rayner v. Drowitt* (1900), 82 L. T. 718; *Dixon v. Blackpool & Fleetwood Tramroad Co.*, [1909] 1 K. B. 860; *Wixon v. Thomas, Lambert v. Thomas, Burrows v. Thomas*, [1911] 1 K. B. 43; *Whennan v. Clark*, [1916] 1 K. B. 94. *Refd.* *R. v. City of London Union* (1907), 2 Konst. Rat. App. 596.

1549. — — — Objection to recovery of expenses—Sewerage expenses.]—On an application for a distress warrant for the enforcement of a sewers rate in a special district under Metropolis Management Act, 1855 (c. 120), ss. 159, 161, the rate being good on the face of it, the magistrate cannot entertain an objection that the expenses ought to have been sought to be recovered under Metropolis Management Amendment Act, 1862 (c. 102), ss. 52 & 53, in which case the property rated would have been exempt.—*BATES v. PLUMSTEAD OVERSEERS* (1895), 64 L. J. M. C. 127; 72 L. T. 393; 59 J. P. 118, D. C.

Annotations:—*Consd.* *Westminster Corpn. v. Army & Navy Auxiliary Co-op. Supply*, [1902] 2 K. B. 125; *R. v. Shuttleworth, Ex p. Tickle* (1908), 72 J. P. 329. *Refd.* *Kershaw, Leese v. Stockport Overseers*, [1923] 2 K. B. 129.

1550. — — — To state a case.]—*SANDGATE LOCAL BOARD v. PLEDGE*, No. 1547, *ante*.

1551. — — — To postpone enforcement—Pending result of inquiry by Local Government Board.]—A rural district council having incurred expenses in the execution of Public Health Act, 1875 (c. 55), for the common benefit of several parishes within their district, & having apportioned them between the parishes & having issued a precept to the overseers of one of the parishes to pay to them the contribution of that parish, the overseers appealed to the Local Govt. Board against the apportionment & the Board decided to hold an inquiry. On proceedings being taken by the council against the overseers under sect. 231 of the above Act, to recover the amount of the precept, the justices adjourned the hearing pending the announcement of the decision of the Board:—*Held*: the justices were entitled to take into consideration the fact that an appeal to the Board was pending, & they were not bound to issue their distress warrant until such appeal had been determined.—*R. v. FOX, Ex p. PLYMPTON ST. MARY RURAL DISTRICT COUNCIL* (1908), 99 L. T. 90; 72 J. P. 331; 6 L. G. R. 1068, D. C.

Annotation:—*Refd.* *Plympton St. Mary R. C. v. Reynolds* (1909), 78 L. J. K. B. 417.

1552. — — — To decide whether occupier exempt.]—*WHENMAN v. CLARK*, No. 1412, *ante*.

1553. Appeal from order of justices—To quarter sessions—Inquiry into validity of rate.]—The local board of health of the borough of M. assessed R. to three several district rates in respect of property, the greater part of which was situated out of the borough. R. allowed the time for appealing against the rates to expire without appealing therefrom. The local board made complaint before justices of the peace of the nonpayment under Public Health Act, 1848 (c. 63), s. 103, who made an order whereby they adjudicated R. to pay the rates forthwith, & ordered that if the same should not be paid they should be levied by distress & sale. R. appealed to the quarter sessions against the order, who inquired into the propriety of the rates, & quashed the order, awarding a sum to R. for his costs. The ct. refused a prohibition to restrain proceedings on the order of the ct. of quarter sessions, as it was not clear that there was any want of jurisdiction:—*Semble*: the order of justices was the subject-matter of an appeal under

3.—*General district rate. Sects. 4, 5 & 6.*

sect. 135 of the Act, & the sessions had jurisdiction. *Qu.*: whether the quarter sessions did right in entertaining the question whether the property was subject to the rates, the rates not having been appealed against. — *RICARDO v. MAIDENHEAD LOCAL BOARD OF HEALTH* (1857), 2 H. & N. 257; 27 L. J. M. C. 73; 29 L. T. O. S. 165; 21 J. P. 359; 5 W. R. 691; 157 E. R. 107.

Annotation:—*Mentd. Denton v. Marshall* (1863), 7 L. T. 689.

1554. Levying the distress—Resistance to entry—Use of force by wife of debtor.—C., a constable, in executing a warrant of distress for a general district rate in arrear, went to the door of the debtor's house, & the debtor's wife resisted his entry, & assaulted him when entering against her will:—*Held*: the wife had implied authority to admit or exclude a constable executing civil process, & was justified in using force to exclude him.—*ROSSITER v. CONWAY* (1893), 58 J. P. 350, D. C.

1555. Commitment in default of distress.—A landlord of a house in London agreed with a tenant to pay the rates & taxes, but he did not do so, & the tenant's name being on the rate book, a distress warrant was issued against the tenant for an instalment of a general rate & costs, & on a return of *nulla bona* a warrant of commitment was issued. Before it was executed the landlord sent the tenant a cheque payable to the order of the rate collector for the amount of the rate, but not the costs. The rating authorities refused the cheque without the costs, & the tenant was sent to prison, where he remained for a few days:—*Held*: (1) the rate was recoverable under London Government Act, 1890 (c. 14), s. 10 (2), & Distress for Rates Act, 1849 (c. 14), ss. 1, 2; (2) Summary Jurisdiction Act, 1879 (c. 49), did not apply, & the imprisonment was not illegal.—*ATKINS v. HUTTON* (1909), 103 L. T. 514; 74 J. P. 329; 8 L. G. R. 513, C. A.

SECT. 4.—BOROUGH RATE.

See, generally, RATES & RATING; Municipal Corporations Act, 1882 (c. 50).

1556. Authority of borough overseers—Warrant under seal to town clerk.—The town council of the borough of R. made an order that a fair & equal borough rate, under Municipal Corporations Act, 1835 (c. 76), should be made on the several parishes, etc., for raising £1,654, & that the proportion of that part of the parish of S. lying within the limits, should be £365 8s., the sums to be rated at 1s. in the pound; & that the churchwardens, etc., should levy, collect, & pay the amounts assessed on their respective parishes, & that a warrant under the corporate seal should be directed to the town clerk authorising him to demand, collect, & receive the amounts so rated, & for that purpose to issue his warrants to the churchwardens, etc., requiring them to levy, collect, & pay the same amounts, etc. A warrant was accordingly issued to the town clerk, commanding him to "demand, collect, & receive" the amounts rated. The town clerk issued his precept to the special overseer, who had been previously appointed for that part of the parish of S. which lay within the limits, requiring him to "levy, collect, & pay," by a fair & equal rate, the sum of £365 8s. The special overseer thereupon made a rate, headed "a borough rate, etc., upon the lands,

etc., within that part of the parish of S. situate within the borough after the rate of 1s. 2d. in the pound," & calculated to produce £427 17s. The town council having at the same time also ordered a watch rate to be made for raising £685 2s. at 6d. in the pound, the proportion of the parish of S. being £153 7s., similar proceedings were taken to raise the amount, & the special overseer made a watch rate on the lands within that part of the parish of S. at 6d. in the pound, & calculated to produce £160 5s. Pltf. having refused to pay both rates, the amounts were levied by two several warrants of distress on his goods; & an action of trespass being brought:—*Held*: (1) the order of the town council that the overseers should levy, collect, & pay, empowered them to make rates in the above form; (2) the watch rate being for the amount in the pound mentioned in the order, & free from all objection, the warrant of distress relating thereto was valid, & was a defence to the action.

Qu.: if the borough rate was good.—*COBB v. ALLAN* (1847), 10 Q. B. 683; 16 L. J. Q. B. 397; 9 L. T. O. S. 244; 11 Jur. 1081; 11 J. P. Jo. 403; 116 E. R. 259.

1557. Liability of overseer—After quitting office.—(1) A borough rate made in aid of the borough fund under Municipal Corporations Act, 1835 (c. 76), need not be made publicly & in open ct., though the town council is declared to have all the powers of justices of the peace for any county at the general or quarter sessions, or as near thereto as the nature of the case may admit, & they, by County Rates Act, 1834 (c. 48), are required to make the county rate publicly & in open ct. In the estimate for such rate the town council included certain arrears of salary due to the late town clerk with whom the borough had been in litigation concerning his compensation, & also a sum paid to him voluntarily by the present town clerk for his costs in order to prevent an execution, & a certain other sum due to the town clerk for his own costs:—*Held*: a rate made on such estimate was not invalid by reason of its including such retrospective sums, & that being good on the face of it, the justices enforcing it by their warrant are not liable, even if it were void as retrospective.

(2) Where the order of the council to the treasurer was to demand a rate within a hundred days from the date of such order, but the treasurer demanded it from the overseers within a hundred days from the receipt by them of such demand:—*Held*: such variance was immaterial.

(3) A distress warrant for a borough rate may be levied on the goods of the overseer in office when such rate was due, though at the time of the issue of the warrant he had quitted office.

(4) A distress warrant for a borough rate did not aver that defts., the mayor & a justice of the borough in question, were acting within their jurisdiction; but the venue was in the margin. Nor did it set forth that deft. who was mayor, was such, but he executed the warrant twice, as justice & as mayor, with the corporate seal attached to the latter signature:—*Held*: the warrant was good & well executed.—*JONES v. JOHNSON* (1852), 7 Exch. 452; 21 L. J. M. C. 102; 19 L. T. O. S. 31; 16 J. P. 325; 16 Jur. 840; 155 E. R. 1026, Ex. Ch.

Annotation:—*Generally, Refd. R. v. Hunslet Overseers* (1859), 33 L. T. O. S. 101.

1558. Validity of warrant—Execution by mayor & justice.—*JONES v. JOHNSON*, No. 1557, *ante*.

1559. Issue of distress warrant—Objection on ground of non-publication of rate.—*BEESON v. DERBY OVERSEERS*, No. 1405, *ante*.

SECT. 5.—WATER RATE.

See, generally, WATER SUPPLY.

1560. Power of distress—Under local Act—Effect of Waterworks Clauses Act, 1847 (c. 17).]—By 46 Geo. 3, c. cxix., s. 57, the W. Co. were to supply water to the occupiers of premises in certain parishes, they paying to the co. such rates or sums of money for such water as should be mutually agreed upon between them, & in default of payment, power was given to the co. to issue their warrants for the recovery of arrears by distress & sale of the consumer's goods. By 50 Geo. 3, c. cxxxii., s. 13, it was provided that the co. should not alienate their powers, but only take & demand "such sums as should be reasonable," for the water supplied under that Act; & by 15 & 16 Vict. c. clix., passed in 1852, which recited the earliest Acts of the co., it was provided that, "except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this Act of the recited Acts or any of them; & except only so far as is requisite for the execution of this Act, all these provisions, & all powers thereby respectively created, conferred, or saved, shall be & continue as valid & effectual as if this Act had not passed":—*Held*: (1) the effect of 50 Geo. 3, c. cxxxii., s. 13, was merely to alter the mode of ascertaining the amount of the rate, but not the mode of enforcing payment of arrears, & the power of distress given to the co. by 46 Geo. 3, c. cxix., s. 57, was not, either expressly or by implication, taken away by 50 Geo. 3, c. cxxxii., or by any of the provisions of the above Act, but such power of distress was expressly preserved to the co. by 15 & 16 Vict. c. clix., s. 48; (2) the co. were not responsible for an assault committed by the broker or his assistant when executing the warrant.—*RICHARDS v. WEST MIDDLESEX WATERWORKS CO.* (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551; 49 J. P. 631; 33 W. R. 902, D. C.

1561. Liability of company—For assault committed by broker.]—*RICHARDS v. WEST MIDDLESEX WATERWORKS CO.*, No. 1560, *ante*.

1562. Costs—Discretion of magistrates.]—By Ruabon Water Act, 1870 (c. lvii.), s. 37, which incorporates Waterworks Clauses Acts, 1847 (c. 17), & 1863 (c. 93), when a person neglects to pay a rate due to the water co., the latter may recover the same, with full costs of suit, in any ct. of competent jurisdiction; & by sect. 38, after a defaulter has been summoned, water rates & costs ordered to be paid may be recovered by distress. Upon a summons before justices for payment of a water rate:—*Held*: the justices were not bound, on making an order for payment of the rate, to order the defaulter to pay the costs, but they had a discretion in the matter.—*RUABON WATER CO. v. EVANS* (1906), 22 T. L. R. 541, D. C.

SECT. 6.—LIGHTING, WATCHING AND PAVING RATES.

See, generally, HIGHWAYS; LOCAL GOVERNMENT; RATES & RATING; Lighting & Watching Act, 1833 (c. 90).

1563. Lighting & watching rate—Issue of warrant by magistrates—Mandamus.]—(1) A rule calling upon justices to show cause why they should not

issue a distress warrant, was founded upon an affidavit, showing the refusal only but not stating the proceedings which took place before the justices, or the reason why they refused. The parties showing the cause against the rule made no affidavit:—*Held*: the affidavit must be construed in favour of the party making it; & the rule should be absolute.

(2) A notice of the adoption of Lighting & Watching Act, 1833 (c. 90), for a district chapelry, was held to be sufficiently published where it was affixed on the chapel of the district but not on two dissenting & proprietary chapels within the district, nearly two months after the meeting at which it was adopted.—*R. v. DEVERELL* (1854), 3 E. & B. 372; 23 L. J. M. C. 121; 118 E. R. 1181.

Annotations:—As to (2) *Distd. R. v. Kingswinford Overseers* (1854), 3 E. & B. 688. *Generally, Mentd. Backhouse v. Bishopwearmouth* (1861), 7 Jur. N. S. 338.

1564. ——— Whether proof of adoption of statute necessary.]—A rule was obtained calling on the overseers of a parish to show cause why two justices should not issue their warrants under Lighting & Watching Act, 1833 (c. 90), s. 38, to levy by distress on the goods of the overseers two sums of money ordered to be paid by the inspectors of a district within the parish, in which the provisions of that Act had been adopted. By the affidavits it appeared that the district was one assigned to a chapel for ecclesiastical purposes, under Church Building Act, 1831 (c. 38); & that 1833 Act had been adopted, more than two years before the application at a meeting convened by the churchwardens of the district church. These churchwardens, as was shown affirmatively by the affidavits, were churchwardens for ecclesiastical purposes only, & never in the habit of calling meetings for secular purposes:—*Held*: the meeting was improperly convened, the churchwardens of the district church not being such churchwardens as are contemplated by 1833 Act, s. 5, & consequently the provisions of the Act had never been duly adopted in the district; & the order of inspectors was void.—*R. v. KINGSWINFORD OVERSEERS* (1854), 3 E. & B. 688; 23 L. J. Q. B. 337; 18 J. P. 678; 118 E. R. 1299; *sub nom. R. v. LEIGH & COPE, STAFFORDSHIRE JJ.*, 18 Jur. 1073.

1565. ———.]—On application being made to justices under Lighting & Watching Act, 1833 (c. 90), for a distress warrant, the duty of the justices is purely ministerial, & upon proof by the overseers of notice to them by inspectors purporting to be duly appointed & of due demand by them of the amount of rate in arrear, it is the duty of the justices to assume that the Act had been adopted & all the requisite formalities gone through, unless deft. himself brought forward some ground to the contrary.—*R. v. REYNOLDS*, [1893] 2 Q. B. 75; 69 L. T. 321; 42 W. R. 32; 57 J. P. Jo. 356; *sub nom. R. v. FRODSHAM JJ. & EDWARDS*, 62 L. J. M. C. 120; 9 T. L. R. 456; 5 R. 423, D. C.

Annotation:—*Consd. Clown Overseers v. Roberts* (1896), 61 J. P. 7.

1566. ——— Non-publication of rate.]—*R. v. SOMERSETSHIRE JJ.* (1858), 31 L. T. O. S. 215; 22 J. P. Jo. 431.

1567. ——— Magistrate's duty ministerial.]—*R. v. REYNOLDS*, No. 1565, *ante*.

1568. ——— Appeal to quarter sessions—

PART III. SECT. 5.

s. Power of distress—When service pipe laid—Whether water used or not.]—The laying down of a service pipe & stop cocks to each occupation

is equivalent under the Act No. 59 to an actual supply of water; & payment is compulsory after each supply whether the water be used or not. F. gave notice that it was his intention to discontinue the use of water supplied

to his messuage after June, and refused to pay water rates after June. The Board distrained:—*Held*: the distress was legal.—*FELLOWS v. BOARD OF LAND & WORKS* (1864), 1 W. W. & A'B. 198.—AUS.

*Sect. 6.—Lighting, watching and paving rates.
Sect. 7.]*

Validity of rate unimpeachable.]—A parish council, having adopted the Lighting & Watching Act, 1833 (c. 90), ordered the overseers, the resps., of the parish to raise a special rate to meet the expenses. The same was allowed by two justices for the county. No notice of appeal against the rate was given. A demand note was served upon applt. as occupier of a house & building, but he refused to pay, & was summoned for non-payment before a court of summary jurisdiction, & an order for the issue of a distress warrant was made. This order for the issue of a distress warrant was appealed against at quarter sessions. The ct. of quarter sessions allowed applt. to go behind the rate made & impeach the procedure by which the Act had been adopted, being of opinion that certain statutory provisions had not been complied with, & that the order for the payment of the rate could not be enforced against applt. & allowed his appeal with costs:—*Held*: they were wrong in so doing, & the order for the issue of the distress warrant made by the justices in petty sessions must be enforced.—*CLOWN OVERSEERS v. ROBERTS* (1896), 61 J. P. 7; *sub nom. ROBERTS v. CLOWNE OVERSEERS*, 13 T. L. R. 18, D. C.

1569. Liability of magistrates—Illegal rate.]—(1) It is competent to a part of a parish to meet & adopt Lighting & Watching Act, 1833 (c. 90), as far as that part is concerned, though a general meeting of the whole parish held within a year before rejected it, if the second meeting be not substantially the same as the first, & not a colourable evasion of the clause which prohibits the discussion of the question within a year after its rejection. Where justices sign a warrant to enforce a rate made at such second meeting, they act without jurisdiction if that meeting be an illegal one, & trespass lies against them at the suit of any one distrained on under their warrant, for they are not protected by a rate apparently good, but by one actually good only.

(2) Where a warrant authorises the constable to enter & seize the goods of the party, & after retaining them for five days, to sell them, the justices signing the warrant are liable, if they act without jurisdiction, for any excess which may be committed by the constables as well as for the scope of the warrant. Where, therefore, the constables remain in possession six days & then sell, the time within which an action must be begun runs from the day of sale. In such a case the notice is confined to entry into, continuance in the house, & seizure & conversion of the goods:—*Held*: that included the sale as a cause of complaint, of which reasonable notice was given to the justices.

(3) A notice addressed to justices & overseers is a good foundation for an action against the former only.—*WILKINSON v. GRAY* (1844), 2 L. T. O. S. 348; 9 J. P. 71.

See, now, Justices Protection Act, 1848 (c. 44).

1570. Watch rate—Authority of borough overseers.]—*COBB v. ALLAN*, No. 1556, *ante*.

1571. Lighting & paving rate—Issue of warrant by magistrates—Legality of rate doubtful—Mandamus.]—Certain comrs. were empowered under a local act, 53 Geo. 3, c. iii., for lighting & paving Margate to levy a rate of 1s. in the pound, to defray the expenses of the year, & if that was found insufficient, they were then enabled to levy a further rate of 6d. in the pound for the expenses of the same year. A rate of 1s. was levied, but before all the money was collected under this rate a second was levied of 6d. in the pound; certain

inhabitants of the town of Margate refused to pay the sums demanded of them under the second rate; a warrant of distress was applied for to the magistrates, who, under those circumstances, refused to grant one. A *mandamus* was applied for to compel the magistrates to grant a warrant of distress. The ct. refused the application, on the ground that they entertained great doubt whether the rate was legal, & whether the comrs. had not exceeded their power, by making a second rate before the money under the first rate was collected & found insufficient.—*R. v. CINQUE PORTS JJ.* (1840), 4 J. P. 525.

1572. ——— Jurisdiction of justices—Parish incorporated in borough.]—Comrs. under a local Act of Parliament, 41 Geo. 3, c. cxxvi., for lighting & paving the parish of Bathwick were empowered to levy rates, & power was given to justices for the county of Somerset to enforce payment of them by distress. A charter of incorporation was granted by Queen Elizabeth to the City & Borough of Bath. Before Municipal Corporations Act, 1835 (c. 76), was passed the parish of Bathwick was situate partly in the County of Somerset & partly in the city of Bath; & by sect. 7 of that Act, the whole parish was included within the city of Bath. An inhabitant of the parish of Bathwick was duly assessed under their local Act, & the amount not being paid, a magistrate for the city & borough of Bath refused to grant a warrant of distress:—*Held*: the refusal to pay these rates was an offence against the local Act, within Municipal Corporations Act, 1837 (c. 78), s. 31, & the justices for the city & borough of Bath had jurisdiction to enforce the payment of them.—*PALMER v. SUTCLIFFE* (1849), 3 New Sess. Cas. 634.

Annotation:—*Refd. Ex p. Burwash* (1850), 1 L. M. & P. 60.

1573. Paving rate—Issue of warrant by magistrates—Whether previous summons necessary.]—By a local act for paving, etc. the town of Stafford, certain comrs. were authorised to make rates for the purposes of the act, & if any person thought himself aggrieved by the rate, an appeal was given to the comrs. & from their determination to the sessions; & it was enacted that in case any person rated should neglect to pay his rate for seven days after demand, it should be lawful for any justice, upon proof on oath of such demand & non-payment, by warrant to authorise the collector to levy the rate by distress & sale of the goods of the person rated; & in case there should be no distress, to commit the party to gaol:—*Held*: the clause was not obligatory on the justice to issue a warrant without a previous summons.

Semble: in all cases in which magistrates are authorised, upon application, to issue a distress warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons unless by Act of Parliament it be specially directed that the warrant shall be issued immediately.—*R. v. STAFFORD JJ.* (1835), 1 Har. & W. 328; 5 Nev. & M. K. B. 94; 3 Nev. & M. M. C. 191.

Annotation:—*Refd. Painter v. Liverpool Oil Gas Light Co.* (1836), 2 Har. & W. 233.

1574. ——— Remedy for improper assessment.]—Ratepayers, liable under a local act to the payment of rates in respect of houses & gardens, cannot, when summoned before justices for non-payment, resist the issue of distress warrants, because, at the making of the rate, warehouses, & other property not ratable under the Act were improperly included in the assessment. The proper remedy is by appeal to the sessions, where the error can be corrected, & if this be not adopted, the rate may be enforced.—*R. v. TWOPENY, ETC.*

(KENT JJ.) & MILTON NEXT SITTINGBOURNE (TWENTY-FOUR RATEPAYERS) (1867), 17 L. T. 266.

1575. ——— **Mandamus to enforce—Metropolitan Paving Act, 1817 (c. xxix), s. 38.]**—(1) A *mandamus* will not lie to justices to enforce by distress warrants paving rates laid within the operation of the above sect. of that Act giving a remedy by action, even though the rates are collected under prior local acts applicable to particular districts, by which the remedy by action is confined to cases where no sufficient distress can be made.

(2) The above sect. applies to districts which were before regulated by local acts; & enlarges the power of recovering paving rates by action, where the local acts give only a right to recover by action where no sufficient distress can be made.—*R. v. MIDDLESEX JJ.* (1835), 1 Har. & W. 462; 5 Nev. & M. K. B. 126; 3 Nev. & M. M. C. 202.

SECT. 7.—RATES LEVIED BY COMMISSIONER OF SEWERS AND DRAINAGE BOARDS.

See, generally, COURTS, Vol. XVI., pp. 204, 205, Nos. 1125–1134; RATES & RATING; Land Drainage Act, 1861 (c. 133); SEWERS & DRAINS.

1576. **Necessity for demand of rate—Before distress levied.]**—There ought to be notice given of the tax & a demand of it before any distress might be taken (BACON, J.).—*WHITLEY v. FAWSETT* (1647), Sty. 12; 82 E. R. 492.

1577. **The presentment—Not traversed by distralnee—Distress justified.]**—(1) A jury, impaneled to inquire & present at a Ct. of Comrs. of Sewers, presented, that A. was benefited by the sewers; & he received a summons to show cause why he should not pay; he neglected to traverse the presentment, & a distress was levied for the amount of the rate:—*Held*: these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, & not traversed, justified the comrs. in issuing the warrant of distress.

(2) The presentment need not contain the name of every person benefited; if it find “All Fore Street” to be benefited, that is enough to include every one having a house there; & any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, & that he is aggrieved by the presentment.

(3) The warrant of distress need not recite the presentment.—*WARREN v. DIX* (1805), 3 C. & P. 71, N. P.

1578. ——— **Necessary preliminary to distress—Liability of commissioners in trespass.]**—A parish, consisting of two districts, had immemorially been assessed to the repairs of a sea bank, which was necessary for the protection of lands from the sea in both districts, by one assessment, collected by one dyke reeve. The Comrs. of Sewers, without any presentment of a jury, appointed two dyke reeves, one for each district, & made a rate on one district exclusively for the repairs of the sea bank:—*Held*: the rate was void for the want of a presentment, & the Comrs. were without jurisdiction, & were liable in trespass for the taking of pltf.’s cattle under a distress warrant issued by them for arrears of such rate.—*WINGATE v.*

WAITE (1840), 6 M. & W. 739; 9 L. J. Ex. 319; 4 Jur. 860; 151 E. R. 610.

Annotation:—*Folld. R. v. Warton* (1862), 2 B. & S. 719.

See, now, Land Drainage Act, 1861 (c. 133), s. 33.

1579. **The warrant—Recital of presentment not necessary.]**—*WARREN v. DIX*, No. 1577, *ante*.

1580. ——— **Execution of—Where directed to two jointly.]**—A joint warrant to two persons to distrain for drainage rates, under an Act for draining certain fens & improving the navigation of a river, may be well executed by one of them.—*LEE v. VESSEY* (1856), 1 H. & N. 90; 25 L. J. Ex. 271; 27 L. T. O. S. 109; 20 J. P. 327; 4 W. R. 554; 156 E. R. 1130.

1581. ——— **Delegation of authority—Sewers Act, 1849 (c. 50), s. 7.]**—A warrant of distress for sewers’ rates issued under the above sect. can only be lawfully executed by the person to whom such warrant is directed, & who is named in the warrant. If the warrant is handed over by such authorised person to any other person who executes it, the latter has no authority to execute the warrant; in executing it he commits a trespass, & if, in execution of the same, he commits an assault, he may be convicted thereof.—*SYMONDS v. KURTZ* (1889), 61 L. T. 559; 53 J. P. 727; 5 T. L. R. 511; 16 Cox, C. C. 726, D. C.

1582. **Liability of occupier—What constitutes occupation — Official residence.]**—Under the statutes of sewers, a sewers’ rate, to be valid, must be laid on the occupier of the property assessed.

A clerk of the works of Chelsea Hospital dwelt in the hospital, in apartments in which he was permitted by the Comrs. of Woods & Forests to dwell, in respect of his office, & which were separately rated for the sewers by an undisputed rate. He was appointed by the Comrs., & his duty was to see that the hospital was not out of repair, & under their directions to superintend any repairs of the buildings; he also superintended part of the land. The building & land received benefit from the sewers:—*Held*: (1) the clerk of the works was not an occupier of the land, or of any part of the building, except the apartments separately assigned to him; (2) he was not concluded from disputing his liability, by a judgment of the Comrs. of Sewers, on a traverse by him before them of his liability to be rated; (3) trespass would lie for a seizure of his goods as a distress under the warrant of the Comrs. to enforce a rate upon him in respect of the building & land which he did not occupy.—*NEAVE v. WEATHER* (1842), 3 Q. B. 984; 3 Gal. & Dav. 221; 12 L. J. Q. B. 32; 7 Jur. 168; 114 E. R. 786.

Annotations:—*As to* (2) *Folld. Biglin v. Wylie* (1867), 36 L. J. Q. B. 307. *As to* (3) *Reid. St. Katharine Dock Co. v. Higgs* (1845), 10 Q. B. 641.

1583. ——— **For arrears of predecessor — & interest thereon.]**—A local drainage Act empowered the comrs. to appoint valuers to estimate the amount of benefit derived, or likely to be derived, by the lands in the various townships embraced by the Act, from the works thereby contemplated, & to fix a rate thereon accordingly, subject to objections & with power to appeal. By sect. 81 the comrs. were to “charge & assess” all such lands within the parishes & townships as shall have been included in such statement of the valuers, & rated by them as aforesaid, & the respective occupiers of such lands, with an acre tax, according to the

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t. Necessity for demand of rate—Before distress levied—Time limit.]—18 Vict. c. 38, relating to sewerage & water supply in St. John, authorised

any two comrs. to issue a distress warrant for a rate, but no distress was to issue till thirty days after a demand in writing under the hands of the comrs., or any two of them, of the amount due; one of the comrs. signed a war-

rant in blank without any proof of a demand made for the rate, & the other comr. afterwards filled it up & issued it:—*Held*: it was illegal.—*NOWLIN v. SEARS* (1864), 6 All. 215.—*CAN.*

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several prices & sums at which the lands shall have been classed & taxed by the valuers." Sect. 84 provided, that, in case "any rates shall not be duly paid within 28 days after the time appointed for that purpose, every person failing to pay the same shall also pay interest for the same at 5 per cent. *per annum* from the day whereon the same ought to be paid." Sect. 85 enacted that "all the occupiers of lands so rated shall pay all such sums of money as shall be so assessed, taxed or charged in respect of the several lands in their respective occupations, & may retain the same out of the rents; & every such occupier shall be discharged of so much money as the said rate so paid by him shall amount to, as if the same had been actually paid to his landlord, but not of any interest which may have been incurred, by such occupier for non-payment thereof, provided that no occupier shall be compelled to pay more than the rent which shall from time to time become due from him to his landlord." Sect. 39 enacted that, "if any person being the occupier of any of the lands rated or taxed by virtue of the Act, shall refuse or neglect to pay the money so rated or taxed on such lands, within thirty days after the respective times of payment, the same & all arrears thereof may be enforced by distress & sale of the goods & chattels of the person so neglecting or refusing to pay, or the comrs. may enter upon the lands, & take the rents & profits till the same be satisfied," & by sect. 90 "unoccupied lands are to remain a security for the payment of the tax, & all goods & chattels which shall at any time thereafter be found thereon may be distrained, etc."—*Held*: (1) one who came into the occupation of lands subject to the tax after the expiration of thirty days after the time appointed for payment thereof, was liable to be distrained upon, there being a continuing default; (2) his liability extended to rents accruing due, as well as rent actually due to his landlord; (3) his liability for interest commenced only from the time of his own default; (4) the seizure of growing crops could not be justified.—*MATTISON v. HART* (1854), 14 C. B. 357; 23 L. J. C. P. 108; 18 Jur. 380; 2 W. R. 237; 139 E. R. 147; *sub nom.* *MATHESON v. HART*, 2, C. L. R. 314.

Annotation:—*Mentd.* *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 69.

1584. Authority of collector—Limited by specific instructions.—Where a collector for the Comrs. of Sewers receives from them a warrant directing him to distrain & afterwards sell the goods of A., he cannot, if he distrains the goods of A.'s tenant, justify the distress on the ground of his general authority of collector. Whatever that general authority may be, it is taken away in the particular case by the warrant directing him to do a specific thing.—*SABOURIN v. NEALE* (1836), 2 Har. & W. 103.

Place of distress—Whether leviable in Royal Palace.—*See* CONSTITUTIONAL LAW, Vol. XI., p. 520, Nos. 245–250.

1585. Sale of distress—By Commissioner of Sewers.—*COMBS v. CHENY* (1648), Aleyn, 92; 82 E. R. 932.

Annotation:—*Folld.* *R. v. Speed* (1702), 1 Salk. 379.

1586. Replevin—Whether maintainable.—*Qu.*: whether goods taken under a warrant of distress granted by Comrs. of Sewers may not be replevied while in the hands of the officer. *Qu.*: whether they may not be replevied by the sheriff or his deputy. *Qu.*: if they be actually replevied, & the proceedings in replevin be removed here, the

ct. will not quash the proceedings in a summary way, but will leave it to deft. in replevin to put his objection on the record.—*PRITCHARD v. STEPHENS* (1796), 6 Term Rep. 522; 101 E. R. 681.

Annotation:—*Mentd.* *R. v. Speed* (1699), 12 Mod. Rep. 328.

1587. Wrong assessment by Commissioners—Liability of distraining officer.—Comrs. of Sewers made a wrong assessment, & pltf. by their warrant distrained; the ct. would not relieve.—*Bow v. SMITH* (1724), 9 Mod. Rep. 94; 2 Eq. Cas. Abr. 206; 88 E. R. 338, L. C.

Annotation:—*Refd.* *Tracey v. Taylor* (1842), 3 Q. B. 966.

1588. Second distress—First frustrated by distrainee—Lawful.—Defts. comrs. for draining certain lands, distrained a bean stack of pltf. for a rate due from him, & sold the stack by auction, one of the conditions of sale being that the purchaser was to take possession & pay for the same at the fall of the hammer. At the time of the sale pltf. said that "it would be one thing to buy the stack & another to take it away," & when the purchaser attempted to remove the stack from pltf.'s premises, he was forcibly prevented by pltf. The purchaser did not pay for the stack, & the comrs. levied a second distress for the same rate:—*Held*: as pltf. by his own misconduct had prevented the comrs. from realising the first distress, the second was not unlawful.—*LEE v. COOKE* (1858), 3 H. & N. 203; 27 L. J. Ex. 337; 30 L. T. O. S. 335; 22 J. P. 177; 4 Jur. N. S. 168; 6 W. R. 284; 157 E. R. 444, Ex. Ch.

1589. Under private Inclosure Act—Person deriving no benefit from sewer—Nor liable *ratione tenuræ*.—An Inclosure Act authorised comrs. to set out roads, drains, etc., & enacted that these were to be maintained like others in the same township, & that all such ways, etc., should be repaired by all or any of the proprietors of lands within the township, as the comrs. should appoint. The comrs. by their award appointed two public sewers to be maintained by the owners of the inclosed lands, according to an acreage rate, & such owners had paid for repairs during eighty years after the statute:—*Held*: a distress proceeding on a presentment, that one of the sewers ought to be widened & repaired by the owners according to an acreage rate, was bad, because there was nothing to show that they derived any benefit from the sewer, or that they were liable *ratione tenuræ*, & there was nothing in the inclosure Act which dispensed with these conditions of liability.—*BIGLIN v. WYLIE* (1867), 36 L. J. Q. B. 307; 31 J. P. 771.

1590. — Recovery by distress not action.—A private Inclosure Act gave the comrs. power by their award to direct by whom & in what manner certain necessary drainage works were to be made & maintained. The comrs. having directed by their award that the expenses of the works should be paid by a rate to be levied & recovered by certain surveyors in the same manner as parish rates were by law recoverable in the parish:—*Held*: the rate must be recovered by distress & not by action.—*DANBY v. WATSON* (1877), 46 L. J. M. C. 179; 36 L. T. 412; 41 J. P. 406; 25 W. R. 464.

Sewerage expenses as part of district rate.—*See* Sect. 3, *ante*.

SECT. 8.—OTHER RATES.

1591. Under local improvement Act—Death of person rated—Warrant against mortgagee of premises rated.—The R. improvement comrs.

made a rate in 1876 on P., the owner, for improvement expenses, & he paid part thereof & died, having, at the date of the rate, executed a mtge. to B. B. entered into possession in 1882, & in 1885 the justices issued a distress warrant against B. for the unpaid rate made on P.:—*Held*: the justices had no power to issue a distress warrant against B., who was not named in the rate.—**ROCHDALE BUILDING SOCIETY v. ROCHDALE CORPN.** (1886), 51 J. P. 134, D. C.

Annotation:—**Mentd.** Stokes v. Mitcheson (1902), 66 J. P. 615.

1592. — “Sufficient cause for non-payment of rate” — Ratability at one-fourth of annual value—Warrant for full amount.—A rate was made by a local authority under a local Act which provided that occupiers of land used only “as a railway constructed under the powers of any Act of Parliament for public conveyance” should be assessed in respect of one-fourth part only of the value. The Act gave to any party aggrieved by a rate a right to appeal to quarter sessions. It also provided that if any person failed to pay the rate due from him he might be summoned before a justice, & if “no sufficient cause for the non-payment” of the rate should be shown a distress warrant should be issued. Resps. were assessed to the above-mentioned rate on the aggregate ratable value of a tramroad & certain other property. A demand note for the amount of the rate was served on resps., in which they were charged on the full ratable value of the whole hereditaments, but they did not appeal to quarter sessions. A summons having been issued against them for non-payment of the rate, it was admitted by the local authority that, on the assumption that a decision of the Ct. of Appeal then under appeal to the House of Lords was correct, so much of resps.’ ratable hereditaments as consisted of a tramroad was a railway of the kind mentioned in the local Act, & that resps. should have been charged on one-fourth part only of its value. The parties also agreed the sum to which the demand should on the above assumption have been reduced. Under these circumstances the justices refused to issue their distress warrant for the full amount of the demand note:—*Held*: resps. had shown sufficient cause for the non-payment of the larger amount, & the justices were justified in their refusal.—**DIXON v. BLACKPOOL & FLEETWOOD TRAMROAD CO.**, [1909] 1 K. B. 860; 78 L. J. K. B. 637; 100 L. T. 403; 73 J. P. 219; 25 T. L. R. 323; 7 L. G. R. 390; Konst. & W. Rat. App. 114, D. C.

Annotations:—**Expld.** Wixon v. Thomas, Lambert v. Thomas, Burrows v. Thomas, [1911] 1 K. B. 43. **Consd.** Whetton v. Clark, [1916] 1 K. B. 94. **Refd.** Blackpool & Fleetwood Tramroad Co. v. Bispham with Norbrook U. C., [1910] 1 K. B. 592. **Mentd.** Shillito v. Hinchliffe, [1922] 2 K. B. 236.

1593. Under a local Act—Failure of action against distrainer—Right to treble costs—No inquiry as to damages.—Upon avowry for rates made on pltf.’s lands under 50 Geo. 3, c. 47, where pltf.’s were nonsuited:—*Held*: def’t. was not entitled to a writ of inquiry of damages, the Act only giving treble costs.—**GOTOBED v. WOOL** (1817), 6 M. & S. 128; 105 E. R. 1191.

1594. — — — Another Act quoted in notice of distress.—Where a distress is made under the authority of one local act, & the notice of distress states it to be made under another, & pltf. discontinues an action brought in respect of that distress, the mistake as to the act authorising the distress does not interfere with def’t.’s claim to treble costs under that Act in case of discontinuance although pltf. may have adopted a form of action

not contemplated by the protecting Act.—**DEBNEY v. CORBETT** (1837), 5 Dowl. 701; Will. Woll. & Dav. 211.

1595. — Limitation of time of complaint—Power to state case.—**SWEETMAN v. GUEST**, No. 1671, *post*.

1596. — Excessive rate—No ground to refuse warrant.—The owners of abbey lands were, by a local Act authorised to levy rates on certain occupiers towards repair of roads, & enforce payment by distress warrant of justices; or they might compound with neighbouring trustees of roads to pay an annual sum in lieu of repairs. Any person aggrieved by a rate might appeal to quarter sessions. In 1876 an Act passed authorising the owners to pay to a local board a large sum in lieu of future repairs of the road, & thereby to be discharged for ever; the prior Act to be repealed. A month before the last Act the owners made a rate under the first Act to cover prior liabilities as well as a payment to the local board in lieu of repairs, & the rate did not show this double object on the face of it. The rate was not appealed against, but the justices deeming it to be in excess refused to issue their distress warrant:—*Held*: a *mandamus* must issue to the justices to issue their distress warrant, as an excess in amount was no reason for their refusing to enforce payment.—**R. v. ESSEX J.J.** (1877), 36 L. T. 554; 41 J. P. 676, D. C.

1597. Police & ward rates—Necessity for demand & refusal—As to each separate rate.—Where an Act authorises a justice, on oath made that a party refuses to pay his rates, to issue a summons calling on the party to show cause why he refuses, oath being first made by the officer that he has demanded the rate, & that it is due & in arrear, & authorises a warrant of distress to be issued on neglect to show good cause, it must be shown in any pleading or special case on the part of the officer, who justifies a distress under a warrant issued for non-attendance to such a summons, that there had been a demand & refusal previously to the summons; & if one warrant be issued for several separate rates, a demand of both, & refusal of one, is not sufficient to support the warrant.

In a special case on an action for an illegal distress under such an Act, it appeared that the distress was for two rates, a police rate & a ward rate, one of which had been previously tendered & refused, unless the other was also paid. The summons had been served after the tender, but it did not appear whether it was not issued before the tender; nor did it appear that there had been any demand, otherwise than by the refusal to receive the one rate without the other. The summons called on pltf. to show cause why he refused to pay both the rates, & the warrant recited refusal of both:—*Held*: (1) as there was no distinct statement of any demand which was necessary either in a plea, or avowry, or a special case, def’t. had failed to disclose any justification of the distress; (2) a demand of both rates after a tender of one could not support a distress for both.—**JAY v. HALKSWORTH** (1854), 2 C. L. R. 1776.

1598. Under Public Health Act, 1848 (c. 63), s. 103—Non-publication of rate—Distress not thereby invalid.—The above sect. enacts, that all rates made or collected under it shall be published in the same manner as poor rates:—*Held*: non-publication did not make a rate void; & on a summons to enforce the rate, which had not been published, but had not been appealed against

the justices were right in disregarding the non-publication; & their warrant was a protection to the officer distraining under it.—*LE FEUVRE v. MILLER* (1857), 8 E. & B. 321; 26 L. J. M. C. 175; 29 L. T. O. S. 263, 344; 22 J. P. 226; 3 Jur. N. S. 1255; 120 E. R. 120.

Annotations:—*Folld. R. v. Somersetshire JJ.* (1858), 22 J. P. Jo. 431. *Consd. Beeson v. Derby Overseers* (1903), 89 L. T. 47. *Refd. R. v. Worksop Board of Health* (1865), 10 L. T. 297; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

1599. — **No formal order for issue of warrant necessary.**—The justices to whom an application is made under Public Health Act, 1848 (c. 63), s. 103, for a distress warrant to levy the amount due for rates are not required to make any formal order.—*Ex p. PERRY* (1860), 24 J. P. 87.

SECT. 9.—APPEALS.

1600. Enforcing payment of poor rate—Necessity for notice to overseer.—*PRIESTLEY v. WATSON*, No. 1502, *ante*.

1601. — **Grounds for objection—Poor Relief Act, 1744 (c. 38), ss. 4, 7.**—Appl't. against a distress warrant issued to enforce payment of poor rates, cannot, under sect. 7 of the above Act, avail himself of any objection which he might have urged against the rate itself on appeal to the sessions under sect. 4. Nor will the ct. grant a *mandamus* to justices to hear such appeal against the warrant, if the application discloses no grounds of appeal other than the grounds which might have been urged against the rate.—*R. v. KENT JJ.*, *Ex p. ROOTS* (1867), 16 L. T. 672.

Annotation:—*Expld. R. v. London JJ.*, [1899] 1 Q. B. 532.

1602. — **Time for making appeal.**—An appeal will not lie against the issue of a distress warrant for poor rate before the distress has been levied.—*R. v. LONDON JJ.*, [1899] 1 Q. B. 532; 47 W. R. 316; *sub nom. R. v. LONDON JJ.*, *Ex p. BAYNE*, 68 L. J. Q. B. 383; 80 L. T. 286; 63 J. P. 388; 43 Sol. Jo. 398; *sub nom. Re LONDON JJ.*, *Ex p. BAYNE*, 15 T. L. R. 196, D. C.

Annotations:—*Appld. R. v. Lincolnshire JJ.*, [1912] 2 K. B. 413. *Expld. Kershaw, Leese v. Stockport Overseers*, [1923] 2 K. B. 129. *Refd. R. v. London JJ.*, *Ex p. Greenwich Union*, [1900] 1 Q. B. 438.

1603. — **A "criminal cause or matter"**—**Judicature Act, 1873 (c. 66), s. 47.**—A case stated by justices on appeal from an order granting a distress warrant to enforce payment of a poor rate is a "criminal cause or matter" within the above sect., & no appeal lies to the Ct. of Appeal from the decision of Q. B. Div. upon such case.—*SEAMAN v. BURLEY*, [1896] 2 Q. B. 344 65 L. J. M. C. 208; 75 L. T. 91; 60 J. P. 772; 45 W. R. 1; 12 T. L. R. 599; 40 Sol. Jo. 684; 18 Cox, C. C. 403, C. A.

Annotations:—*Consd. Southwark & Vauxhall Water Co. v.*

Hampton U. C., [1899] 1 Q. B. 273; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089. *Refd. Scott v. Scott*, [1912] P. 241; *R. v. Newcastle-upon-Tyne Profiteering Committee, Ex p. Provincial Cinematograph Theatres* (1920), 89 L. J. K. B. 1098.

1604. — **Appeal to Quarter Sessions—Application of Summary Jurisdiction Act, 1879 (c. 49).**—An appeal to quarter sessions under Poor Relief Act, 1744 (c. 38), s. 7, by a person aggrieved by a distress for non-payment of poor rate is not an appeal from an "order" of a ct. of summary jurisdiction within Summary Jurisdiction Act, 1879 (c. 49), s. 31, & the appeal is therefore not subject to the conditions & regulations prescribed by that sect.—*R. v. LINCOLNSHIRE JJ.*, [1912] 2 K. B. 413; 81 L. J. K. B. 967, D. C.

1605. Enforcing payment of general district rate—Not a "criminal cause or matter."—An application to a ct. of summary jurisdiction for an order to enforce payment of a general district rate under Public Health Act, 1875 (c. 55), s. 256, is not a "criminal cause or matter," & therefore an appeal lies to the Ct. of Appeal from the judgment of a Divisional Ct. upon a case stated on such an appln.—*SOUTHWARK & VAUXHALL WATER CO. v. HAMPTON URBAN COUNCIL*, [1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 79 L. T. 512; 63 J. P. 100; 47 W. R. 177; 15 T. L. R. 95; 43 Sol. Jo. 124, C. A.; *affd. sub nom. HAMPTON URBAN COUNCIL v. SOUTHWARK & VAUXHALL WATER CO.*, [1900] A. C. 3, H. L.

Annotations:—*Consd. R. v. Shuttleworth, Ex p. Tickle* (1908), 72 J. P. 329. *Refd. Atkins v. Hutton* (1910), 103 L. T. 514.

1606. Prohibition in lieu of—Justices having jurisdiction to issue warrant.—On a motion for a writ of prohibition to justices to restrain them from issuing their distress warrant to enforce a rate made under a local improvement act, it appeared that the rate had been signed & allowed by the justices before the amount to be paid by each of the persons rated had been inserted, but it also appeared that the ratable value of the property rated, the name of the person rated, & the amount at which the property was to be rated, were inserted. It also appeared that part of the rate to be levied was made on appct. in respect of his being owner of a tithe commutation rent-charge. The justices had these facts before them at the time they made the order for the issuing of their distress warrant:—*Held*: no prohibition ought to go, on the ground that they had jurisdiction to issue their warrant on proof before them of the liability of the party to pay the rate, & if the justices were wrong in their decision on the facts before them, the proper way of reversing their decision was by appeal to the sessions.

Semble: the rate was a good rate, as the amount to be paid by each ratepayer could be made perfectly certain by the mere operation of an arithmetical calculation.—*Ex p. BINNEY* (1851), 16 J. P. 22.

Part IV.—Distress for Assessed Taxes.

SECT. 1.—IN GENERAL.

See Taxes Management Act, 1880 (c. 19).

1607. Remedy of person improperly assessed—Appeal to commissioners—Cannot replevy—Judgment of commissioners or judges conclusive.—A person who has been improperly assessed by the

assessor of his district for a tax to which he is not legally liable, should appeal to the comrs. against it; & may, if he pleases, afterwards require a case for the opinion of the judges upon it. Whether he appeals or not, if he allows a distress to be taken upon his goods for the amount of such

PART IV. SECT. 1.

a. *What may be distrained—Not property on Crown land.*—Lands in the

possession of the Crown are not liable to be distrained upon; nor are lands in the possession of the Crown *jure coronæ*

liable to be assessed for county cess & charges, unless made so by express enactment. When a distress had been

assessed tax, he cannot replevy, as the judgment of the comrs. or the judges is final & conclusive.—*ALLEN v. SHARP* (1848), 2 Exch. 352; 3 New Mag. Cas. 39; 17 L. J. Ex. 209; 11 L. T. O. S. 155; 12 J. P. 693; 154 E. R. 529.

Annotations:—*Mentd.* *Livingstone v. Westminster Corpn.*, [1904] 2 K. B. 109; *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768.

1608. Action at common law for wrongful distress—Statutory power of commissioners to determine differences—Jurisdiction of High Court not affected.]—*M.* bequeathed the household goods, etc., in his mansion of B. to trustees to permit his son, who took a life interest in the mansion, to enjoy the same without removing them from the mansion-house. A distress was taken of the household goods, etc., for the assessed taxes of the son. The trustees paid the amount of the house & window taxes, & then brought an action for an excessive distress, in taking goods, etc., for the taxes on the carriages, horses, etc., of the son:—*Held*: (1) the taxes on carriages, etc., being a charge on the person, & not on the premises, these goods, not being the property of the son, could not be seized for them; &, moreover, even if the son could have become a bkpt., these goods were not in his order & disposition, within the meaning of 21 Jac. 1, c. 19; (2) the jurisdiction of the Ct. of K. B. was not taken away by the powers given to the Comrs. of Taxes.—*SHAFTESBURY (EARL) v. RUSSELL* (1823), 1 B. & C. 666; 3 Dow. & Ry. K. B. 84; 1 L. J. O. S. K. B. 202; 107 E. R. 244.

Annotations:—*As to* (1) *Distd.* *MacGregor v. Clamp*, [1914] 1 K. B. 288. *Mentd.* *Re Acraman, Ex p. Castle* (1842), 3 Mont. D. & De G. 117.

1609. Remedy for illegal distress—Action for money had & received against bailiff—Distress upon inhabitant where collector liable.]—(1) The action for money had & received lies to recover back money which has been obtained through compulsion, under colour of process, by an excess of authority, although it has been paid over.

(2) To make it a defence to an agent that he had paid over the money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over.

(3) A sheriff issued a warrant on mesne process

made by the collector of the county cess, upon cattle grazing in the Phoenix Park, Dublin:—*Held*: there being no statutable enactment expressly binding the crown to payment of such cess, the collector was not justified in making such distress, although the cattle distrained belonged to a private individual.—*GIBBONS v. MORAN* (1838), 6 Ir. L. Rec. N. S. 141.—*IR.*

*growing crops.]—*The grand jury cess collector is not warranted in distraining growing crops, under the 6 & 7 Will. 4, c. 116, though the distress was made before 13 & 14 Vic. c. 82.—*M'NAMARA v. APJOHN* (1850), 13 L. L. R. 394.—*IR.*

c. — Property of executors & devisees—For taxes due on land in trust.]—*Held*: exors. & devisees in trust of land were properly assessed as owners, & that their own goods might be seized for the taxes.—*DENNISON v. HENRY* (1859), 17 U. C. R. 276.—*CAN.*

d. — Goods of stranger.]—A bailiff having a warrant from the collector to distrain for taxes due by A. on his lands went to the premises and seized a pair of horses which belonged to A.'s son-in-law:—*Held*: the horses were in the possession of A., & liable to seizure; & the facts proved amounted to a distress.—*FRASER v. PAGE* (1859), 18 U. C. R. 327.—*CAN.*

agreement between pliffs. & the E. & N. Ry. Co., pliffs. were working the latter ry. with their own engines & cars, & defts. as collector seized pliff.'s car on such ry. for taxes due by the E. & N. Ry. Co., in respect of other land belonging to that co.:—*Held*: such seizure was unauthorized, for the car when taken was in pliffs.' possession & their own property.—*GREAT WESTERN RY. CO. v. ROGERS* (1869), 29 U. C. R. 245.—*CAN.*

f. — — —.]—Consolidated Assessment Act, 55 Vict. c. 48, s. 124 (O.), does not authorize a distress for non-payment of taxes of the goods of strangers on the premises, unless such goods are in the possession of the person who ought to pay the taxes or of a legal occupant of the property.—*CHRISTIE v. TORONTO CITY* (1894), 25 O. R. 425, 606.—*CAN.*

g. — — — Left with auctioneers for sale.]—Premises in a city were occupied by a firm of auctioneers, who, however, were not assessed in respect to them. Goods of pliff. left with the auctioneers to be sold by auction were distrained by defts. for the taxes payable upon the premises for the current year:—*Held*: the distress was valid.—*NORRIS v. TORONTO CITY* (1893), 24 O. R. 297.—*CAN.*

h. — Machine with engine—Not

to distrain the goods of A.; the bailiff levied the debt upon the goods of B., & paid it over:—*Held*: money had & received will lie against the bailiff.—*SNOWDON v. DAVIS* (1808), 1 Taunt. 359; 127 E. R. 872.

Annotations:—*As to* (1) *Refd.* *Morgan v. Palmer* (1824), 4 Dow. & Ry. K. B. 283; *Atlee v. Backhouse* (1838), 3 M. & W. 633; *Valpy v. Manley* (1845), 1 C. B. 594; *Sharland v. Mildon*, *Sharland v. Loosemore* (1846), 5 Hare, 469; *Parker v. Bristol & Exeter Ry.* (1851), 6 Exch. 702; *Steele v. Williams* (1853), 8 Exch. 625; *Taylor v. Met. Ry.* (1906), 95 L. T. 149; *Marshal Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343. *As to* (2) *Refd.* *East India Co. v. Tritton* (1824), 5 Dow. & Ry. K. B. 214; *Smith v. Sleep* (1844), 12 M. & W. 585; *Oates v. Hudson* (1851), 6 Exch. 346.

1610. What may be distrained—Property in order & disposition of bankrupt—Not property subject to trust—Furniture.]—*SHAFTESBURY (EARL) v. RUSSELL*, No. 1608, *ante*.

1611. Levying the distress—One warrant for several amounts—Under several statutes—Each giving power of distress.]—One warrant of distress for the amount of several duties imposed by different Acts of Parliament, each giving a power of distress, is legal. The judgment of the Comrs. of Land Tax on appeal is conclusive in an action of trespass brought against the officer for levying under a warrant of distress.

As all the taxes were confirmed on appeal, however improper perhaps the one objected to was, it must be binding on the parties; & then the warrant of distress, though it included them all, was properly issued (*LORD KENYON, C.J.*).—*PATCHETT v. BANCROFT* (1797), 7 Term Rep. 367; 101 E. R. 1024.

Annotation:—*Apld.* *Simpkin v. Robinson* (1881), 45 L. T. 221.

1612. — Demand & refusal—Necessary preliminary—Where reasonable interval necessary between demand & distress.]—*GIBBS v. STEAD*, No. 1624, *post*.

1613. — — — Need not be personal.]—(1) To justify a distress for taxes under 43 Geo. 3 (c. 99), s. 33, it is not necessary that there should have been a personal demand by the collector, or personal refusal by the party distrained upon.

(2) Nor is it essential that the demand to which the refusal applies should have specified the precise amount claimed, if the debtor understood what the

a fixture.]—Held: a planing machine standing on the floor without fastening, with belts, & an engine to work it, was a chattel liable to seizure for taxes.—*HOPE v. CUMMING* (1860), 10 C. P. 118.—*CAN.*

k. — Goods of subsequent occupant of property assessed.]—*Held*: the goods of a subsequent occupant, who took possession of premises after assessment, & was in possession before the return of the collector's roll, were liable to distress for taxes assessed against the previous occupier, although the goods were not at the time on the property actually assessed.—*ANGLIN v. MINIS* (1868), 18 C. P. 170.—*CAN.*

l. — Goods not on property assessed.]—A lot of land being in arrear for taxes for six years, during which it had been assessed as "non-resident" land, was duly returned as occupied by pliff., who had become tenant of it. These taxes were placed on the collector's roll, & in order to satisfy them he seized pliff.'s goods upon another lot in the same township:—*Held*: such seizure was unauthorized.—*WARNE v. COULTER* (1866), 25 U. C. R. 177.—*CAN.*

m. — Goods in custodia legis.]—There is nothing in Assessment Act, R. S. O. 1897, c. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods, which being

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amount was, & did not object to it.—*R. v. FORD* (1835), 2 Ad. & El. 588; 1 Har. & W. 46; 4 Nev. & M. K. B. 451; 3 Nev. & M. M. C. 27; 4 L. J. M. C. 58; 111 E. R. 227.

Annotation:—As to (1) Refd. R. v. Brecknock & Abergavenny Canal Co. (1835), 3 Ad. & El. 217.

1614. ——— When precise amount need not be specified in demand.]—*R. v. FORD*, No. 1613, *ante*.

1615. ——— Where resistance threatened—Collector's right to take constable—Constable in execution of duty.]—(1) If a collector of taxes has reason to believe, from threats used towards him by a person on whose goods he is about to distrain for payment of taxes, that resistance will be offered, he has a general right, from the nature of his office, to take a constable with him for protection; & if such constable is assaulted under such circumstances, an indictment may be maintained describing such assault, as an assault on the constable in the execution of his duty.

(2) A collector of taxes may distrain without having his warrant with him.—*R. v. CLARK* (1835), 3 Ad. & El. 287; 1 Har. & W. 252; 4 Nev. & M. K. B. 671; 3 Nev. & M. M. C. 70; 4 L. J. M. C. 92; 111 E. R. 422.

1616. ——— Collector may distrain without having warrant with him.]—*R. v. CLARK*, No. 1615, *ante*.

SECT. 2.—LAND TAX.

generally, LAND TAX.

1617. Validity of assessed rate—Judgment of commissioners conclusive.]—*PATCHETT v. BANCROFT*, No. 1611, *ante*.

1618. ——— ———.]—A rate of one-tenth of a penny in the pound on the ratable property in a parish was sufficient to raise the quota which the parish was liable to contribute to the land tax; but, in order to avoid the difficulty & inconvenience of collecting such small sums as would, under that rate, have to be collected, amounting in many cases to no more or even less than a penny, the assessors assessed the parish at the rate of one penny in the pound, thereby realising an amount which, after deducting the quota payable by the parish to the tax, left a large surplus, & it was the intention of the comrs. that such surplus should be collected yearly for four years, & be applied at the end of each year, under Revenue (No. 2) Act, 1861 (c. 91), so as in four years time wholly to extinguish the land tax chargeable on the parish. Due notice of a meeting of comrs. to hear appeals from persons aggrieved by being overrated by the assessors was given, but no ratepayer appealed. Upon pltf.'s refusing to pay the penny rate assessed on a leasehold house belonging to & occupied by him, the collector, acting under a warrant of distress signed by deft. & another comr., seized a piece of furniture of pltf.'s on the premises, whereupon pltf. brought an action in the county ct. against deft. for an illegal distress, in which judgment was given, with damages, in pltf.'s

favour, & on appeal by deft. :—*Held* : the distress warrant, & the proceedings thereunder, being perfectly regular, pltf. could not go behind the warrant, which justified the persons executing it; & the quota being established, the rate assessed not being appealed against must be considered as the rate payable under the judgment of the comrs., & pltf., if objecting to the amount, should have appealed to them under Land Tax Act, 1797 (c. 5), by which their decision was made final & conclusive.—*SIMPKIN v. ROBINSON* (1881), 45 L. T. 221, D. C.

Redemption of tax.]—A prebendary agreed by writing, in consideration of a sum in 3 per cent Stock, of the amount necessary for redeeming the land tax, to convey to a lessee then in possession a part of the reversion in the prebendal estate; such part to be set out & valued by B. & approved by the King's comrs. The lessee furnished the sum required for purchasing the stock, & the prebendary concluded the necessary contract with the Land Tax Comrs., transferred the stock into the names of the Comrs. for Reducing the National Debt, & had the contracts duly registered; the land was also set out & valued; but the lessee then refused to sign the necessary memorial for the purpose of obtaining the approbation of the King's comrs. pursuant to Land Tax Redemption Act, 1802 (c. 116), s. 76. The prebendary afterwards distrained upon an under-tenant of the land for the amount of the redeemed land tax as additional rent pursuant to sect. 88 of the Act :—*Held* : (1) there had been no valid sale of the land, for want of the assent of the comrs. & because in order to comply with sect. 69 of the Act the prebendary ought to have sold not only the fee simple of the lands demised but also the rents, services & other profits; (2) he had no right by sect. 88 to distrain until the precise quantity of land, & the portion of reserved rent, to be sold were ascertained by the comrs.—*WARNER v. POTCHETT* (1832), 3 B. & Ad. 921; 110 E. R. 339.

Annotation:—Mentd. Willoughby v. Willoughby (1843), 4 Q. B. 687.

1620. Where part tax redeemed—Distress for full amount illegal.]—Pltf., being vicar of E., & owner & occupier of the vicarial tithes, & being also occupier of the rectorial tithes, which belonged to B., & on which the land tax had been redeemed, was assessed to the land tax in a gross sum for the vicarial & rectorial tithes. The whole sum, up to the quarter day last past, being demanded by deft., who was collector, pltf. refused to pay the sum at which the rectorial tithes had been redeemed but paid the residue of the assessment. The collector distrained on him, under Land Tax Act, 1797 (c. 5), s. 17, for the amount withheld. The distress warrant did not specify the property :—*Held* : (1) the distress was illegal, as being for a sum not due, & because the assessment should have separated the tithes belonging to different proprietors under Parliamentary Elections Act, 1780 (c. 17), s. 3; (2) trespass lay for the distress; (3) the distress being made for an assessment alleged to be due on a past half year, the collector

under distraint by a landlord, are in custodia legis.—*KINGSTON CITY v. ROGERS* (1899), 31 O. R. 119.—CAN.

.]—*MACMONAGLE v. CAMPBELL* (1902), 35 N. B. R. 625.—CAN.

o. ——— Goods purchased from chattel mortgagee.]—Goods purchased from the chattel mtgee. thereof are not "claimed * * by purchase, gift, transfer, or assignment" from the

mtgor. within R. S. O. 1897, c. 224, s. 135, sub-s. 4 (b), so as to make them liable in the purchaser's hands to distress for taxes due by the mtgor.—*HORSMAN v. TORONTO CITY* (1900), 27 A. R. 475.—CAN.

p. ——— Goods not in possession of person assessed.]—Goods which are not in the possession of the person assessed in respect of them cannot be distrained for the taxes assessed against them.—*DONAHUE v. CAMP-*

BELL (1901), 2 O. L. R. 124.—CAN.

q. ——— Goods in possession of chattel mortgagee—Not on land assessed.]—Chattels in the possession of a chattel mtgee. who has distrained under a power in the mtge. may not be distrained by a town for taxes due upon lands other than those upon which the goods are found.—*ROYAL TRUST CO. v. CASTOR TOWN*, [1917] 1 W. W. R. 1529; Alta. L. R. 335.—CAN.

could not justify under a distress for the current year, no demand having been made for the sum due for the latter period.—*CHARLETON v. ALWAY* (1840), 11 Ad. & El. 993; 3 Per. & Dav. 618; 9 L. J. Q. B. 237; 113 E. R. 691.

Annotation :—As to (1) *Reid*. *Allen v. Sharp* (1848), 2 Exch. 352.

1621. —.]—Pltfs. were the exors. of the will of H., & deft. was a collector of land tax. In 1799 the predecessor in title of H. had entered into a contract for the redemption of the land tax charged upon, a manor of which such predecessor was lord. The certificate of contract given by the Land Tax Comrs. set out that the manor, grove, & woodlands were charged with land tax to the amount of £70 4s., & the contract for redemption, that the tax charged upon the manor, grove, & woodlands was redeemed for a sum therein mentioned, but neither the duplicate assessment nor the schedules to the certificate or contract made any mention of such manor, groves, & woodlands. In 1844 H. bought the manor, & afterwards brought the waste into profitable occupation. No demand of land tax was made of him until 1867, when £12 17s. 4d. was demanded as a sum "assessed & not exonerated." H. refusing to pay, & being distrained upon by defendant, brought an action for illegal distress, which was continued by pltfs. upon a special case stated without pleadings :—*Held* : pltfs. were entitled to judgment.—*HODGSON v. PEARSON* (1874), 31 L. T. 679; 39 J. P. 198.

Annotations :—*Mentd.* *Newton Chambers v. Hall*, [1907] 2 K. B. 446; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467.

1622. Double assessment—Distress acquiesced in—No action for wrongful distress.—In 1824 M. purchased lands in the parish of A. which adjoined the parish of B. The lands had always been assessed to the land tax in A., & in 1826 M. paid for these lands to the collector of A., & continued to do so. In the same year, M. was called upon by the collector of B. to pay for the same lands, which he refused to do, & in 1828 his lands were distrained upon for land tax for two years & a half due to the collector of B. M. then brought an action of trespass against the assessors of B., & twice obtained a verdict, on the ground that his lands ought not to be assessed in B. The assessors of B. still continued the assessment there, & in Jan. 1837, three writs of *levari facias* issued out of the Ct. of Exchequer, directed to the sheriff of Huntingdon, to levy upon the goods of the tenant of M. for three years' land tax, due to the parish of B. in respect of these lands in A. These writs were executed in Feb. in the same year, & the money raised & paid over to the Crown. Upon a motion to set aside the writs of *levari facias* in 1838, the ct. refused to do so, as there had been no wrongful act in the execution of them, & the sheriff was justified in acting in obedience to the writs. *Semble* : the opportunity for redress had passed, & an application should have been made to the ct. in an earlier stage of the proceedings, before the money had been paid over to the Crown.—*Re GLATTON LAND TAX* (1839), 4 M. & W. 570; 1 Horn & H. 430; 8 L. J. Ex. 113; 150 E. R. 1547.

1623. Arrears—For years where no assessment made—Distress illegal.—Comrs., under an Act of Parliament, directing them yearly & every year to rate, charge, tax, & assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, & added to it the arrears of the past years. & levied for the

assessment so made including such arrears :—*Held* : no arrears could be due for the years respecting which no assessment had been made, & the distress was therefore bad.—*NEWTON v. YOUNG* (1805), 1 Bos. & P. N. R. 187; 127 E. R. 432.

1624. Levying the distress—Necessity for demand—Reasonable interval before seizure.—Under Land Tax Act, 1797 (c. 5), ss. 2 & 12, land tax for the quarter ending Mar. 25 is due, & may be demanded, & upon default in payment, distrained for, at any period during that quarter.

Under sects. 9 & 17 of the above Act & 43 Geo. 3, c. 99, s. 33, where payment of land or assessed taxes is demanded upon the premises in the absence of the owner, mere non-payment, without notice of the demand, is not a neglect or refusal to pay, to justify an immediate distress; a reasonable interval must be allowed between the demand & the seizure.—*GIBBS v. STEAD* (1828), 8 B. & C. 528; 2 Man. & Ry. K. B. 547; 6 L. J. O. S. K. B. 378; 108 E. R. 1138.

Annotation :—*Reid*. *Re Hammersmith Rent-charge* (1819), 4 Exch. 87.

1625. —.]—*CHARLETON v. ALWAY*, No. 1620, *ante*.

1626. — Breaking open outer door previous to seizure—Presence of constable necessary.—The presence of a constable is necessary at the breaking open of the outer door of a house previous to a seizure of goods for land tax, under Land Tax Act, 1797 (c. 5), s. 17, & the necessity of such presence is not confined to the breaking open of a box or chest within the house.—*FOSS v. RACINE* (1838), 8 C. & P. 699; 7 Dowl. 53; 4 M. & W. 419; 1 Horn & H. 403; 8 L. J. Ex. 38; 2 J. P. 743.

1627. Remedy for illegal distress—Action of trespass.—*CHARLETON v. ALWAY*, No. 1620, *ante*.

SECT. 3.—INCOME TAX.

See, generally, INCOME TAX; & Income Tax Act, 1918 (c. 40), ss. 162–165, 177.

1628. Whether demand necessary before issue of warrant.—*EAST INDIA CO. v. SKINNER* (1695), Comb. 342; 90 E. R. 516.

1629. What recoverable by distress—Arrears—House owned but not occupied.—On Apr. 22, 1897, a lease was granted to pltf. of premises, beginning Dec. 25, 1896, for sixty years at £65 a year rent. The rent was to be paid quarterly, the first payment being payable on Sept. 29, 1897. He did not take possession until Apr. 1897, & for several years before he entered the premises had been unoccupied. An assessment for income tax of £9 3s. 4d. was made for the year Apr. 1896, to Apr. 1897. In Aug., & again in Sept. 1897, demands were made for payment, & as pltf. refused to pay, on Nov. 17 a distraint was put in. The present action was then commenced against deft., a duly appointed collector for the purpose of the Income Tax Acts, for wrongful distress :—*Held* : this was a lawful entry, & no action would lie, as it was covered by Income Tax Act, 1842 (c. 35), s. 70.—*READING v. CHEW* (1898), 78 L. T. 681; 14 T. L. R. 468; 42 Sol. Jo. 593; 3 Tax Cas. 625.

1630. Who may distrain—Appointed collectors—After collector's year expired.—The collectors appointed in each year under the Taxes Management Act, 1880 (c. 19), to collect the duties payable for the year have authority to distrain for those duties if unpaid, although the year has expired;

Sect. 3.—Income tax. Part V. Sects. 1, 2, 3,

at any rate, until they have accounted for the duties given them in charge to collect under Part VII. of the Act.—*ELLIOTT v. YATES*, [1900] 2 Q. B. 370; 69 L. J. Q. B. 820; 82 L. T. 812; 64 J. P. 564; 48 W. R. 610; 16 T. L. R. 473; 44 Sol. Jo. 591, C. A.

1631. What may be distrained—Goods & money.]—*EAST INDIA CO. v. SKINNER* (1695), Comb. 342; 90 E. R. 516.

1632. — Goods of third person—On premises charged—House Tax Act, 1803 (c. 161), sched. A.]—The collector of the house & window tax under House Tax Act, 1803 (c. 161), may distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, & the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears.—*JUSON v. DIXON* (1813), 1 M. & S. 601; 105 E. R. 225.

*Annotations:—**Apld. MacGregor v. Clamp*, [1914] 1 K. B. 288. *Refd. Shaftesbury v. Russell* (1823), 3 Dow. & Ry. K. B. 84. *Mentd. Eastwood v. McNab*, [1914] 2 K. B. 361.

1633. — — — — Income Tax Act, 1842 (c. 35), sched. A.]—Under Taxes Management Act, 1880 (c. 19), s. 86, a collector of taxes may distrain for arrears of income tax under Income Tax Act, 1842 (c. 35), sched. A., & for inhabited house duty, which are taxes charged on the land, the goods of a third person on the premises charged; & an implement of trade is not exempt from a distress for taxes.—*MACGREGOR v. CLAMP & SON*, [1914] 1 K. B. 288; 83 L. J. K. B. 240; 109 L. T. 954; 78 J. P. 125; 30 T. L. R. 128; 58 Sol. Jo. 139, D. C.

*Annotations:—**Refd. McCreagh v. Cox & Ford* (1923),

92 L. J. K. B. 855. *Mentd. Eastwood v. McNab*, [1914] 2 K. B. 361.

1634. — Implement of trade.]—MACGREGOR v. CLAMP & SON, No. 1633, *ante*.

1635. Costs & charges—Tax not exceeding £20—Cost of man in constructive possession.]—Where a distress is made upon the goods of a taxpayer for unpaid income tax not exceeding £20, the collector is not entitled to charge 2s. 6d. a day for a man in possession, if the man has only been in constructive possession & not in real possession of the goods distrained upon, unless the taxpayer, in order to avoid the inconvenience of having a man in real possession, has expressly agreed to pay that sum.—*LUMSDEN v. BURNETT*, [1898] 2 Q. B. 177; 67 L. J. Q. B. 661; 78 L. T. 778; 46 W. R. 664; 14 T. L. R. 403, C. A.

1636. Remedy for wrongful distress—Action for damages—Invalid assessment.]—B. was the manager of a co. having its registered office in the City of London. The co. did no business, & B., who resided at W., was very rarely in attendance at the office. Various notices relating to demands for income tax under sched. E. were addressed to B. at the office of the co., but in fact such notices never were delivered to him & he knew nothing of them. In Jan. 1913, a distress was levied upon B.'s premises at W. B. sued for damages for wrongful distress:—*Held*: no valid assessment had been made upon B. in respect of the income tax for the year for which the same was demanded & in respect of the non-payment of which the distress was levied; the proceedings taken to recover the amount assessed were unlawful; & B. was entitled to damages for the wrongful distress.—*BERRY v. FARROW*, [1914] 1 K. B. 632; 83 L. J. K. B. 487; 110 L. T. 104; 30 T. L. R. 129.

*Annotation:—**Mentd. G. W. Ry. v. Bater*, [1922] 2 A. C. 1.

Part V.—Distress for Tolls.

SECT. 1.—IN GENERAL.

1637. Right incident to every legal toll.]—*HICKMAN'S CASE* (1599), Noy, 37; 74 E. R. 1006.

1638. —.]—The power of distress is incident to every legal toll (*LORD MACNAGHTEN*).—*SIMPSON v. A.-G.*, [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, H. L.; *reusg. S. C. sub nom. A.-G. v. SIMPSON*, [1901] 2 Ch. 671.

*Annotations:—**Mentd. Newcastle v. Workson U. C.*, [1902] 2 Ch. 145; *Queenborough Corpn. v. Smeed, Dean* (1904), 68 J. P. 244; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Dibden v. Skirrow*, [1908] 1 Ch. 41; *Robinson v. Smith* (1908), 24 T. L. R. 573; *Re Hatschek's Patents, Ex p. Zerener*, [1909] 2 Ch. 68; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Folkestone Corpn. v. Brockman*, [1914] A. C. 338; *Hamerton v. Dysart*, [1916] 1 A. C. 57; *Morpeth Corpn. v. Northumberland Farmers Auction Mart Co. & Donkin* (1920), 90 L. J. Ch. 420.

1639. Whether goods may be detained—Until payment of tolls & charges.]—*PITTS v. GAINEE & FORESIGHT* (1700), 1 Ld. Raym. 558; Holt, K. B. 12; 1 Salk. 10; 91 E. R. 1272.

*Annotations:—**Mentd. Hopper v. Reeve* (1817), 1 Moore, C. P. 407; *Newcastle v. Clark* (1818), 2 Moore, C. P. 666; *Branscomb v. Brydges* (1823), 2 Dow. & Ry. K. B. 256; *Parker v. Bailey* (1824), 4 Dow. & Ry. K. B. 215; *Moreton v. Hardern* (1825), 4 B. & C. 223; *Moore v. Robinson* (1831), 1 L. J. K. B. 4; *Hansworth v. Fowkes* (1833), 2 L. J. K. B. 72; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *M'Mahon v. Lennard* (1858), 6 H. L. Cas. 970.

SECT. 2.—HIGHWAY TOLLS.

See, generally, HIGHWAYS.

1640. Right to distrain for—Tolls thorough & traverse—Existing by prescription.]—Toll-traverse, toll-thorough, turn-toll, & toll for murage, may exist by prescription, & may be distrained for *in viâ regid*; but a justification without saying for distress, *nomine districtionis*, is bad.—*SMITH v. SHEPHERD* (1599), Cro. Eliz. 710; Moore, K. B. 574; 78 E. R. 945.

*Annotations:—**Mentd. James v. Johnson* (1677), 1 Mod. Rep. 231; *Nottingham Corpn. v. Lambert* (1738), Wills, 111; *Truman v. Walgham & Key* (1766), 2 Wils. 296; *Pelham v. Pickersgill* (1787), 1 Term Rep. 660; *Rickards v. Bennett* (1823), 1 B. & C. 223; *Brett v. Beales* (1830), 10 B. & C. 508.

SECT. 3.—MARKETS AND FAIRS.

Sec, generally, MARKETS; Markets & Fairs *Clauses Act, 1847 (c. 14), s. 38; Railway* *Clauses Act, 1845 (c. 20), ss. 140, 141, 148, 149.*

1641. General rule.]—The right to the toll & the right to distrain for it are incident to the right to bring the goods to the market or fair (*ERLE, O.J.*).—*WHITSTABLE FREE FISHERS & DREDGERS CO. v. GANN, GANN v. JOHNSON* (1861), 11 C. B. N. S.

PART V. SECT. 2.

r. Goods seized for—Right to replevy.]—WILSON v. MIDDLESEX COUNTY (1859), 18 U. C. R. 348.—*CAN.*

387; 31 L. J. C. P. 372; 142 E. R. 847; *on appeal*,
sub nom. GANN v. FREE FISHERS OF WHITSTABLE
(1865), 11 H. L. Cas. 192, H. L.

Annotations :—Mentd. Bridgwater Trustees v. Bootle Surveyors (1866), 7 B. & S. 348; Holford v. George (1868), L. R. 3 Q. B. 639; Foreman v. Whitstable Free Fishers (1869), L. R. 4 H. L. 266; Jolliffe v. Wallasey L. B. (1873), L. R. 9 C. P. 62; R. v. Keyn (1876), 2 Ex. D. 63; Sutton Harbour Improvement Co. v. Plymouth Town Grdns. (1890), 63 L. T. 772; Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171; The Bien, [1911] P. 40.

1642. Right to distrain for.]—AGAR v. LISLE (1613), Hob. 187; 1 Brownl. 5; Hut. 10; 80 E. R. 334.

Annotations:—*Mentd.* Calvert v. Arnold (1662), 1 Sid. 96 ;
R. v. Haughton (1718), 1 Stra. 83.

1643. —.]—HARRIS v. HAWKINS (1662), 1
Keb. 342; 83 E. R. 983.

1644. —.]—LEIGHT v. PYM (1685), 2 Lut.
1329; 125 E. R. 735.

1645. — Not where goods carried out of jurisdiction.]—HICKMAN'S CASE (1599), Noy, 37; 74 E. R. 1006.

1646. — Not where goods sold out of market.— To avoid distress.]—Distress cannot be made for the toll of goods fraudulently sold out of the market, to avoid the toll. But the party injured must bring a special action on the case.—**BLAKEY v. DINSDALE** (1777), 2 Cowp. 661; 98 E. R. 1294.

Annotation : -**Mentd.** Brecon Corpn. v. Edwards (1862), 6 L. T. 293.

1647. Liability for illegal distress—Tolls let by owners under statutory powers—Illegal distress by lessee.]—WAKEFIELD BOROUGH MARKET CO. v. CRAWSPAW (1865), 29 J. P. Jo. 791.

**SECT. 4.—PORTS, HARBOURS, DOCKS,
WHARVES, ETC.**

See, generally, SHIPPING.

1648. Harbour rate—Remedy by distress under private Act—Limitation of time for.]—Of the Ramsgate Harbour Acts one was passed before the statutes were ordered to be classified, & the other was passed after that date, & was classified under the head of “local & personal”:—*Held*: as the former was *in pari materia*, both must be taken to be local & personal, & therefore the period of limitation prescribed by Limitation of Actions & Costs Act, 1842 (c. 97), applied to a distress made under those acts.—MOORE *v.* SHEPHERD (1854), 10 Exch. 424; 3 C. L. R. 54; 3 W. R. 57; 156 E. R. 502; *sub nom.* SHARP *v.* SHEPHERD, MOORE *v.* SHEPHERD, 24 L. J. Ex. 28; 24 L. T. O. S. 97; *on appeal, sub nom.* SHEPHERD *v.* MOORE (1856), 1 H. & N. 125, Ex. Ch.

Annotations :—*Mentd. Carr v. Royal Exchange Assco.* (1862), 1 B. & S. 956 ; *R. v. L. C. C.*, [1893] 2 Q. B. 454.

1849. ——— Alternative remedy by action.]—
The 32 Geo. 3, c. 74, s. 8, imposes certain rates & duties "to be paid by the master or owners" for every ship or vessel of a certain burthen passing from, to, or by Ramsgate. Sect. 15 empowers the collectors to distrain every ship, & all the tackle, etc., for non-payment of the duties. By sect. 16 if any master or owner of any ship or vessel shall elude or avoid payment of the duties, he shall stand charged & be liable to the payment of the same; & the same shall be levied & recovered from such master or owner by the same method by which fines & penalties imposed by that Act are levied & recovered. By sect. 72 penalties & forfeitures are to be recovered by action or distress. Deft., who was sued for duties under the above

Act, was the owner of a vessel which several times in the year sailed in ballast to Jersey, & brought from thence oysters, which deft. purchased of fishermen there, & which he deposited in beds at Milton:—*Held*: an action would lie on the statute for the recovery of the duties. - The power of distress was merely a cumulative remedy.—*SHEPHERD v. HILLS* (1855), 11 Exch. 55; 25 L. J. Ex. 6; 156 E. R. 743.

Annotations:—*Reid. Lowe v. Dorling*, [1906] 2 K. B. 772; *Mentd. St. Pancras Parish Vestry v. Batterbury* (1857), 2 C. B. N. S. 477; *Lamplough v. Norton* (1889), 58 L. J. Q. B. 279; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101; *Cohen v. Hall*, [1922] 2 K. B. 37.

1650. Port duties—What may be distrained for—Tackle of ship—Or cargo subject to tolls.]—If a corpⁿ. be entitled to a toll of 5*d.* a chaldron on all coals shipped at a certain port, the tackle of the ships on which coals are laden, or the coals, may be distrained, at the election of the party, for the non-payment of the toll.—**VINKINSTONE v. EBDEN** (1698), Carth. 357 ; Holt, K. B. 674 ; 1 Ld. Raym. 384 ; 5 Mod. Rep. 359 ; 12 Mod. Rep. 216 ; 1 Salk. 248 ; 90 E. R. 809.

Annotations:—*Consd.* *Hutchins v. Chambers* (1758), 1 Burr. 579. *Refd.* *Simpson v. Hartopp* (1744), Willes, 512; *McCreagh v. Cox & Ford* (1923), 92 L. J. K. B. 855. *Mentd.* *Rudd v. Morton* (1692), 2 Salk. 501.

1651. Wharfage rates—Right to distrain for, on goods deposited—Removal of goods by owner without payment—Seizure of other goods of same owner.]—A dock co. was empowered to charge wharfage rates for goods deposited, & in default of payment of rates to distrain & sell the goods. A. removed goods from the docks without paying. The co. claimed to distrain on other goods of his then at their docks in default of his paying his arrears:—*Held*: the co. was entitled by their act to distrain any of his goods they held.—*GREEN v. ST. KATHERINE'S DOCK CO.* (1849), 19 L. J. K. B. 53; 13 L. T. O. S. 465; 13 Jur. 1116.

Annotation :—**Mentd.** *Norwich Corpn. v. Norfolk Ry.* (1855),
1 Jur. N. S. 344.

Toll for goods landed at quay—Partly within manor.]—See COPYHOLDS, Vol. XIII., p. 24, No. 185.

1652. Wrongful distress—Who may maintain action for—Master of ship.]—An action on the case lies by a master of a ship against the officer of a corpn. for wrongfully distraining his cargo, whereby he lost his voyage.—**MIKES v. CALY** (1700), Holt, K. B. 467 ; 12 Mod. Rep. 381 ; 88 E. R. 1394.

1653. — — — —.]—PITTS v. GAINEE & FORESIGHT (1700), 1 Ld. Raym. 558; Holt, K. B. 12; 1 Salk. 10; 91 E. R. 1272.

Annotations:—**Distd.** Hopper v. Reeve (1817), 1 Moore C. P. 407. **Consd.** Moore v. Robinson (1831), 1 L. J. K. B. 4. **Refd.** Newcastle v. Clarke (1818), 2 Moore C. P. 666; Branscomb v. Brydges (1823), 2 Dow & Ry. K. B. 256. **Mentd.** Parker v. Bailey (1824), 4 Dow. & Ry. K. B. 215; Moreton v. Hardern (1825), 4 B. & C. 223; Hansworth v. Fowkes (1833), 2 L. J. K. B. 72; Muskett v. Hill (1839), 5 Bing. N. C. 694; M'Mahon v. Lennard (1858), 6 H. L. Cas. 970.

SECT. 5.—RAILWAY AND CANAL TOLLS.

See, generally, RAILWAYS; Railway Clauses Act, 1845 (c. 20), ss. 140, 141, 148, 149.

1854. Railway—Authorised by private Act to distrain for—Strict compliance with statutory provisions essential.]—Where a railway co. is authorised by its private Act to distrain for tolls, all the provisions of the Act giving them that power must be strictly complied with.—*NORTH v. LONDON & SOUTH WESTERN RY. CO.* (1863), 14 C. B. N. S. 132 ; 2 New Rep. 33 ; 32 L. J. C. P.

Sect. 5.—Railway and canal tolls. Part VI. Sects. 1 & 2: Sub-sect. 1.]

156; 8 L. T. 246; 9 Jur. N. S. 897; 11 W. R. 624; 143 E. R. 395.

1655. Canal company—Authorised to distrain carriages or goods—Distrain of vehicles for arrears on goods carried—Only at time of carriage of goods.]—A canal co. were authorised by statute to demand & sue for certain tolls upon the carriage of goods & to distrain any carriage or goods in respect of which any such tolls ought to be paid, & to detain the same until payment made of such tolls & of all arrears of the same then due from the owner of such carriage or goods; & in case such distress should not be redeemed within five days to appraise & sell the same as in the case of a distress for rent; they were not expressly authorised to levy any toll upon carriages:—*Held*: trams could not be distrained for arrears of tolls due from the owners for goods carried in them if they were not carrying goods of such owners at the time of the distress.—

JENKINS v. COOKE (1833), 1 Ad. & El. 372, n.; 110 E. R. 1248.

Annotation:—*Mentd.* Fraser v. Swansea Canal Co. (1834), 1 Ad. & El. 354.

1656. — Power to seize & detain goods & boats—Confined to goods actually upon canal—Sale of boats not justifiable.]—A canal co. were empowered by statute to impose rates for toll of carriage of goods on the canal & to fix the places of payment, & in case of non-payment to seize the goods in respect of which such rates ought to have been paid, or any part thereof, & the boat laden therewith, & detain the same till payment of such rates, & also of all arrears of the said rates due from the owner of such boat; & if such goods were not redeemed within seven days to sell the same as in cases of distress for rent:—*Held*: this clause did not empower the co. to distrain goods when no longer upon the canal or to sell the boats.—FRASER v. SWANSEA CANAL CO. (1834), 1 Ad. & El. 354; 3 Nev. & M. K. B. 391; 3 L. J. K. B. 153; 110 E. R. 1241.

Annotation:—*Mentd.* Edmonds v. Best (1862), 7 L. T. 279.

Part VI.—Distress under Summary Jurisdiction Acts.

SECT. 1.—JURISDICTION.

See Summary Jurisdiction Act, 1849 (c. 45), s. 21; Criminal Justice Administration Act, 1914 (c. 58), s. 25; Distress for Rates Act, 1849 (c. 14), s. 2.

1657. Discretion to issue warrant of distress—Postponement upon terms.]—A penalty imposed for travelling on a railway without having previously paid the fare under Railways Clauses Act, 1845 (c. 20), s. 103, is not "a sum of money claimed to be due & recoverable on complaint to a court of summary jurisdiction," but a penalty adjudged to be paid on conviction not recoverable as a civil debt under the Summary Jurisdiction Act, 1879 (c. 49):—*Semble*: justices have a discretion as to the issuing of a warrant to enforce penalty forthwith or to postpone it upon terms & conditions as to time or otherwise.—R. v. PAGET (1881), 8 Q. B. D. 151; 51 L. J. M. C. 9; 45 L. T. 794; 46 J. P. 151; 30 W. R. 336, D. C.

Annotations:—*Reid*. R. v. Lewis & Moss (1896), 74 L. T. 551. *Mentd.* Kennard v. Simmons (1884), 48 J. P. 551; R. v. Burrows, *Ex p.* Wilson (1897), 77 L. T. 338; R. v. Daly, *Ex p.* Newson (1911), 104 L. T. 892.

PART VI. SECT. 1.

a. To enforce penalties—By awarding distress.]—Where a statute gives justices of the peace power to make bye-laws & impose penalties for their infraction, they cannot, unless they are expressly authorised by the statute, levy such penalties by distress.—KIRKPATRICK v. ASKEW (1837), (1823-1900), 2 Ont. Dig. 3692.—CAN.

t. — — —.]—A bye-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour before the reeve or the nearest justice of the peace, who upon conviction should impose a fine with costs, & in default of payment should issue a distress warrant:—*Held*: good.—*Re* STODDARD & UNITED TOWNSHIPS OF WILBERFORCE, GRATTAN & FRASER (1857), 15 U. C. R. 163.—CAN.

a. — — —.]—A conviction for a first or second offence under the Canada Temperance Act should be a complete judgment, & the ct. should thereby award distress in default of payment of the penalty, & for want of sufficient distress, imprisonment of deft. The jurisdiction of the justice

does not terminate with the imposition of the fine.—R. v. WHITE, *Re* PERRY (1889), 28 N. B. R. 216.—CAN.

b. To issue distress warrant—Under conviction signed outside jurisdiction.]—By R. S. O. 1877, c. 3, certain cities form, for judicial purposes, part of the respective counties in which they are situate, & by c. 72, s. 6, no other justice of the peace shall act in any case for any city having a police magistrate. A conviction was signed by two justices of the county of F. The case was heard in the county, & the conviction stated that it was signed there, but it appeared that one of the justices signed it in the city. In replevin for pltf.'s goods sold under a distress warrant issued upon such conviction:—*Held*: pltf. could not recover, for the justices had not acted for the city within c. 72; & the conviction stated it was signed within the county.—LANGWITH v. DAWSON (1879), 30 C. P. 375.—CAN.

c. To vary judgment—By awarding distress.]—Justices have no power after their adjudication to add to or vary their judgment, by awarding distress in default of payment of the fine

1658. No evidence of distrainable goods.]

Justices refused to issue distress warrants against the goods of defts. fined for the non-attendance of their children at a board school, without affirmative evidence that defts. possessed goods upon which distraint could be made:—*Held*: the justices were in their discretion, entitled to require affirmative evidence, that defts. possessed goods *prima facie* distrainable &, in the absence of it, could not as of right be called upon by the prosecution to issue distress warrants.—R. v. GERMAN (1891), 61 L. J. M. C. 43; 66 L. T. 264; 56 J. P. 358; 8 T. L. R. 26, D. C.

SECT. 2.—DISTRESS.

SUB-SECT. 1.—IN GENERAL.

See Summary Jurisdiction Act, 1848 (c. 43); Summary Jurisdiction Act, 1879 (c. 49); Summary Jurisdiction Act, 1884 (c. 43); Quarter Sessions Act, 1849 (c. 45); Supreme Court Procedure Act, 1894 (c. 16).

& imprisonment for want of distress.—R. v. PERLEY & HARTT, *Re* WHITE (1885), 25 N. B. R. 43.—CAN.

d. To quash conviction—Giving right of distress.]—Application by deft. to quash a conviction made by a justice of the peace for offences against Liquor Licence Act. Objection was raised with regard to the provision as to the recovery of penalties by distress, which was, it was urged, wholly unauthorised:—*Held*: assuming it to be a valid objection, not to be got rid of by amendment in the present proceedings, it did not entitle appct. to invoke the aid of the ct. to quash the conviction.—R. v. RENAUD (1909), 18 O. L. R. 420; 13 O. W. R. 1090.—CAN.

PART VI. SECT. 2, SUB-SECT. 1.

e. Replevin—When maintainable—Impounded cattle.]—A justice of the peace may grant replevin for cattle impounded, for breach of regulations of justices in sessions made under 13 Vict. c. 30, it being in the nature of a distress *damage feasant*.—STERLING v. JONES (1852), 2 All. 522.—CAN.

—.]—Goods seized under

1659. For what purposes—Payment of wages—Agricultural servant.]—Upon a rule calling upon justices to issue their warrant of distress to enforce an order made by two justices for the payment of wages to H., under 20 Geo. 2, c. 19, it appeared that H. was hired to serve at a farm for a year as a dairymaid, & to assist in the harvesting of the hay & corn if required, & according to the affidavits of the master, as a servant of all work necessary to be done in house-keeping, & to cook for the servants & labourers, & make their beds, & also to attend upon him & his family on their occasional visits to the farm, their residence being two miles off:—*Held*: there was evidence from which the justices might find that H. was a servant in husbandry, within the above Act; & therefore the ct. made the rule absolute.—*Ex p. HUGHES* (1854), 2 C. L. R. 1542; 23 L. J. M. C. 138; 23 L. T. O. S. 93; 18 Jur. 447; 2 W. R. 465.
Annotations:—*Refd. Ex p. Strong* (1854), 3 C. L. R. 76; *Hampton v. Winward*, [1921] 2 K. B. 669.

— **Distress upon ship in Admiralty custody.]**—*See ADMIRALTY*, Vol. I., p. 164, No. 735.

1660. — Enforcement of penalty—Travelling without paying fare—Railway Clauses Consolidation Act, 1845 (c. 20), s. 103.]—*R. v. PAGET*, No. 1657, *ante*.

1661. — Non-repair of tramway—Receiver in possession of goods distrainable.]—Penalties, imposed on a tramways co. for non-repair of a tramway, can be recovered by distress on the rolling stock & chattels. Leave to distrain for such penalties was given in a debenture-holders' action in which a receiver had been appointed.—*PEGGE v. NEATH DISTRICT TRAMWAYS CO.*, [1895] 2 Ch. 508; 64 L. J. Ch. 737; 73 L. T. 25; 44 W. R. 72; 11 T. L. R. 470; 39 Sol. Jo. 622; 2 Mans. 474; 13 R. 762; *on appeal*, [1896] 1 Ch. 684, C. A.
Annotations:—*Refd. Re Crosbie, Johnson & Hughes v. Crosbie* (1909), 74 J. P. 25. *Mentd. Reeve v. Medway* (Upper) Navigation Co. (1905), 21 T. L. R. 400.

— **Affiliation order.]**—*See BASTARDY*, Vol. III., p. 404, No. 372.

— **Recovery of rent for electric light, gas, & water.]**—*See Part VIII., Sect. 2, post*.

— **Recovery of costs.]**—*See Sect. 4, post*.

1662. Power of sale—Implied in statute authorising distress for penalty.]—Where a statute gives a penalty to be levied by distress it gives power to sell without other words.—*ANON.* (1671), T. Jo. 25; 84 E. R. 1129.

Annotation:—*Refd. R. v. Speed* (1702), 1 Salk. 379.

1663. — —.]—If a constable, under a warrant of distress, levies & sells goods, but afterwards, under an idea that he had no right to sell, & on the party refusing to indemnify him, he undoes the sale & restores the money to the buyer, & the goods to the owner, the ct. will not grant a

mandamus to compel him to pay the money. A statute directing a penalty to "be levied by distress" means by distress & sale.—*MORLEY v. STACKER* (1703), 6 Mod. Rep. 83; 87 E. R. 839.

1664. — In whom vested.]—*R. v. SPEED*, (1702), 1 Salk. 379; 12 Mod. Rep. 328; 1 Ld. Raym. 583; 91 E. R. 330.

Annotations:—*Refd. Morley v. Stacker* (1703), 6 Mod. Rep. 83. *Mentd. Fletcher v. Calthorpe* (1845), 4 L. T. O. S. 393; *White v. Fox* (1880), 49 L. J. M. C. 60.

1665. Replevin—Not maintainable.]—If there be a distress for any duty to the Crown, the person distrained cannot replevy, no more than in the case of a fee farm; & if he does, an attachment shall be granted for this contempt. O., who was fined by the comrs. of the land tax, & distrained upon, replevied: but he was discharged of this contempt by the act of pardon.—*R. v. OLIVER* (1717), Bunb. 14; 145 E. R. 578.

Annotation:—*Refd. Cawthorn v. Campbell* (1790), 1 Anst. 205, n.

1666. — —.]—Replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate who has competent jurisdiction under 20 Geo. 2, c. 19, s. 1, to issue a warrant of distress & sale on refusal of the party to pay, nor can the question of a magistrate's jurisdiction be tried in such an action; & therefore it cannot be pleaded in bar to a cognizance made under such warrant that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such sum was not due.—*WILSON v. WELLER* (1819), 1 Brod. & Bing. 57; 3 Moore, C. P. 294; 129 E. R. 644.

Annotations:—*Distd. Rhymney Ry. v. Price* (1867), 16 L. T. 394. *Mentd. R. v. Millard* (1853), 6 Cox, C. C. 150; *R. v. Carr* (1867), 16 W. R. 137.

1667. — Attachment lies for pursuing.]—*R. v. OLIVER*, No. 1665, *ante*.

1668. — —.]—An attachment lies for replevying goods distrained under a conviction on a penal statute.—*R. v. BURCHET* (1723), 8 Mod. Rep. 208; 1 Stra. 567; 88 E. R. 150.

Annotations:—*Consd. R. v. Davies*, [1906] 1 K. B. 32. *Mentd. R. v. Parke*, [1903] 2 K. B. 432.

1669. — Information lies—If party replevying knew of conviction.]—*R. v. —* (1728), 1 Barn. K. B. 98; 94 E. R. 68.

1670. Liability of distrainor—For return or condition of goods.]—Where goods have been seized by excise officers, under a magistrate's warrant, to levy for a penalty, & that penalty is afterwards paid, the excise officers are not bound to restore the goods until a demand made by the owner; nor are they answerable for any injury which may happen to the goods subsequently to the penalty. *Semble*: the same rule will apply to a constable, who may make a distress under a magistrate's warrant.—*HUTCHINGS v. MORRIS*

a distress warrant for non-payment of a fine imposed by a conviction are not repleviable by the person against whom the distress issued unless the magistrate who issued it acted without jurisdiction.—*HANNIGAN v. BURGESS* (1888), 26 N. B. R. 99.—*CAN.*

g. — —.]—Liquor seized by the sheriff under a warrant was given into custody of the licence inspector. A druggist, claiming the liquor, replevied same:—*Held*: the inspector was entitled to hold the liquor.—*COLPITTS v. MCKEEN* (1909), 7 E. L. R. 184.—*CAN.*

h. — Necessity for notice of action.]—The action of replevin is not within 13 Vict. c. 30, s. 15, which requires a month's notice before an action is brought against any person for anything done in pursuance of the Act.—*STERLING v. JONES* (1852), 2 All. 522.—*CAN.*

of pltf. had been seized under a distress warrant issued by a justice of the peace, & pltf. had replevied the distress:—*Held*: the magistrate who issued the warrant was not entitled to a month's notice of action.—*VANDERKISTE v. GEARY* (1852), 4 Ir. Jur. 285.—*IR.*

i. — Payment in settlement of fine & costs—Effect of.]—Deft. G. having been convicted of a violation of Canada Temperance Act & fined, a warrant of distress was issued to enforce payment of the fine under which the goods of G. were seized. G. obtained possession of the goods in replevin proceedings on executing the usual bond, but on trial of the suit judgment was given against him & in favour of pltf., for the return of the goods & payment of costs. Deft. thereupon paid to the solrs., who were

entrusted with the enforcement of the judgment, the sum of \$110, taking a receipt "in full settlement of C. T. A. fine & costs," & a satisfaction piece was drawn up & signed by M., the prosecutor, & placed on record. To an action by pltf. on the bond alleging that the goods were not returned & the judgment not satisfied, deft. pleaded discharge by the payment, receipt & satisfaction piece:—*Held*: if the matter was to be regarded as a compromise in respect to the value of the replevin judgment, pltf. were bound by it, but so far as it purported to be a satisfaction of the fine it must be regarded as invalid.—*McMILLAN v. GIOVANETTI* (1895), 28 N. S. R. 91.—*CAN.*

m. — Liability of officer executing distress—Informal writ.]—In replevin against a constable for the seizure of goods under execution issued

Sect. 2.—Distress: Sub-sects. 1 & 2.]

(1827), 6 B. & C. 464; 4 Dow. & Ry. M. C. 399; 9 Dow. & Ry. K. B. 499; 5 L. J. O. S. M. C. 144; 108 E. R. 522.

1671. "Complaint"—To what applicable—
Under Summary Jurisdiction Act, 1848 (c. 43), ss. 8 & 11—Not to issue of warrant for poor rate.]—
 By a local act for a borough in case any person assessed to a rate under it should refuse or neglect to pay the rate for ten days next after demand it was lawful for a justice of the borough by warrant under his hand & seal to authorise the collector to levy the rate by distress & sale of the goods of the person in default, or of the goods found on the premises; no time was fixed within which proceedings to enforce the rate were to be taken. By sect 11 of the above Act, in all cases where no time is specially limited for making "such complaint," is shall be made within six calendar months from the time when the matter of such complaint arose:—*Held*: "such complaint" referred to complaints mentioned in sect. 8, viz. complaints "upon which a justice may make an order for the payment of money or otherwise," & sect. 11 therefore did not apply to proceedings for enforcing a rate by the mere issuing of a warrant of distress. *Qu.*: whether these proceedings were "the exercise of summary jurisdiction by justices" within Summary Jurisdiction Act, 1857 (c. 43), so as to enable them to state a case under that statute.—*SWEETMAN v. GUEST* (1868), L. R. 3 Q. B. 262; 37 L. J. M. C. 59; 18 L. T. 52; 32 J. P. 212; 16 W. R. 426.

Annotation:—*Reid. R. v. Hannam & Ramsgate Smack-owners' Ice Co.* (1885), 2 T. L. R. 81.

1672. Expenses of—Definite sum to be stated in conviction—"Reasonable charges" bad.]—Where an Act gives power to a magistrate on a summary conviction to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; & an adjudication that debt. shall pay the reasonable charges of the levy is bad.—*R. v. SYMONDS* (1801), 1 East, 189; 102 E. R. 74.

1673. ——— Not included in statutory penalty—
Under Elementary Education Act, 1870 (c. 75), s. 74.]—By the above sect. "no penalty imposed for the breach of any bye-law shall exceed such amount as with the costs will amount to 5s. for each offence":—*Held*: this does not include the costs of a distress to enforce payment under 11 & 12 Vict. c. 43, s. 19.—*COOK v. PLASKETT* (1882), 46 L. T. 383; 47 J. P. 265, D. C.

1674. Remedy for illegal distress—Against constable—Whether demand of copy of warrant necessary—Constables Protection Act, 1750 (c. 44), s. 6.]—Action for money had & received against a constable who had levied money on a conviction by a justice in petty sessions, the conviction having been quashed:—*Held*: 24 Geo. 2, c. 44, as to a

by a justice of the peace after the lapse of a year from the time of entering judgment, in the absence of the affidavit required to be made in such cases of R. S. c. 160 (Procedure in Justices Cts.), s. 32, the writ was in the form prescribed by the statute & recited the judgment but did not give the date of its recovery:—*Held*: the constable could justify under the writ notwithstanding the want of the affidavit, & notwithstanding the fact that, after action brought for that reason, the execution was set aside by the magistrate.—*LAW v. LOVELL* (1915), 49 N. S. R. 282.—*CAN.*

n. ———.]—When the goods of pltf. had been seized under a distress warrant issued by a justice of the

peace, & pltf. had replevied the distress:—*Held*: the constable to whom the warrant had been directed, was entitled to a verdict, being protected by 6 Will. 4, c. 13, s. 50.—*VANDERKISTE v. GEARY* (1852), 4 Ir. Jur. 285.—*IR.*

*o. Provision for—Not part of penalty.]—*A provision for distress in the conviction in default of payment of the fine & costs imposed, does not constitute a part of the penalty or punishment imposed by the bye-law.—*R. v. FLORY* (1889), 17 O. R. 715.—*CAN.*

p. What may be distrained—
*Meaning of "chattels."—*Under a warrant of distress issued in pursuance of a judgment obtained in a

demand for a copy of warrant, did not apply & this statute only applied to actions of tort.—*FELTHAM v. TERRY* (1773), Bull. N. P. 24; Lofft, 207; 98 E. R. 613.

Annotations:—*Consd. Birch v. Wright* (1786), 1 Term Rep. 378. *Refd. Lindon v. Hooper* (1776), 1 Cowp. 414; *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Thurston v. Mills* (1812), 16 East, 254.

SUB-SECT. 2.—THE WARRANT.

1675. Validity—As to form—Jurisdiction must be set out.]—In an action against magistrates for a distress under a regular conviction, but by a warrant informal in not setting out the jurisdiction, the ct., after a verdict, for debts. refused to grant a new trial, the objection to the warrant not having been distinctly taken at the trial, & being *strictissimi juris*.—*PENPRASE v. JOHNS* (1833), 2 Nev. & M. K. B. 376; 1 Nev. & M. M. C. 429.

1676. ——— ———.]—*DAY v. KING*, No. 1878, *post*.

1677. ——— ——— Directions to whom fine payable.]—By Beerhouse Act, 1830 (c. 64), s. 25, a conviction, in the form, or to the effect following, *mutatis mutandis*, as the case may be, shall be good & effectual, without stating the case, or the facts or evidence in any more particular manner. By Beerhouse Act, 1834 (c. 85), s. 11, which amended that Act, all powers & forms in the former Act, with reference to persons licensed under that Act, shall be applicable to all persons licensed under it, & to all offences committed by such persons of the same description as the offences mentioned in the former.

In trespass for taking the goods of W., who was licensed under Beerhouse Act, 1834, under a distress warrant to levy a penalty on the following conviction under Beerhouse Act, 1838, sect. 13. "Be it remembered that on Dec. 5, 1846, W. of etc., was duly convicted before us, two justices in & for the said county, acting in petty sessions in & for the division of A. in the said county, for that he being licensed to sell beer by retail, to be drunk in the house, under the provisions of the statutes in that case made & provided, did, on Sept. 28, 1846, permit drunkenness & other disorderly conduct in the house mentioned in such licence, in the parish of A., in the county aforesaid, against the tenor of such licence, granted to him under the provisions of the statutes, & contrary to the form of the said statutes; whereby W. has forfeited £10, this being adjudged to be his second offence against the provisions of the aforesaid statutes, pursuant to the statutes in such case made & provided. We award one moiety of the penalty of £10, after deducting the costs of the conviction, to the use of the prosecutor, & the other moiety, after deducting the costs, to the treasurer of the county":—*Held*: (1) the house of W. appeared to

ct. constituted under Magistrates' Cts. Act, 1893, the bailiff may seize & sell chattels owned by the judgment debtor. The word "chattels" includes the unexpired term of a lease.—*PARKER v. SIMPKINS* (1895), 13 N. Z. L. R. 278.—*N.Z.*

PART VI. SECT. 2, SUB-SECT. 2.

*q. Validity—As to form.]—*On demurrer to an avowry justifying under a conviction for selling spirituous liquors without a licence, & a distress warrant issued thereon:—*Held*: as to the form of the warrant, it was unnecessary to allege that it was under seal or that it was directed to any one, it being averred to have been duly issued & delivered for execution to debt.

be in the division of A., & if it did not, the defect was cured, the conviction being in the form given by the statute; (2) the conviction need not mention that the prosecution was within three months after the offence; & if otherwise necessary, the form given by the statute dispensed with it; (3) it was necessary to specify the names of the drunkards, or state that they were unknown; (4) the charge of permitting drunkenness & disorderly conduct was not double, & was sanctioned by sect. 13 of Beerhouse Act, 1830, s. 64; (5) a conviction for transgressing the condition of the licence in this respect was good, without setting out the licence, because the licence was embodied in the statute, & further, because the form given by the statute, dispensed with it; (6) a penalty for the offence in question being specified in sect. 13, it was proper, under sect. 15, not to adjudge costs; & the award of part of the penalty & of costs being within the power of the justices by 18 Geo. 3, c. 19, & sect. 22 of Beerhouse Act, 1834, s. 64, though made informally, did not render the conviction bad.—*WRAY v. TOKE* (1848), 12 Q. B. 492; 3 New Mag. Cas. 84; 3 New Sess. Cas. 290; 17 L. J. M. C. 183; 12 L. T. O. S. 289; 12 J. P. 804; 12 Jur. 936; 116 E. R. 951.

1678. — Supporting conviction bad—Improperly framed.]—A conviction on a statute, on the face of it not pursuing the provisions of the statute, nor showing that any offence has been committed, is bad; & although it has not been quashed, its invalidity may be taken advantage of, on the trial of an action of trespass for a distress taken under a warrant grounded on it.—*GIMBERT v. COXNEY* (1825), M'Cle. & Yo. 469; 3 Dow. & Ry. M. C. 323; 148 E. R. 497.

1679. — — — — —.]—A conviction under Beerhouse Acts, 1830 (c. 64), ss. 14, 25, & 1834 (c. 85), s. 6, for allowing beer to be consumed in a licensed house at other hours than those prescribed by order of petty sessions, must state the time fixed by the justices at which houses may be kept open, & the hour at which the beer was consumed. It is not enough to say, "at a time declared to be unlawful by an order of the justices." If goods be seized upon a warrant founded on a conviction so improperly framed, the magistrates issuing the warrant are liable in trespass.—*NEWMAN v. HARDWICKE (EARL)* (1838), 8 Ad. & El. 124; 3 Nev. & P. K. B. 368; 1 Will. Woll. & H. 284; 7 L. J. M. C. 101; 2 J. P. 328; 2 Jur. 493; 112 E. R. 782.

Annotation:—Refd. Wilkinson v. Gray (1844), 9 J. P. 71.

1680. — — — — —.]—Where a conviction under Beerhouse Act, 1830 (c. 64), s. 14, purported to charge the party with the offence of keeping his house open for the sale of beer & selling beer, & suffering the same to be drunk & consumed in the house at an unlawful time, & convicted him in the penalty of 40s. as upon a single offence:—*Held*: the conviction was bad, because it included more than one distinct offence; & trespass lay for levying the penalty by distress.—*NEWMAN v. BENDYSHE* (1839), 10 Ad. & El. 11; 2 Per. & Dav. 340; 8 L. J. M. C. 58; 3 J. P. 437; 113 E. R. 5.

Annotations:—Mentd. Martins v. Upcher (1842), 2 Gal. & Dav. 716; *Ex p. Pardy* (1850), 1 L. M. & P. 16.

1681. — — — — —.]—*WRAY v. TOKE*, No. 1677, *ante*.

1682. — — — — —.]—Where it appeared, on the face of a conviction for an offence against the excise laws, that pltf. had been summoned on

Sept. 20, to appear before deft. on Sept. 30, & pltf. not appearing on that day, that deft. proceeded to hear evidence & convicted him in a penalty of £50:—*Held*: the conviction was null & void, & deft. liable in trespass for issuing a distress warrant, as the Excise Management Act, 1834 (c. 51), s. 19, required that "ten days' notice at least" should be given to the party to appear, & the rule was inflexible to construe such limitation of time as ten clear days.—*MITCHELL v. FOSTER* (1840), 12 Ad. & El. 472; 9 Dowl. 527; 4 Per. & Dav. 150; 9 L. J. M. C. 95; 5 Jur. 70; 113 E. R. 891.

Annotation:—Refd. R. v. Middlesex JJ. (1815), 3 Dow. & L. 109.

1683. — Not founded on order for payment—But in subsequent conviction for non-payment.]—(1) The quarter sessions have no power to make a general order for costs of an appeal, though they may refer the taxation of the amount to their officers, provided they during the session adopt his decision & incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not.

(2) The non-payment of costs awarded by an order of the quarter sessions, on the trial of an appeal against the stoppage of a highway, under Highway Act, 1835 (c. 50), s. 90, is not an offence forming a subject for a conviction under sects. 101 & 103 of that statute, but the non-payment of them may be enforced by a distress warrant, issued by two justices under sect. 103 grounded directly on the order of sessions.

Such a distress warrant is bad, if it do not show on the face of it an order of sessions for the payment of a specific sum as costs.—*SELLWOOD v. MOUNT* (1841), 1 Q. B. 726; 1 Gal. & Dav. 358; 10 L. J. M. C. 121; 6 Jur. 78; 113 E. R. 1309; *previous proceedings, sub nom. SELWOOD v. MOUNT* (1839), 9 C. & P. 75.

Annotations:—As to (1) *Apld. R. v. Winder*, [1900] 2 Q. B. 666. *Refd. R. v. Long* (1841), 1 Q. B. 740; *R. v. Yorkshire, West Riding, JJ.* (1843), 1 L. T. O. S. 317; *R. v. Belton* (1848), 12 J. P. 232; *Freeman v. Read* (1860), 9 C. B. N. S. 301. *As to* (2) *Folld. Lock v. Sellwood* (1811), 1 Q. B. 736. *Refd. Leary v. Patrick* (1850), 15 Q. B. 266; *Re Tryddyn* (Surveyors of the Highways), *Ex p. Harrison* (1854), 23 L. J. M. C. 45. *Generally, Mentd. Chaney v. Payne* (1841), 1 Q. B. 712.

1684. — Issued under repealed Act.]—A local Act prohibited the exposing for sale of certain goods on the footway of a street, under a penalty of 10s.; & by sect. 90 the justices have a summary jurisdiction to enforce the payment of the penalty. By a subsequent Act, the sect. in the first Act creating the offence was repealed & re-enacted with this difference that the penalty was made 20s. instead of 10s. There was no clause in the last Act as to the mode in which the penalty should be enforced:—*Held*: as the first Act was repealed by the second, the justices having granted a distress warrant for the purpose of enforcing payment of a penalty imposed by this latter Act, were liable to an action of trespass.—*WARD v. STEVENSON* (1844), 1 New Sess. Cas. 162; 8 J. P. 789.

1685. — Distress for sum not appearing in conviction.]—A pltf. had been convicted in a penalty of £5 under Theatres Act, 1843 (c. 68), s. 2, for keeping an unlicensed theatre. The conviction was silent as to costs; but the distress warrant issued thereon recited a conviction, not only for the penalty, but for 12s. costs, & directed both to be levied. There was no return-day to

M., the constable.—*REID v. McWHINNIE* (1868), 27 U. C. R. 289.—CAN.

Necessary preliminary providing for distress of the Peace

Statute, 1865 (No. 267), where a deft. duly summoned does not appear, & is convicted in his absence, the conviction providing for distress in default of payment, it is unnecessary to serve

him with a copy of the minute of conviction before issuing a warrant for distress, & in default of distress, a warrant for commitment.—*R. v. KOCH* (1883), 9 V. L. R. 121.—AUS.

Sect. 2.—Distress: Sub-sect. 2. Sect. 3: Sub-sect. 1.]

the warrant. Immediately after the conviction pltf. was ordered into custody, & detained twenty-four hours:—*Held*: (1) in issuing the warrant of distress for costs, the magistrates exceeded their jurisdiction; &, therefore, pltf. was entitled to maintain trespass for the seizing of the goods.

(2) Assuming that under 5 Geo. IV. c. 18, justices have some power to detain a person against whom a distress warrant has issued, such an imprisonment is not a part of the punishment under the conviction but is a mere detention till return of the warrant, in case there should be no distress. It is a power to imprison *quia timet*, extra the punishment; & such a power should be strictly pursued. Assuming that defts. acted in exercise of that power, they detained pltf. by a parol commitment for an indefinite time, & that was an excess of their jurisdiction (COLERIDGE, J.).—*LEARY v. PATRICK* (1850), 15 Q. B. 266; 4 New Mag. Cas. 95; 4 New Sess. Cas. 258; 19 L. J. M. C. 211; 15 L. T. O. S. 203; 14 J. P. 575; 14 Jur. 932; 117 E. R. 459.

Annotation:—*As to* (1) *Distd. Ratt v. Parkinson* (1851), 4 New Sess. Cas. 651.

1686. Issue of—Necessary preliminaries—Demand & refusal of payment—Payment of wages under Militia Act, 1801 (c. 90).]—Above Act, s. 61, enables a magistrate to make an order for payment of servant's wages in certain cases & directs that in case of refusal or non-payment of any sum so ordered for 21 days after such determination he may issue his warrant of distress; but it gives an appeal to the sessions:—*Held*: 21 days having elapsed between the making of such order before the appeal, & also 21 days after such appeal dismissed before the warrant of distress issued the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal.—*WOOTTON v. HARVEY* (1805), 6 East, 75; 102 E. R. 1215; *sub nom.* *WOOD v. HARVEY*, 2 Smith, K. B. 238.

Annotation:—*Mentd. Kendall v. Wilkinson* (1855), 4 E. & B. 680.

1687. ——— Formal drawing up of justices order—& disobedience thereof.]—Pltf. having refused to pay a church-rate to which he had been duly assessed under Ecclesiastical Courts Act, 1812 (c. 127), s. 9, he was summoned before defts., justices of the peace, who, on May 6, verbally made an order on him to pay the same with costs. A minute of this order was drawn up & served on him on the following day, pursuant to Summary Jurisdiction Act, 1847 (c. 43), ss. 16 & 17. Some time afterwards a formal order & a warrant of distress were drawn up, & both dated as May 6. The formal order was filed at the Midsummer quarter sessions, & the warrant of distress delivered to the constable, but the execution thereof was suspended until Oct. following, when a distress was made on pltf.'s goods for the amount due for church-rate & the costs. An action of trespass having been brought against defts. as justices for this distress, on the ground that the warrant had been improperly issued by them:—*Held*: (1) the proceedings were regular, & it was not necessary that the order of the justices should have been formally drawn up & disobeyed before the warrant was signed & sealed by the justices; (2) although the warrant was in some respects informal, yet as the justices had in other respects acted within their jurisdiction they were entitled to the protection of Justices Protection Act, 1847 (c. 44), s. 1, & trespass would not lie against them.

(3) It is not necessary to serve the order on the

party before the warrant is issued; it is sufficient if a minute of the order be served, if the formal order be subsequently drawn up & dated as of the day the parol order was made; it then relates back to the day when the verbal order was made (JERVIS, C.J.).—*RATT v. PARKINSON* (1851), 4 New Sess. Cas. 651; 20 L. J. M. C. 208; 17 L. T. O. S. 94; 15 J. P. 356.

1688. ——— Service of order.]—*RATT v. PARKINSON*, No. 1687, *ante*.

1689. ——— Enforcement by mandamus—Discretion of High Court.]—*Ex p. THOMAS*, No. 1719, *post*.

1690. ——— ———.]—*Re WILLIAMS*, No. 1720, *post*.

Discretion of justices.]—*See Sect. 1, ante*.

1691. Action against issuing justices—Informal warrant—Jurisdiction otherwise preserved.]—*RATT v. PARKINSON*, No. 1687, *ante*.

1692. ——— Limitation under Public Authorities Protection Act, 1893 (c. 62), s. 1.]—Deft., a police magistrate, convicted pltf. of an offence & ordered him to pay a fine. Pltf. having failed to pay the fine, deft. issued a distress warrant by virtue of which pltf.'s goods were distrained upon. The conviction was subsequently quashed. Pltf. thereupon brought an action against deft. claiming damages for illegal distress. The action was commenced more than six months after the conviction was made, but less than six months after the distress warrant was issued:—*Held*: the action was not barred by above sect.—*POLLEY v. FORDHAM*, [1904] 2 K. B. 345; 73 L. J. K. B. 687; 90 L. T. 755; 68 J. P. 321; 53 W. R. 48; 20 T. L. R. 435; 48 Sol. Jo. 436, D. C.

1693. ——— Conviction upheld in appeal—Subsequently quashed—Justices Protection Act, 1848 (c. 44), sect. 6.]—Pltf. was summarily convicted by justices & fined, & on appeal to quarter sessions the conviction was confirmed. After the confirmation, deft., a justice of the peace, issued distress warrants under which pltf.'s goods were seized. Subsequently the High Ct. made absolute rules *nisi* for a *certiorari* to quash the conviction & the confirmation on the ground that the original summons had not been properly served on pltf. Pltf. then issued the writ in the present action against the justice who issued the distress warrants, claiming damages for an illegal distress:—*Held*: deft. was protected by above sect., & the action would not lie.—*McVITTIE v. MARSDEN*, [1917] 2 K. B. 878; 86 L. J. K. B. 653; 116 L. T. 629; 81 J. P. 109; 15 L. G. R. 249, C. A.

1694. Execution of—To what districts constable restricted.]—*R. v. CHANDLER*, No. 1713, *post*.

1695. ——— Area of Kent within jurisdiction of Cinque Ports.]—Where goods were taken by constables under a warrant of distress granted by a justice of peace for the county of Kent, directed "to the constables of the lower half hundred of C. & G. in the county of Kent," which warrant recited that pltf. whose goods were distrained, of the parish of G. in the county, was balloted for the militia of the county, & having refused to serve, etc., was convicted in a certain penalty, for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of C. within the jurisdiction of the Cinque Ports, & not within the county of Kent, the constables are not within the protection of Constables Protection Act, 1750 (c. 44), s. 6, & may be sued in trespass without the magistrate's being made a deft.—*MILTON v. GREEN* (1804), 5 East, 283; 1 Smith, K. B. 402; 102 E. R. 1059.

Annotations:—*Refd. Parton v. Williams* (1820), 3 B. & Ald. 330; *Sturch v. Clarke* (1832), 4 B. & Ad. 113.

1696. Afterwards nullified by executing officer—No mandamus to compel repayment by him.]—*MORLEY v. STACKER*, No. 1663, *ante*.

1697. ——— Warrant irregular—Liability of officer acting under magistrate.]—*PAINTER v. LIVERPOOL GAS CO.*, No. 1875, *post*.

1698. ——— Liability of party putting justice in motion—If interfering with execution.]—*PAIN-TER v. LIVERPOOL GAS CO.*, No. 1875, *post*.

SECT. 3.—IMPRISONMENT IN DEFAULT OF DISTRESS.

SUB-SECT. 1.—IN GENERAL.

1699. When applicable—Non-payment of rent—Under Metropolis Management Act, 1855 (c. 120), s. 161—Effect of Summary Jurisdiction Acts, 1879 (c. 49), & 1884 (c. 43).]—(1) Summary Jurisdiction Acts, 1879 (c. 49), & 1884 (c. 43), & Interpretation Act, 1889 (c. 63), have not had the effect of superseding the remedy—namely, by distress & imprisonment in default of a sufficient distress—for the recovery of local rates recoverable under Metropolis Management Act, 1855 (c. 120), s. 161, in the same manner as poor rates.

(2) A married woman, being owner of houses in a metropolitan parish as her separate property, gave notice to the overseers, under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 4, that she was willing to be rated in respect of such houses, whether the same were occupied or not, & that she claimed to be allowed the deductions from the amount of the rates, amounting to 30 per cent, specified in that sect. Having been rated & allowed such deductions accordingly, she made default in paying the amount of the sewers, lighting, & general rates for the parish, which by Metropolis Management Act, 1855 (c. 120), were recoverable in the same manner as poor rates:—*Held*: she had made no contract with the overseers in respect of the rates so as to bring the rate within Married Women's Property Act, 1882 (c. 75), s. 1, & therefore, she was liable to the ordinary remedy for the recovery of poor rates—namely, by distress & imprisonment in default of a sufficient distress.—*Re ALLEN*, [1894] 2 Q. B. 924; 63 L. J. M. C. 267; 59 J. P. 229; 43 W. R. 141; 10 T. L. R. 647; 10 R. 514, D. C.

Annotations:—As to (1) *Reid. Atkins v. Hutton* (1909), 103 L. T. 514. As to (2) *Reid. McCreagh v. Cox & Ford* (1923), 92 L. J. K. B. 855.

PART VI. SECT. 3, SUB-SECT. 1.

a. When applicable — Non-payment of fine.]—A board of licence courers, under the authority of the Liquor Licence Act, R. S. O. 1897 (c. 245), s. 4 (4), passed a resolution that no gambling or any game of chance whatever should be played about any licensed tavern or other house of public entertainment or on the premises. Four persons played "euchre" for amusement in a room behind the bar of debt's hotel:—*Held*: debt. was properly convicted of an infraction of the resolution by reason of the game having been played on his premises, though without his knowledge, & s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, & the direction of the conviction for recovery by distress & in default of distress, imprisonment was authorised.—*R. v. COOK & LAIRD* (1903), 23 C. L. T. 281; 6 O. L. R. 180; 2 O. W. R. 667.—*CAN.*

t. — Non-payment of amount of recognisance.]—Where a recognisance to keep the peace is entreated at petty

sessions, & there is default of distress for the recovery of the amount of the recognisance, the justices, under Fines Act, 1851, s. 3, may direct the person against whom the recognisance is being enforced to be imprisoned for such term as could be imposed in respect of such sum in the case of an offence under Petty Sessions Act, 1851, s. 22, as altered by the Small Penalties Act, 1873.—*R. (CARROLL) v. WESTMEATH JJ.* (1911), 45 I. L. T. 242.—*IR.*

a. Wrongful imprisonment—No previous summons to show cause against commitment.]—Pltf. was convicted for a breach of Scab. Act, 1870 (No. 370), s. 38, & fined; in default of payment, distress; in default of sufficient distress, imprisonment. The fine was not paid, & a distress warrant was issued & was returned *nulla bona*. A summons was then signed by debt. calling on pltf. to show cause why a warrant of commitment should not be issued against him. The summons was never served on pltf. & debt. afterwards signed the warrant under which pltf. was arrested. In an action for assault & false imprisonment against debt.:—*Held*: no summons to show

1700.

.]—Appct. had refused to pay part of a rate, having a conscientious objection to the payment of it. He tendered part of the rate accordingly to the overseers, who refused to accept it. On a summons being issued before a magistrate, he again tendered part of the rate in ct., but the magistrate issued a distress warrant for the full amount. Appct. tendered part of the rate to the bailiffs, who refused it, & reported to the overseers that there was not sufficient goods on the premises to satisfy the distress warrant. The overseers applied to the justices for a warrant of commitment, who made it accordingly:—*Held*: the justices had jurisdiction to issue the warrant of distress for the whole amount, & it was a matter entirely within their discretion.—*Ex p. WILES* (1903), 90 L. T. 225; 20 T. L. R. 150; 2 L. G. R. 103; 20 Cox, C. C. 602; *sub nom. Re WILES*, 73 L. J. K. B. 112, n.; *sub nom. Ex p. WYLES*, 68 J. P. 13, D. C.

1701. ———.]—*ATKINS v. HUTTON*, No. 1555, *ante*.

— Non-payment of costs.]—*See Sect. 4, post*.

1702. Status of person committed—Information under Vaccination Act, 1867 (c. 84), s. 31—"A criminal prisoner."—A person who is committed to prison in default of distress for non-payment of a sum of money adjudged to be paid by a ct. of summary jurisdiction on an information under sect. 31 of the above Act, is a "criminal prisoner" within the meaning of Prison Act, 1865 (c. 126), s. 5, & must be treated as such while in prison.—*KENNARD v. SIMMONS* (1884), 50 L. T. 28; 48 J. P. 551; 15 Cox, C. C. 397.

Annotation:—*Reid. R. v. Burrows, etc. JJ., Ex p. Wilson* (1897), 77 L. T. 338.

1703. Wrongful imprisonment—Penalty paid to obtain release—Recoverable by party.]—*CLARK v. WOODS*, No. 1437, *ante*.

1704. ———.]—Pltf. was arrested under a committal warrant signed & issued by debt., a justice of the peace, for non-payment of a debt made up of a certain sum of money alleged to be due from pltf. to the local sanitary authority, under an order made at quarter sessions, & of the costs awarded:—*Held*: such a warrant was altogether bad, & pltf. was entitled to recover from debt., as special damages, the whole amount so paid by him to obtain his release from gaol.—*NORTON v. MONCKTON* (1895), 43 W. R. 350; 11 T. L. R. 242; 39 Sol. Jo. 286, D. C.

cause why pltf. should not be committed was necessary before signing the warrant of commitment.—*WARR v. TEMPLEMAN* (1872), 3 V. R. (Law) 56.—*AUS.*

previous issue of distress warrant.]—Pltf., having been convicted of selling spirituous liquors without licence, was fined a certain sum, to be levied by distress, & if not paid within a limited time, pltf. to be imprisoned. At the expiration of the time limited for payment, debts. issued a warrant of commitment, without previous issue of distress warrant. In an action for false imprisonment:—*Held*: as pltf. was guilty of the offence of which she was convicted, & her imprisonment did not exceed that assigned by law to the offence, debts. were entitled to the protection of R. S. c. 129, s. 11, & to have the verdict reduced to twopence.—*SMITH v. SIMMONS* (1872), 2 Pug. 203.—*CAN.*

c. ———.]—A bye-law directed imprisonment only in default of distress. *Qu.*: whether 32 & 33 Vict., c. 31, s. 59, would apply so as to enable the justice to commit under it in the first instance upon proper evidence.—

Sect. 3.—Imprisonment in default of distress: Sub-sects. 1

1705. Liability of married woman—Whether protected under Married Women's Property Act, 1882 (c. 75), s. 1.]—*Re ALLEN*, No. 1699, *ante*.

SUB-SECT. 2.—THE COMMITMENT.

1706. Commitment pending return to distress warrant—Whether valid by parol.]—13 Geo. 3, c. 80, gives a penalty in case of killing game on a Sunday, & directs that it shall be forthwith paid on conviction; & that in case of neglect or refusal to pay or give security for the payment of it the justice shall by warrant under his hand & seal cause the same to be levied by distress & sale of the offender's goods; & that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, etc.:—*Held*: such order to detain in custody until the return of the warrant of distress might be by parol.—*STILL v. WALLS* (1806), 7 East, 533; 3 Smith, K. B. 513; 6 Esp. 36; 103 E. R. 206.

1707. ———.]—*LEARY v. PATRICK*, No. 1685, *ante*.

1708. ——— No date for return.]—*LEARY v. PATRICK*, No. 1685, *ante*.

1709. Issue of distress warrant prior to—Necessity for—Licensing Act, 1872 (c. 94), s. 51.]—B. was convicted before justices for selling beer without a licence, & fined £50. B. confessed himself unable to pay, & was forthwith committed by the justices to prison for six months without any distress having been made:—*Held*: (1) the justices had exceeded their jurisdiction, inasmuch as the issue of a warrant of distress was necessary in all cases to make the above sect. applicable. (2) (*COCKBURN, C.J.*) the operation of the above sect. was not intended to apply to offences where a specific term of imprisonment was imposed in default of payment of the penalty adjudged.—*Re BROWN* (1878), 3 Q. B. D. 545; 26 W. R. 757; *sub nom. Ex p. BROWN*, 47 L. J. M. C. 108.

McLELLAN v. McKINNON (1882), 1 O. R. 219.—**CAN.**

d. ———.]—A magistrate may order imprisonment forthwith in default of payment of a penalty & costs imposed for protecting dentistry in violation of Dental Profession Act, notwithstanding that s. 51 of the Act provides a special mode of levying the same by distress.—*COWAN v. SCHILLING* (1915), 30 W. L. R. 463; 7 W. W. R. 1112; 8 Sask. L. R. 20.—**CAN.**

e. Liability of married woman—Offence under Licensing Act, 1876 (No. 586), s. 54.]—A married woman who has been convicted & fined for an offence under the above sect. may be committed to prison on default of sufficient distress to satisfy the fine.—*R. v. TATLOCK, Ex p. McLELLAN* (1885), 11 V. L. R. 186.—**AUS.**

PART VI. SECT. 3, SUB-SECT. 2.

1. Validity of—Minute of conviction not served.]—Under "Justices of the Peace Statute, 1865" (No. 267), where deft., duly summoned, does not appear & is convicted in his absence, the conviction providing for distress in default of payment, it is unnecessary to serve him with a copy of the minute of conviction before issuing a warrant for distress, & in default of distress, a warrant for commitment.—*R. v. KOCH* (1883), 9 V. L. R. 121.—**AUS.**

1710.

—.]—There is no jurisdiction under Licensing Act, 1872 (c. 94), ss. 3 (1), 51 (2), to order a person to be imprisoned for non-payment of a penalty exceeding £5, without previously ordering a distress warrant to issue. Summary Jurisdiction Act, 1879 (c. 49), s. 21 (3), is not applicable to a case under Licensing Act, 1872, s. 3.—*Re CLEW* (1881), 8 Q. B. D. 511; 51 L. J. M. C. 140; 46 J. P. 534; 30 W. R. 704, D. C.

1711. ——— Evidence of insufficient distress—Motor Car Act, 1903, c. 36.]—Deft. was convicted by a ct. of summary jurisdiction of an offence under Motor Car Act, 1903 (c. 36), s. 1, & fined £10 & 9s. 6d. costs.

It appeared from the affidavits of deft. & his solr. that on the announcement of the sentence the solr., stating that his client was in employment as a chauffeur at £2 a week, asked the ct. to grant time for payment; but that the chairman of the justices replied, "£10, or alternatively one month's imprisonment"; & that the solr. then left the ct. & deft. was removed in custody. It appeared from the affidavits of the justices & their clerk that on the announcement of the sentence the clerk asked an inspector of police what deft. was & where he lived, & he received the reply that he was a servant or a chauffeur, living on weekly wages in a room in certain mews; that solr. then stated that his client was only a second chauffeur, & had no means whatever beyond his wages, & made an appeal to the bench for time for payment, urging that if it were not given his client would have to go to prison; & the justices being satisfied by what had passed before them that deft. had not sufficient goods to satisfy a distress, issued their warrant of commitment. It was contended on the return to a writ of *habeas corpus* that the warrant was bad in that no application was made to the justices to levy a distress, & that no distress was levied, & that there was no evidence that deft. had not sufficient goods to satisfy a distress:—*Held*: the conviction & warrant of commitment being good upon the face of them, & there being nothing in the affidavits to displace the justices' finding that deft. had not sufficient goods whereupon to levy the distress, deft. must be recommitted to prison.—*R. v. MORTIMER* (1906), 70 J. P. 542, D. C.

g. ——— Distress warrant not issued.]—Under Fishery Act, 31 Vict. c. 60 (D.), a warrant of commitment may issue in the first instance, the statute not requiring that a distress warrant must first issue.—*ARNOTT v. BRADLY* (1873), 23 C. P. 1.—**CAN.**

h. ———.]—A conviction for a common assault adjudged payment of a fine & costs, & in default imprisonment:—*Held*: it was not necessary to order that a distress warrant to compel payment be issued before imprisonment.—*R. v. SMITH* (1881), 46 U. C. R. 442.—**CAN.**

k. ——— Warrant of commitment authorising hard labour—Not warranted by conviction.]—On a motion to set aside a conviction & warrant of commitment on the grounds: (1) that the conviction was not in the magistrates' office, but in that of the clerk of the peace; (2) that the conviction did not contain a clause of distress; (3) that the conviction only warranted the imprisonment without hard labour, whereas the prisoner had been committed with hard labour:—*Held*: the prisoner must be discharged, but on the last ground only.—*R. v. YEOMANS* (1873), 6 P. R. 66.—**CAN.**

l. ——— Costs added to penalty—Verbal instructions as to place of imprisonment.]—Pltf. was convicted before two of the defts., justices of the

peace for K.'s county, of "selling liquor without licence," & ordered to pay twenty dollars & costs, otherwise a distress warrant to issue, & in default of goods, to be imprisoned in the common gaol at X., K.'s county, for 50 days, unless the penalty & costs, together with costs of distress & commitment & of conveying pltf. to gaol, should be sooner paid. At this time an Act had been passed to provide for the removal of the shiretown from X. to H., & in the meantime, making the gaols of J. & W. the common gaol of K.'s county, the officer executing any process having the option of taking the prisoner either to J. or W. The constable not being able to find any goods to levy on, the justices issued a warrant of commitment, directing pltf. to be taken to X., & there imprisoned for 50 days, unless the penalty & costs, including costs of distress warrant & of conveying pltf. to gaol, be sooner paid. The justices verbally directed the constable to take pltf. to J., & the fees were made up for taking him there. Pltf. was only confined a few days, when he was discharged by judge's order. In an action brought against the justices & constable for false imprisonment:—*Held*: the warrant of commitment was illegal, both as to amount & place of imprisonment, & the justices had no authority, verbally to direct the constable to

1712. Constable's certificate of search.]—*Held*: in enforcing payment of a penalty by distress, the justices acted wrongly in directing warrant of imprisonment at once on a mere certificate, contrary to fact, of the constable as having diligently searched & found no sufficient goods to distrain.—*Re AUTHERS* (1889), as reported in 53 J. P. 116; 5 T. L. R. 216; *sub nom. Ex p. AUTHERS*, 37 W. R. 320.

1713. Validity of—Form of conviction—Must show insufficiency of distress.—(1) If a statute directs that a person convicted by a justice of an offence shall for want of a sufficient distress for a penalty he incurs on the conviction, suffer imprisonment, the justice must before he can issue a warrant for his commitment, state on the conviction that he has not such distress, & enter an adjudication that he be imprisoned.

(2) A constable cannot execute out of his own district a warrant directed generally to all constables. But he may execute anywhere within the limits of the justice's jurisdiction a warrant directed particularly to him.—*R. v. CHANDLER* (1899), 1 Ld. Raym. 545; Carth. 508; 91 E. R. 1264.

Annotations:—As to (1) *Folld. R. v. Whitlock* (1720), 1 Stra. 263. As to (2) *Consd. R. v. Weir* (1823), 1 B. & C. 288. *Folld. Gimbert v. Coyney* (1825), 3 Dow. & Ry. M. C. 323.

1714. ——— Certificate of constable.]—*R. v. WHITLOCK* (1720), 1 Stra. 263; 93 E. R. 511.

1715. ——— Must make provision for distress.]—K. was charged with opening his premises for sale of intoxicating liquors on Sunday within the prohibited hours, & was convicted, & fined £5, & also 13s. 6d. for costs. The conviction when drawn up contained no clause of distress, but ordered imprisonment in default of payment:—*Semble*: the justices might draw up a fresh conviction containing the clause of distress any time before filing it with the clerk of the peace.—*Ex p. KENYON* (1881), 45 J. P. 303.

1716. ——— Warrant issued by different justices from those hearing plaint—Must show adjudication by those hearing.]—A warrant of distress or com-

mitment issued under 3 Geo. 4, c. 23, by different justices from those before whom the complaint was heard must show upon the face of it an adjudication by the justices who heard the complaint; otherwise it will be bad, & prisoner entitled to his discharge upon *habeas corpus*.—*Re RAMSDEN* (1846), 3 Dow. & L. 748; 2 New Sess. Cas. 427; 15 L. J. M. O. 113; 11 J. P. 21; 10 Jur. 879.

— Costs added to penalty—Penalising statute silent as to costs.]—*See Sect. 4, post.*

1717. Duration of—Under Licensing Act, 1910 (c. 24), s. 65—Not exceeding one month.]—Deft. was convicted of an offence under above sect. & ordered to pay a fine of £25, & in default of payment & of sufficient distress to be imprisoned for three months:—*Held*: although under above sect. a sentence of imprisonment for the offence could not have exceeded one month, there was power under Summary Jurisdiction Act, 1879 (c. 49), s. 5, to impose a sentence of three months' imprisonment for non-payment of the fine & in default of sufficient distress.—*R. v. LEACH, Ex p. FRITCHLEY*, [1913] 3 K. B. 40; 82 L. J. K. B. 897; 109 L. T. 313; 77 J. P. 255; 29 T. L. R. 569; 23 Cox, C. C. 535, D. C.

1718. ——— Whether until payment.]—*CLARK v. WOODS*, No. 1437, *ante*.

— Whether determined by receiving order in bankruptcy.]—*See BANKRUPTCY*, Vol. V., p. 1022, No. 8340.

1719. Enforcement of—By mandamus—Discretion of High Court.—The ct. has a discretion as to granting a *mandamus* to justices to issue a warrant of distress or commitment against a person summarily convicted by them.—*Ex p. THOMAS* (1847), 2 New Mag. Cas. 73; 16 L. J. M. O. 57; 11 J. P. 295; 11 Jur. 107.

1720. ———.]—The ct. in its discretion refused to grant a *mandamus* to justices to enforce a summary conviction by warrant of distress or commitment.—*Re WILLIAMS* (1847), 9 Q. B. 976; 2 New Sess. Cas. 570; 115 E. R. 1548; *sub nom. R. v. FLINTSHIRE JJ.*, 11 J. P. Jo. 85.

take pltf. to J.—*CAMPBELL v. FLEWELL* (1874), 2 L'ug. 403.—CAN.

m. ——— Without express order—5th R. S., c. 102, s. 33.]—Under the above Act no execution to commit shall issue without express order therefore to the justice or justices from the party requiring the same, instructions to take the body shall be indorsed on the execution.—*R. v. LANTZ* (1885), 7 R. & G. 1.—CAN.

n. ——— Warrant of commitment dated prior to return of distress warrant—But not issued till after return.]—The warrant of commitment, which was not issued until after the return of the distress warrant, was dated June 14, & the distress warrant was not returned before June 17:—*Held*: the warrant of commitment need not be dated at all if not issued too soon.—*R. v. SANDERSON* (1886), 12 O. R. 178.—CAN.

o. ——— Issued without evidence of insufficient distress.]—Where an Act directs a penalty to be recovered by distress, & in default of distress, by imprisonment, a warrant of commitment cannot be issued in the first instance under Consol. Stat. c. 62, s. 25, unless it appears to the justice, by admission of deft., or by evidence, that deft. has not sufficient goods whereon to levy a distress.—*WINSLOW v. GALLAGHER* (1888), 27 N. B. R. 25.—CAN.

p. ——— Warrant of commitment including costs of commitment.]—Deft. was the salaried police magistrate for

O., in which Canada Temperance Act was in force prior to May 11, 1889, when the order-in-council declaring it in force was revoked. On Jan. 11, 1889, pltf. was convicted before deft. of a second offence against the Act, & adjudged to pay a fine of \$100 & \$12.05 costs. On Mar. 20, 1889, deft. issued a warrant of commitment reciting pltf.'s conviction before him & the imposition of the fine & costs; declaring that pltf. had no goods & chattels; & directing her committal to gaol for sixty days unless the several sums & all the costs & charges of the distress & of the commitment & conveying of pltf. to the common gaol, amounting to the further sum of seventy-five cents, etc., should be sooner paid. At the trial of an action for the arrest & imprisonment of pltf. under this commitment a conviction of pltf. was put in dated Jan. 11, 1889, but which was not drawn up till Feb. 1890. The conviction adjudged that pltf. should pay the penalty & costs according to adjudication, & if these sums were not paid forthwith, then, inasmuch as it had been made to appear that pltf. had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days unless those sums & the costs & charges of conveying to gaol should be sooner paid. The conviction had not been quashed. It appeared by the examination of deft. that the seventy-five cents in the warrant were charged for the warrant, & that the blank was left for the constable to fill in the costs

of conveying to gaol. The constable, however, did not fill in the costs, but indorsed a memorandum of them on the back of the warrant, making them \$13.40:—*Held*: although the warrant of commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained pltf. was the sum of seventy-five cents mentioned in the warrant, & the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant.—*MECHAM v. HORNE* (1890), 20 O. R. 267.—CAN.

q. Enforcement of—Power of officer to receive payment of amount due.]—A constable acting under a warrant issued under Fishery Act, 31 Vict. c. 60 (D.), directing him to convey pltf. to gaol, & the gaoler to hold him for thirty days absolutely, & not until the fine, etc., be sooner paid, for the non-payment of which the warrant was issued, has no authority to receive the money & discharge the prisoner.—*ARNOTT v. BRADLY* (1873), 23 C. P. 1.—CAN.

r. ———.]—Where it was alleged, but denied that the bailiff had refused to receive the penalty & costs:—*Held*: his duty was to execute the warrant of commitment & he had no authority to receive such payment.—*R. v. SANDERSON* (1886), 12 O. R. 178.—CAN.

SECT. 4.—RECOVERY OF COSTS.

1721. By distress—Costs awarded by quarter sessions.]—By Debtors Act, 1869 (c. 62), s. 4: "with the exceptions thereafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment; . . . 2. Default in payment of any sum recoverable summarily before a justice or justices of the peace"—*Held*: costs, which had been awarded by quarter sessions against one of the parties to an appeal, & which by Quarter Sessions Act, 1849 (c. 45), s. 5, & Summary Jurisdiction Act, 1847 (c. 43), s. 27, may be enforced before a justice by warrant of distress, & in default of distress by warrant of commitment, are within the above exception; & the defaulter is therefore not protected from imprisonment.—*R. v. PRATT* (1870), L. R. 5 Q. B. 176; 39 L. J. M. C. 73; 18 W. R. 626; *sub nom. Ex p. COLE*, 21 L. T. 750; 34 J. P. 150.

Annotations:—*Consd. Buckley v. Crawford*, [1893] 1 Q. B. 105. *Reid. Hewitson v. Sherwin* (1870), L. R. 10 Eq. 53; *Re Edgcome, Ex p. Edgcome* (1902), 87 L. T. 108.

1722. — Information against company.]—B. preferred an information against a co. for not keeping a register of members. The charge was dismissed, & B. was ordered to pay costs, but made default, & in default of distress, on a judgment summons, upon proof of means, an order was made against him for committal:—*Held*: Summary Jurisdiction Act, 1879 (c. 49), s. 47, applied, & the order for committal was rightly made. The fact that at the date of the hearing of the information the co. was in voluntary liquidation, that before the date of the order for commitment the liquidators had been removed & no others were appointed, did not invalidate the order of committal.—*R. v. LONDON (LORD MAYOR), Ex p. BOALER*, [1893] 2 Q. B. 146; 63 L. J. M. C. 29; 57 J. P. 633; 42 W. R. 159; 9 T. L. R. 508; 5 R. 554, D. C.

1723. — Information under Vaccination Act, 1867 (c. 84).]—An order was made by justices, under sect. 31 of the above Act, ordering the parent of a child to have the child vaccinated within a certain time, & to pay 8s. 6d. costs to the informant. The order further provided that the

payment of the costs should be enforced by distress & imprisonment:—*Held*: the justices had power under Summary Jurisdiction Act, 1848 (c. 43), s. 18, to order that the payment of the costs should be enforced, & such power was not affected by Summary Jurisdiction Act, 1879 (c. 49), s. 6.—*R. v. BURROWS, ETC. JJ., Ex p. WILSON* (1897), 77 L. T. 338; 61 J. P. 724; 46 W. R. 29; 13 T. L. R. 569; 41 Sol. Jo. 715.

— **Enforcement by mandamus.]—**See CROWN PRACTICE, Vol. XVI., p. 313, No. 1244.

— **Removal of warrant by certiorari—After execution.]—**See CROWN PRACTICE, Vol. XVI., p. 446, No. 3130.

1724. By confinement to the stocks—Illegal—Sunday Observance Act, 1677 (c. 7)—Summary Jurisdiction Act, 1848.]—By Sunday Observance Act, 1677 (c. 7), a justice is empowered, in case of a penalty not being paid, to levy it by distress of the offender's goods, or in default of distress to place him in the stocks for two hours unless the penalty is sooner paid. Summary Jurisdiction Act, 1848 (c. 43), s. 18, enacts, that costs specified in convictions shall be recoverable in the same manner & under the same warrants as any penalty adjudged to be paid by such conviction is recoverable:—*Held*: such conviction under the former Act which adjudged the offender to pay 5s. penalty & 11s. costs, & if not paid to be levied by distress, & in default of sufficient distress, adjudged him to be set in the stocks for two hours, unless the said several sums & all costs & charges of the distress be sooner paid, could not be supported.—*R. v. BARTON* (1849), 13 Q. B. 389; 3 New Sess. Cas. 470; 18 L. J. M. C. 56; 12 L. T. O. S. 449; 13 J. P. 120; 13 Jur. 232; 116 E. R. 1311.

1725. By imprisonment in default of distress.]—*R. v. PRATT*, No. 1721, *ante*.

1726. —.]—*R. v. LONDON (LORD MAYOR), Ex p. BOALER*, No. 1722, *ante*.

1727. —.]—*R. v. BURROWS, ETC. JJ., Ex p. WILSON*, No. 1723, *ante*.

1728. — When penalising statute silent as to costs.]—*CLARK v. WOODS*, No. 1437, *ante*.

1729. —.]—*NORTON v. MONCKTON* (1895), 43 W. R. 350; 11 T. L. R. 242; 39 Sol. Jo. 286, D. C.

Part VII.—Distress Damage Feasant.

SECT. 1.—RIGHT TO DISTRAIN—TITLE OF DISTRAINOR.

1730. Estate in locus in quo—How far to be set out—Tenant in common claiming under devisor.]—(1) One tenant in common may avow for damage feasant; (2) but he ought to show of what estate the devisor was seised.—*WILLIS v. FLETCHER* (1596), Cro. Eliz. 530; 78 E. R. 777.

Annotation:—*As to* (1) *Overd. Culley v. Spearman* (1795), 2 Hy. Bl. 386.

Whether allegation of possession sufficient.]—In trespass for taking cattle, if deft. justifies damage feasant, it is sufficient for the plea to allege possession of the close without stating a title specially.—*SERLE v. BUNNION* (1676), 1 Freem. K. B. 206; 2 Mod. Rep. 70; 3 Salk. 220; 89 E. R. 145.

Annotation:—*Reid. Langford v. Webber* (1688), Carth. 9.

PART VII. SECT. 1.

a. Estate in locus in quo—Jurisdiction of justices to decide—Impounding Act, 1863, s. 40.]—On a complaint under above sect. for

illegally impounding cattle, the justices have jurisdiction to inquire whether deft. was in occupation of the land on which the cattle were alleged to be trespassing, & to decide such incidental

questions of title as are necessary for the determination of that question.—*PHILLIPS v. DOWZER* (1895), 6 Q. L. J. 210.—AUS.

of user only for

1732. —.]—To trespass for taking a horse, a justification that deft. was possessed of a close, & took the horse damage feasant, is good.—*LANGFORD v. WEBBER* (1688), 3 Mod. Rep. 132; Carth. 9; Comb. 60; 87 E. R. 84; *sub nom. LONGFORD v. WEBBER*, 3 Salk. 356.

1733. — Customary heir of copyholds.]—To trespass for taking cattle, if deft. in justification state, that he was seised of certain copyhold lands, of which the place where was parcel, & that the cattle were then damage feasant, he must set out the commencement of his estate.—*ROBINSON v. SMITH* (1694), 4 Mod. Rep. 346; 87 E. R. 435.

1734. — Several closes of same name—Animals distrained in one only.]—Declaration for seizing pigs; plea, that deft. was possessed of a close named H., in which the pigs were eating, etc.,

& were taken damage feasant: replication, that deft. was not possessed of the close in the plea mentioned, in which the pigs were alleged to be eating, etc., & issue thereon. There were several adjacent closes called H.:—*Held*: deft. was bound to show that he was possessed of a close in which the pigs were eating, etc., & it was not enough for him to show his possession of a close named H.—*BOND v. DOWNTON* (1834), 2 Ad. & El. 26; 111 E. R. 11.

1735. — Right of common.—In an avowry deft. averred that all those whose estate he now has, etc., from time whereof, etc., have been accustomed to have & of right during all the time aforesaid ought to have had & still of right ought to have common of pasture in the *locus in quo*:—*Held*: bad; it did not amount to an averment of right of common at all times of the year. If deft. in replevin plead by way of justification of the taking that he was possessed of a messuage with common appurtenant, & that pltf.'s cattle were damage feasant on the common, & conclude in bar, without praying a return, it seems that such a plea is bad.—*HAWKINS v. ECKLES* (1801), 2 Bos. & P. 359; 126 E. R. 1326.

1736. — Right of drift.—Replevin for taking cattle. Plea, that W. was seised in fee of a forest, within which there were wastes: & that certain tenants of lands near the forest had a right of common on such waste for their cattle levant & couchant; that there was a custom within the forest for the master forester to make drifts annually of the cattle depasturing the waste, which were to be driven to a place named to ascertain whether any of them were unlicensed cattle & whether any commoner had surcharged; & if any had surcharged, the cattle were to be impounded damage feasant. That pltf. was a commoner, & deft. making the drift as servant of the master forester, found pltf.'s cattle depasturing & doing damage in the place in which, etc., & that pltf. had surcharged by depasturing with the cattle seised; wherefore deft. detained the cattle to impound them. Replication, admitting W.'s seisin & the existence of the wastes, *de injuria absque residuo*, etc.:—*Held*: good.—*MORTIMER v. MOORE* (1845), 8 Q. B. 294; 15 L. J. Q. B. 118; 6 L. T. O. S. 255; 10 Jur. 370; 115 E. R. 887.

—*See* COMMONS, Vol. XI., p. 41, Nos. 561–563, 565–569.

Beasts of stranger.—*See* COMMONS, Vol. XI., p. 51, Nos. 750–759.

1737. — Conflict as to boundaries—Onus of proof on distrainer.—*MOTT v. TURNAGE* (1856), 1 F. & F. 6, N. P.

Annotation:—*Mentd.* *Golden v. Taylor* (1860), 2 F. & F. 110.

Coterminous parishes & manors.—*See* BOUNDARIES, Vol. VII., p. 266, No. 14.

1738. Tenant in common—Avowry by one only—Whether sufficient.—*WILLIS v. FLETCHER*, No. 1730, *ante*.

1739. — — — — ——One tenant in common cannot avow alone for taking cattle damage

pasturing cattle.—Defts. by an agreement under seal with S., acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make defts. tenants of S. There was, however, a covenant that S. would not allow his own animals or those of others to enter upon the land in question:—*Held*: defts. had no right under this agreement to distrain pltf.'s cattle damage feasant upon the land. *Semble*: defts.' remedy, if any, was by action on the covenant against S.

A. R. 261.—CAN.

a. — Demise of boggy land—With liberty to cut turf.—A demise of thirteen acres & two roods, & the plots of boggy land for the holding, with liberty to cut turf green, i.e., "dry it, & draw it out of the bog, paying reasonable trespass, for three lives":—*Held*: to pass the freehold of the bog, so that the tenant might impound any cattle grazing thereon.—*MACREEN v. LINDSAY* (1827), Rowe, 724.—IR.

b. — Occupied under unlawful contract.—A native was in occupation of landed property in terms of a con-

feasant but he ought also to make cognisance as bailiff of his companion.—*CULLEY v. SPEARMAN* (1795), 2 Hy. Bl. 386; 126 E. R. 610.

1740. Right as bailiff for others—Whether avowing made in own name—Surveyor of copyhold land.—*STEPHENS v. KEBLETHWAYT* (1617), Cro. Jac. 436; 79 E. R. 372.

1741. — — — Guardian in socage.—In replevin if deft. sets forth a custom for the lord of a manor to appoint a guardian to the custody of the lands of any of his infant tenants, & avows taking cattle damage feasant, pltf. cannot plead that he (ptf.) is guardian in socage. The guardian of the land may bring trespass in his own name. In an avowry for damage feasant deft. must set forth his title.—*WADE v. BAKER & COLE* (1696), 1 Ld. Raym. 130; 91 E. R. 984.

Annotations:—*Mentd.* *R. v. Oakley* (1809), 10 East, 491; *R. v. Sutton* (1835), 3 Ad. & El. 597.

1742. — — — — ——It is laid down in *Wade v. Baker & Cole*, No. 1741, *ante*, that he may maintain trespass & ejectment, avow for damage feasant, make admittance to copyhold & leave in his own name (LORD ELLENBOROUGH, C.J.).—*R. v. OAKLEY* (1809), 10 East, 491; 103 E. R. 862.

Annotations:—*Mentd.* *R. v. Toddington* (1818), 1 B. & Ald. 560; *R. v. Sutton* (1835), 3 Ad. & El. 597; *R. v. Burgate* (1854), 23 L. T. O. S. 155.

1743. — & in own right—Double avowing.—D. & L. being defts. in replevin, the ct. allowed D. to avow, for a distress damage feasant, in his own right as tenant from year to year to W. tenant in fee, & also to make cognisance as bailiff of C. tenant in fee; & L. to make cognisance as bailiff of D. tenant to W. as above, & also as bailiff to C. tenant in fee.—*EVANS v. DAVIES* (1838), 8 Ad. & El. 362; 3 Nev. & P. K. B. 464; 1 Will. Woll. & H. 360; 7 L. J. Q. B. 217; 2 Jur. 856; 112 E. R. 875.

1744. Place of taking & locus in quo separate—Under same demise.—Replevin of cattle taken in A. Deft. avowed the taking in A. under a demise of certain premises of which B. was parcel, & because the cattle were damage feasant in B. he took them & drove them through A. in his way to the pound:—*Held*: the avowry was well pleaded.—*ABERCROMBIE v. PARKHURST* (1801), 2 Bos. & P. 480; 126 E. R. 1395.

SECT. 2.—JUSTIFICATION BY DISTRAINEE.

1745. Right of common.—ANON. (1308), Y. B. 1 Edw. 2 fo. 9; Sel. Soc. Y. B., Vol. I., p. 39.

1746. — Between harvest & sowing.—If a plaintiff avows a taking damage feasant, under a claim of common between one period & another, he must show that the cattle were put in during the interval.—*JACKSON v. BELL* (1622), Cro. Jac. 637; 79 E. R. 549.

Annotation:—*Refd.* *Scamler v. Johnson* (1682), T. Jo. 227.

tract with the owner which was unlawful by reason of Act 27 of 1913, s. 1 (a):—*Held*: notwithstanding that the contract was unlawful the native was not a trespasser & he was entitled to impound cattle coming on to the property.—*MOORE v. XAKLAXA*, [1918] T. P. D. 224.—S. AF.

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c. Right of depasture—Travelling sheep—Impounding Act (29 Vic., No. 2).—*MELBOURNE BANKING CO. v. BREWER* (1875), 1 N. S. W. S. C. R. N. S. 103, n.—AUS.

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1747. — **Beasts under certain age.]**—In replevin for taking three steers deft. first made cognisance as bailiff of a lord of a manor, that the *locus in quo* was a common within it, & that the jurors at a court leet, made a regulation or by-law, that no person should keep any steer on the common, after two years old, under the penalty of paying 20s. a head for each of such cattle; & that by another custom, if the sum directed to be paid by way of penalty for a breach of such regulation was refused, a distress might be levied; that as pltf.'s steers, being more than two years old, were depasturing on the common, he took them in the name of a distress; & secondly that he distrained them damage feasant. Pltf. pleaded to the second cognisance, that he was entitled to right of common as being seised in fee of a messuage; & that he turned the steers in question, being less than two years old:—*Held*: (1) the first cognisance was bad, as it did not state that the distress was taken for the penalty, or that pltf. refused to pay the same; (2) the plea to the second cognisance was bad, as it did not state that the steers were less than two years old when they were distrained; & although deft. had tendered an immaterial issue in his replication to that plea, still, as the jury had found a verdict on it for him it could not be disturbed.—*CLEARS v. STEVENS* (1818), 8 Taunt. 413; 2 Moore, C. P. 464; 129 E. R. 443.

Annotation:—*Mentd.* Gwynne v. Burnell (1840), 7 Cl. & Fin. 672.

1748. — **By prescription.]**—In an action of replevin for taking pltf.'s cattle, deft. avowed under a grant of common of pasture from D., to the burgesses of a borough, for each of the burgesses inhabiting therein; pltf. pleaded that the corpn. had a prescriptive right to appoint a reasonable number of herds, for taking care of the cattle put on the common, & a like right of appointing, as a remuneration to each herd, a reasonable number of stints of each such herd, to be depastured on such common, & then prescribed for common of pasture of such stints:—*Held*: sufficient after verdict; although it was objected that the number of herds or stints ought to have been set out with certainty on the face of the plea, & that the custom was invalid, & could not be supported by such a grant.—*ELLIOTT v. HARDY* (1825), 3 Bing. 61; 10 Moore, C. P. 347; 3 L. J. O. S. C. P. 153; 130 E. R. 436.

1749. — **By custom.]**—*SMITH v. FLOWER* (1826), 3 Bing. 401; 11 Moore, C. P. 264; 4 L. J. O. S. C. P. 113; 130 E. R. 567.

1750. — **By custom—Common of vicinage.]**—On an avowry for distraining sheep damage feasant upon a certain down, the plea in bar alleged a right of common *pur cause de vicinage*, which was traversed by deft. & issue being joined on the traverse, it appeared on the trial, that when pltf.'s sheep strayed from his down to the contiguous one of deft., it was the custom to drive them back, & also that the down of the latter, on which the sheep were distrained, was the private property of a third party, who leased it to deft.:—*Held*: the action was not maintainable, & the verdict found for deft. should not be disturbed.—*HEATH v. ELLIOTT* (1838), 4 Bing. N. C. 388; 1 Arn. 170; 6 Scott, 172; 7 L. J. C. P. 210; 132 E. R. 836.

Annotations:—*Refd.* Prichard v. Powell (1845), 10 Q. B. 589; Jones v. Robin (1847), 10 Q. B. 620.

1751. — **By custom.]**—To avowry for damage feasant on a common, D., common *pur cause de vicinage* was well pleaded in bar by alleging immemorial common *pur cause de vicinage* between

commons P. & D. for cattle put on those commons, & that pltf. for thirty or sixty years had right of common on P. Reputation may be given in evidence in support of the immemorial right of common *pur cause de vicinage* so pleaded.—*PRICHARD v. POWELL* (1845), 10 Q. B. 589; 15 L. J. Q. B. 166; 10 Jur. 154; 116 E. R. 224; *sub nom.* *POWELL v. PRITCHARD*, 5 L. T. O. S. 263; *previous proceedings* (1843), 2 L. T. O. S. 226.

Annotation:—*Refd.* Dunraven v. Llewellyn (1850), 15 Q. B. 791.

1752. — **By custom.]**—Trespass for distraining sheep. Second plea stated that J. was possessed of a close, being within & part of a farm, situated in the parish of N., & justified under authority from J. because the sheep were wrongfully in the close doing damage. Replication, that the farms of pltf. & deft. had immemorably joined each other, not separated by any fence sufficient to turn sheep, & "that the sheep from time to time, during all the time, duly put in & on pltf.'s farm to feed on the grass there growing, from time immemorial had used deft.'s farm, in which the sheep were so taken & distrained, etc., & in like manner, etc," stated the mutuality as to the other farm. Rejoinder, after admitting certain matters alleged in the replication, that the other matters in the replication alleged were not true in substance or in fact:—*Held*: such a claim could not be good by custom, & the replication was defective in substance, for not showing that the claim arose by grant or prescription. *Semble*: that common *pur cause de vicinage*, or the right of interpasturing, may exist between two private owners of estates without commoners on either side.—*JONES v. ROBIN* (1847), 10 Q. B. 620; 17 L. J. Q. B. 121; 12 Jur. 308; 116 E. R. 235, Ex. Ch.; *affg.* (1845), 10 Q. B. 581.

Annotations:—*Refd.* Prichard v. Powell (1845), 10 Q. B. 589; Cape v. Scott (1874), L. R. 9 Q. B. 269. *Mentd.* Clarke v. Tinker (1845), 10 Q. B. 604; Kaye v. Sutherland (1887), 20 Q. B. D. 147.

— **By custom.]**—See COMMONS, Vol. XI., p. 35, No. 478, p. 38, No. 526.

1753. — **Long user.]**—Trespass for distraining sheep. Plea, alleged a right of common in certain persons, & because the sheep, etc., deft. as those persons' servant, distrained. Pltf. replied that he & his tenants, & immediately before him certain other persons from & under whom pltf. immediately claimed, & the tenants of the other persons, & immediately before them C. from & under whom the other persons immediately claimed, & the tenants of C., for thirty years next before suit, enjoyed as of right, & without interruption, common of pasture over the land, in gross, for one hundred sheep; that pltf. put on six sheep, which deft. distrained:—*Held*: the replication was bad.—*SAUNDERS v. LATCHAM* (1855), 4 W. R. 97.

1754. — **By custom.]**—In replevin for taking pltf.'s cattle, to an avowry damage feasant, pltf. pleaded in bar, under Prescription Act, 1831 (c. 71), a user for 30 years as of right, & also for 60 years as of right, of common of pasture over the *locus in quo*. At the trial, the fact of user by pltf. & other occupiers of his farm was proved; but it appeared that S. from whom pltf. & deft. derived their title, was for more than 60 years before, & until within 60 years, seised in fee of pltf.'s farm, & during the same period had an estate for life in the land over which the right of common was claimed, but never had actual possession of the dominant tenement except by tenants. More than 60 years before the action he joined a remainderman, in a conveyance of the servient

tenement, to make a tenant to the *præcipe*, for the purpose of suffering a recovery, in order to raise money on mtge.; but no recovery was suffered, & S. continued possessed until 28 years before the action, when the property was sold, & all community of title ceased:—*Held*: although there was no unity of seisin to extinguish an easement or prevent its existence, the facts precluded an enjoyment as of right within the above Act.—*WARBURTON v. PARKE* (1857), 2 H. & N. 64; 26 L. J. Ex. 298; 29 L. T. O. S. 127.

Annotation:—*Mentd.* Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592.

1755. — Inclosure—Not completed.]—GULLETT v. LOPES (1811), 13 East, 348; 104 E. R. 404.

Annotations:—*Consd.* Wells v. Percy (1835), 1 Bing. N. C. 556. *Refd.* Prichard v. Powell (1845), 10 Q. B. 589.

1756. — Award not disputed.]—In replevin for seizing cattle alleged to be damage feasant, pltf. pleaded a right of common over the *locus in quo*, awarded him by the comrs. under an Act for inclosing the waste lands of G. by which the award of the comrs. was declared to be final unless appealed from by an action upon a feigned issue to be brought at the next or the following assizes:—*Held*: (1) after the expiration of the time limited for disputing the award, the original right of common of pltf. could not be called in question; (2) the corpn. of G. who were mentioned in the act as lords of the manor, & received under it an allotment in lieu of their manorial rights, were bound by the Act.—*PHILLIPS v. MAILE* (1830), 7 Bing. 133; 4 Moo. & P. 770; 9 L. J. O. S. C. P. 9; 131 E. R. 51.

Annotations:—*Mentd.* Godmanchester Corpn. v. Phillips (1833), 5 B. & Ad. 198; Casamajor v. Strode (1834), 2 My. & K. 706; Micklethwait v. Vincent (1893), 69 L. T. 57.

—.]—*See* COMMONS, Vol. XI., p. 25, No. 313.

1757. — By lease.]—POPE v. SKINNER (1616), Hob. 72; Moore, K. B. 863; 80 E. R. 222.

Annotations:—*Refd.* Gilbert v. Parker (1704), 2 Salk. 629. *Mentd.* Foote v. Berkley (1666), O. Bridg. 527; Cudlip v. Rundil (1691), 1 Show. 310; Carvick v. Blagrove (1820), 1 Brod. & Bing. 531; Lush v. Russell (1850), 5 Exch. 203.

— **Effect of release.]—See** COMMONS, Vol. XI., p. 53, No. 790.

1758. — Of distinct lands—Sufficiency of evidence.]—Where in an action of replevin the pleas to the avowries or cognisances, damage feasant, claim a right of common in respect of distinct lands, the jury must have sufficient evidence before them to enable them to say in respect of which lands the right of common exists. Thus, where in one set of pleas pltf. claimed a right of common of pasture over certain uninclosed strips of land in respect of 100 acres of land, for all commonable cattle levant & couchant thereon; & in another set claimed that right as an occupier of such strips *pur cause de vicinage*, for all cattle levant & couchant upon the strips of land he occupied, & the jury found a verdict generally for pltf.; that verdict was held to be imperfect, & a new trial granted.—*NEWBY v. SINGLETON* (1832), 1 L. J. K. B. 165.

1765 i. Escape of animals—From public highway—Defect of fences.]—Apart from Land Act, 1884 (No. 812), s. 120, the owner of fenced land adjoining a highway is bound to allow sheep travelling along the highway, which trespass upon his land by walking under the fence, to remain upon his land for a sufficiently long time to give the persons driving them an opportunity of removing them.—*BOURCHIER v. MIT-*

*d. — Defect of fences.]—Tres-*pass for taking, impounding & selling pltf.'s horses. Plea, that horses were damage feasant. Replication, that by town-meeting regulations, fences should be five feet high, & that deft.'s fences not being that height, but ruinous & out of repair, pltf.'s horses escaped out of his close into deft.'s close without the knowledge & consent of pltf. In general demurrer:—*good.*—*IVES v. HITCHCOCK*

1759. Right to locus in quo—By alleged sale.]—To a declaration in trespass for taking a horse & cart, deft. pleaded that he was possessed of a field & a crop of grass growing thereon, & that he distrained the horse & cart, damage feasant; pltf. replied, that deft. agreed to sell & pltf. agreed to buy of deft., the crop of grass, with liberty to pltf. to cut & take it from the close when fit to be cut; & that pltf. by virtue of the agreement entered into possession of the crop, & brought his horse & cart for the purpose of cutting & carrying it away, wherefore deft. committed the trespasses *de injuriâ*. Deft., in his rejoinder traversed the agreement:—*Held*: on these pleadings pltf. was bound to show a valid contract in law for the sale of the grass; there being no note in writing of the agreement for the sale, pltf. could not recover, even though it was to be considered as an agreement for the sale of an interest in land.

Where there is an agreement for a sale of an interest in land, without a note in writing, it operates as a licence to the purchaser to excuse his entry on the land, but cannot be rendered available as a contract in any way.—*CARRINGTON v. ROOTS* (1837), 2 M. & W. 248; Murp. & H. 14; 6 L. J. Ex. 95; 1 Jur. 85; 150 E. R. 748.

Annotations:—*Mentd.* Reade v. Lamb (1851), 6 Exch. 130; Leroux v. Brown (1852), 12 C. B. 801; Williams v. Lake (1859), 6 Jur. N. S. 45; Williams v. Wheeler (1860), 8 C. B. N. S. 299; Britain v. Rossiter (1879), 11 Q. B. D. 123.

1760. — Defendant avowing as bailiff—Impeachment of owner's title.]—FULLER & TRIMWELL'S CASE (1587), 2 Leon. 215; 74 E. R. 490.

Annotations:—*Refd.* Trent v. Hunt (1853), 9 Exch. 14. *Mentd.* Britton v. Cole (1697), 12 Mod. Rep. 175; Durant v. Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629.

1761. — Part title in plaintiff.]—In replevin, if deft. plead that he was seised of the place where, & justifies the taking damage feasant, pltf. may allege that he was seised in fee of a third part of the place where, & traverse the sole seisin of deft.—*GILBERT v. PARKER* (1704), 6 Mod. Rep. 158; 2 Salk. 629; 87 E. R. 915.

1762. — Entry by command of another.]—In trespass for taking & driving pltf.'s cattle, to which there was a justification that deft. was lawfully possessed of a certain close, & that he took the cattle there damage feasant, pltf. may specially reply title in another by whose command he entered, etc., & it does not vitiate the replication that it unnecessarily proceeded farther to give colour to deft.—*TAYLOR v. EASTWOOD* (1801), 1 East, 212; 102 E. R. 83.

Annotation:—*Refd.* Richards v. Fry (1838), 7 L. J. Q. B. 68.

1763. — By licence of defendant bailiff.]—In replevin, if pltf. reply, to an avowry for damage feasant, that deft.'s bailiff gave him licence to drive the cattle through the land, & issue be joined thereon, a verdict for pltf. is good.—*WINGFIELD v. BELL* (1613), Cro. Jac. 377; 79 E. R. 322.

1764. Taking in the highway—Cattle on way to pound—From locus in quo.]—MATTHEW v. FOSSET (1772), 3 Wils. 295; 85 E. R. 1063.

1765. Escape of animals—From public highway—Through defect of fences.]—A plea in bar of an avowry, for taking cattle damage feasant, that the

(1831), Dra. 492.—*CAN.*

e. — — —.]—SPAFFORD v. HUBBLE (1837), 1 Ont. Dig. 1979.—*CAN.*

f. — — —.]—Where in trespass for seizing cattle & causing them to be sold, deft. pleaded that the cattle were taken *damage feasant*, & pltf. replied, that deft.'s fences were defective & that the cattle escaped from the highway into the close. On

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cattle escaped from a public highway into the *locus in quo* through the defect of fences, must show that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped.—*DOVASTON v. PAYNE* (1795), 2 Hy. Bl. 527; 126 E. R. 684.

Annotations:—*Consd.* *Fawcett v. York & North Midland Ry.* (1851), 16 Q. B. 610; *Haigh & Baxter v. West* (1893), 68 L. T. 531. *Refd.* *Ricketts v. East & West India Docks, etc. Ry.* (1852), 12 C. B. 160; *M. S., & L. Ry. v. Wallis* (1854), 14 C. B. 213; *Dickinson v. L. & N. W. Ry.* (1866), Har. & Ruth. 399. *Mentd.* *R. v. Pratt* (1855), 4 E. & B. 860; *Dawes v. Hawkins* (1860), 8 C. B. N. S. 848; *R. v. Rathmines & Rathgar Improvement Comrs.* (1864), 11 L. T. 281; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Rangleley v. Mid. Ry.* (1868), 3 Ch. App. 306; *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26; *St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47; *Arnold v. Holbrook* (1873), 42 L. J. Q. B. 80; *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704; *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Harrison v. Rutland*, [1893] 1 Q. B. 142; *Hickman v. Malsey*, [1900] 1 Q. B. 752.

Reasonable time to recover.]—*See* ANIMALS, Vol. II., p. 226, No. 182.

SECT. 3.—FOR WHAT DAMAGE.

1766. Damage to freehold.]—*WORMER v. BIGGS*, No. 1792, *post*.

1767. —.]—The damage in respect of which trespassing animals may be distrained damage

demurrer to the replication:—*Held*: it was bad for not stating that the cattle escaped through defect in the fence, & the plea was good, as it showed a sufficient justification of the seizure.—*STEDMAN v. WASLEY* (1839), 1 U. C. R. 464.—**CAN.**

g. —.]—A municipal council by bye-law enacted that certain descriptions of named animals & all four-footed animals known to be breachy, should not be allowed to run at large in the township; & provided for fixing the height of fences. The pltf.'s cattle strayed from the highway into the lands of deft., whose fences were not of the height required by the bye-law. He distrained them & they were impounded. In an action of replevin:—*Held*: as the bye-law did not affirmatively authorise these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the pltf. was liable at common law, & under R. S. O. 1877, c. 195, for the damage done, irrespective of any question as to the height of the deft.'s fences.—*ROWE v. STREPER* (1881), 46 U. C. R. 87.—**CAN.**

h. —.]—The effect of Act respecting pounds R. S. O. 1887, c. 215, ss. 2, 3, 6, 20, 21, is to give a right to impound cattle trespassing & doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damage can be obtained by the impounding whatever may be done in an action of trespass.—*MCSLOY v. SMITH* (1895), 26 O. R. 508.—**CAN.**

k. —.]—Where cattle had trespassed on the pltf.'s corn & grass there not being a sufficient boundary between the parties owing to the fact that part of the boundary ran across a river where no fence could be erected & maintained:—*Held*: defts. were under a duty to prevent their beasts from straying or wandering without a herd & if their beasts strayed they were liable to be impounded.—*CALEY v. CORLETT* (1823), Bluet, 32.—**I. of M.**

l. —.]—*Removal of fence.]—*Pltf. sued deft. for taking his cattle. Plea, justifying as for distress damage *feasant* on deft.'s land. Replication,

that pltf. demised to deft. the land mentioned in the plea, reserving a right of way along the west side thereof, & the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way to prevent horses, etc., straying therefrom; & that deft. covenanted by the lease to keep such fence in repair, but removed it, whereby pltf.'s horses strayed from the way upon deft.'s land. Rebutter, that the lease contained covenants allowing pltf. to enter on the land & view the state of repair, & that deft. would repair according to notice; that pltf. directed deft. to remove the fence along the east side of the way, & use the rails for other purposes, which deft., with pltf.'s assistance, & as the act of pltf., accordingly did; & this is the removal referred to in the surrejoinder:—*Held*: upon the evidence, set out in the case, the jury were justified in finding the rebutter proved by deft., whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed, that if the removal of the fence was pltf.'s act, he was bound, having thus thrown open the way, so to use his right over it as not to injure deft.'s land.—*WIXON v. PICKARD* (1866), 25 U. C. R. 307.—**CAN.**

m. —.]—*Immediate recapture by owner.]—*Pltf.'s horse escaped from his stables & got into deft.'s pasture field, but was immediately pursued by M., who saw it escape, & was leading it out of deft.'s field, when deft. seized & detained it. Pltf. replevied & deft. avowed as for distress damage *feasant*:—*Held*: the horse, in the circumstances was not distrainable.—*MCINTYRE v. LOCKRIDGE* (1868), 28 U. C. R. 204.—**CAN.**

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n. General rule.]—The right to distrain *damage feasant* is one of detention only & extends only to damage which is actually being done or is continuing at the time, not to damage done on another occasion in the past or which it is anticipated may be done

feasant is not confined to damage to the freehold, but includes injuries to other animals.—*BODEN v. ROSCOE*, [1894] 1 Q. B. 608; 58 J. P. 368; 42 W. R. 445; *sub nom.* *ROSCOE v. BODEN*, 63 L. J. Q. B. 767; 70 L. T. 450; 10 T. L. R. 317; 38 Sol. Jo. 291; 10 R. 173, D. C.

1768. Damage by incumbrance—Engine incumbering railway.]—*AMBERGATE, ETC. Ry. Co. v. MIDLAND Ry. Co.*, No. 1813, *post*.

1769. Damage to other animals—Belonging to owner of locus in quo.]—*BODEN v. ROSCOE*, No. 1767, *ante*.

SECT. 4.—WHERE DISTRESS MAY BE MADE.

1770. Only in locus in quo.]—*CASE OF AN AVOWRY*, No. 440, *ante*.

1771. —.]—Damage *feasant* is the strictest distress that is, for the thing distrained must be taken in the very act, for if they [the cattle] are once off, though on fresh pursuit, you cannot distrain them (*HOLT, C.J.*).—*VASPER v. EDDOWS* (1702), Holt, K. B. 256; 1 Ld. Raym. 719; 12 Mod. Rep. 658; 1 Salk. 248; 90 E. R. 1040; *sub nom.* *JASPER v. EADOWES*, 11 Mod. Rep. 21.

Annotations:—*Consd.* *Lehain v. Philpott* (1875), L. R. 10 Exch. 242. *Refd.* *R. v. Cotton* (1751), Park. 112; *Lees v.* (1822), 1 Dow. & Ry. K. B. 391; *Knowles v. Blake* (1829), 5 Bing. 499; *Williams v. Price* (1832), 3 B. & Ad. 695; *Roscoe v. Roden* (1894), 38 Sol. Jo. 291.

1772. Cattle driven into locus in quo—For pur-

in the future; & one who claims the right to distrain *damage feasant* cannot at the same time sue to recover the damages in an action for trespass.—*PFEIFER v. SHELDHEIM*, [1921] 2 W. W. R. 41; 59 D. L. R. 631.—**CAN.**

o. Only damage done at time of seizure.]—Deft. seized pltf.'s oxen *damage feasant* in his wheat field, & being unable to find a pound-keeper, turned them loose near pltf.'s gate. On the evening of the same day deft. again seized them for doing damage to his meadow & impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow:—*Held*: the damage to the wheat had been abandoned, & the impounding & sale of the oxen for the damage so claimed were illegal.—*BUIST v. MCCOMBE* (1883), 8 A. R. 598.—**CAN.**

p. —.]—A distraint of cattle *damage feasant* cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage, they cannot on their re-entry be seized for the former damage.—*GRAHAM v. SPETTIGUE* (1885), 12 A. R. 261.—**CAN.**

q. —.]—There is nothing in Stray Animals Act, 1915 (c. 32), to justify a distrainer in making a claim for damages done at a time other than the occasion on which the animals were distrained.—*MCCRAE v. LYONS*, [1921] 2 W. W. R. 490; 14 Sask. L. R. 268.—**CAN.**

r. Measure of—No substantial fence.]—The fact that land upon which cattle have trespassed is not inclosed by a substantial fence does not deprive justices of jurisdiction to hear a complaint under the clause relating to impounding in Justices Act 1915, s. 64 (4), it affects only the quantum of damage.—*SMART v. WILLIAMS*, [1918] V. L. R. 53.—**AUS.**

PART VII. SECT. 4.

s. Cattle at large — Powers of statutory officer.]—A field driver appointed under the Act to impound cattle going at large contrary to the sessions regulations can only take them

pose of being distrained—Not legal distress.]—If one in the night drive my cattle into his land, & afterwards doth distrain them, it is no lawful distress (COKE, C.J.).—READ & HAWKE'S CASE (1612), Godb. 186; 78 E. R. 113; *sub nom.* READ v. HAWKE, Hob. 16.

Annotations:—*Refd.* Bullythorpe v. Turner (1744), Willes, 475; Walton v. Kersop (1767), 2 Wils. 354; Banks v. Angell (1838), 7 Ad. & El. 843. *Mentd.* Martin v. Kesterton (1776), 2 Wm. Bl. 1089.

1773. ———.]—To support a justification for taking cattle as a distress for damage feasant, if it appear that the party distraining had not actually got into the *locus in quo* before the cattle had got out of it, the justification cannot be supported.—CLEMENT v. MILNER (1800), 3 Esp. 95, N. P.

1774. ———.]—A master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful & is not proved to have been authorised by the master. As if a servant, authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, & there distrains them.—LYONS v. MARTIN (1838), 8 Ad. & El. 512; 3 Nev. & P. K. B. 509; 1 Will. Woll. & H. 500; 7 L. J. Q. B. 214; 112 E. R. 932.

Annotations:—*Mentd.* The Druid (1842), 1 Wm. Rob. 391; Limpus v. London General Omnibus Co. (1862), 1 H. & C. 526; Bayley v. M. S. & L. Ry. (1872), L. R. 7 C. P. 415; Dyer v. Munday (1895), 64 L. J. Q. B. 448.

SECT. 5.—WHO MAY DISTRAIN.

Commoner—Against Lord of the Manor.—See COMMONS, Vol. XI., p. 50, No. 723.

Against fellow commoner.—See COMMONS, Vol. XI., p. 50, Nos. 738-741.

Against stranger.—See COMMONS, Vol. XI., p. 51, Nos. 750-759.

1775. **Coparcener—Over property of fellow coparcener.**—One coparcener cannot distrain the lands of another damage feasant (*per cur.*).—PORT v. YATES (1628), Het. 114; 124 E. R. 385.

Persons possessed of adjoining closes.—See No. 1786, *post*.

1776. **Lessor—After termination of lease—Beasts of lessee.**—ANON. (1507), Keil. 95; 72 E. R. 260.

1777. ———.]—An ejectment against the bailiffs *pro tempore* of a corpn. cannot be maintained by proving payment of rent for the premises by the annual predecessors of defts. in the same office for several years before, & service of the notice to quit on defts. the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corpn. But at any rate such tenancy may be determined by a notice to the corpn. to quit, served on its officers; after which the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in actual possession of the

premises.—DOE d. CARLISLE v. WOODMAN (1807), 8 East, 228; 103 E. R. 329.

—— **Under obligation to maintain fence.**—See No. 1782, *post*.

1778. **Lord of the manor—Cattle of tenants having common of pasturage—Damage other than to herbage.**—HOSKINS v. ROBINS (1671), 2 Saund. 319; 1 Vent. 163; 2 Keb. 842; 1 Mod. Rep. 74; Poll. 13; 85 E. R. 1120; *sub nom.* HOPKINS v. ROBINSON, 2 Lev. 2.

Annotations:—*Mentd.* Crouther v. Oldfield (1706), 1 Salk. 364; R. v. Churchill (1825), 4 B. & C. 750; Howlins v. Shippam (1826), 5 B. & C. 221; Jones v. Richard (1837), 6 Ad. & El. 530; Welcome v. Upton (1840), 6 M. & W. 536; Perry v. Fitzhowe (1846), 8 Q. B. 757; Holford v. Bailey (1850), 13 Q. B. 426; Davies v. Williams (1851), 16 Q. B. 546; Bailey v. Stephens (1862), 12 C. B. N. S. 91.

1779. **Cattle in waste—Turned in under right of common.**—ANON. (1770), 3 Wils. 126; 95 E. R. 970.

Annotation:—*Refd.* Cape v. Scott (1874), L. R. 9 Q. B. 269.

1780. **Person having sole right of pasturage—Damage to herbage.**—A. demised to B. the milk of 22 cows to be provided by A. & to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, & that no other cattle should be fed there:—*Held*: the separate herbage & feeding of those closes passed to B. & B. might distrain other cattle of A. doing damage there.—BURT v. MOORE (1793), 5 Term Rep. 329; 101 E. R. 184.

1781. ———.]—In replevin for sheep, defts. made cognisance as bailiffs of the tenant of a messuage & land called B, & prescribed, that the occupiers of B had the sole & exclusive right of pasture & feeding of sheep on L, the *locus in quo*, as to the messuage belonging & appertaining. By another cognisance, they alleged a right of common over, & as appurtenant to B. Both rights were traversed in pleas in bar. At the trial, it appeared that L was a mountain sheep-walk, over which no act of ownership was proved, besides the feeding of sheep. Defts. abandoned their alleged right of common; & the jury having had the distinction between a privilege & a right of soil pointed out to them, found a verdict for defts. & that L was part of the farm of B:—*Held*: the cognisance could not be supported, & new trial granted.

At the second trial, to prove the right to the exclusive pasturage, defts. gave evidence of the occupiers of B having taken sheep to tack, & depastured them on L. The judge told the jury that this looked like a usurpation upon the lord, & that they were not to give any attention to it as an exercise of this right:—*Held*: in reference to the particular right claimed in the action, he was justified in such direction.—JONES v. RICHARD (1837), 6 Ad. & El. 530; 1 Nev. & P. K. B. 747; Will. Woll. & Dav. 276; 6 L. J. K. B. 241; 1 J. P. 264; 112 E. R. 203.

1782. **Failure to maintain fences—Cattle straying on to land.**—If a lessor be bound to repair fences, he cannot distrain the cattle of a stranger that have strayed into the land by reason of his neglect to repair them.—ELMORE v. TUCKER (1704), 6 Mod. Rep. 198; 87 E. R. 953.

1783. ———.]—Pltf. occupied land adjoining a river, & on the other side deft. occupied land

while at large in the parish for which he is appointed. The place of taking is a question for the justices' decision, & unless it is clearly against evidence the superior ct. will not interfere.—*v. JONES* (1852), 2 All. 522.—

corporating the town of H., the corpn. had power to enforce regulations preventing cattle, swine, & other animals from running at large by impounding & selling them, as well to liquidate damage occasioned by their so doing, as a fine imposed.—SMITH v. RIORDAN (1837), 5 O. S. 647.—CAN.

s. ———.]—A municipal regulation provided that any *bond fide* in transit might

graze his stock on the commonage for two days. A further regulation defined commonage in reference to travellers' & carriers' stock as such portion of the commonage as the council might from time to time set apart for the grazing of stock of travellers & carriers, & provided that any carrier or traveller grazing his stock, after being warned by the town ranger, on any portion of the commonage other than

PART VII. SECT. 5.

t. **Public body—Breach of regula-**

Sect. 5.—Who may distrain. Sects. 6 & 7: Sub-sects. 1 & 2.]

which he was bound properly to fence, but from his neglect to fence it pltf.'s cattle escaped into deft.'s close, & afterwards from that close, over a good & substantial fence, into an adjoining corn field of deft.'s. Deft. then distrained pltf.'s cattle in the corn field as damage feasant:—*Held*: in action of trover by pltf. he was entitled to recover; the cattle having first escaped in consequence of deft.'s neglect to fence the first field, he could not distrain the cattle when they escaped over the sound fence into the second, or corn, field.—*SINGLETON v. WILLIAMSON* (1861), 7 H. & N. 410 31 L. J. Ex. 17; 5 L. T. 644; 26 J. P. 88; 8 Jur. N. S. 60; 10 W. R. 174; 158 E. R. 533.

Annotations:—*Mentd.* *Cooke v. Waring* (1863), 2 H. & C. 332; *Holgate v. Bleazard*, [1917] 1 K. B. 443.

1784. ———.]—B. & W. were adjoining owners of lands, which had originally formed part of a waste. B. first obtained a grant of land from the lord, & had from time to time repaired the fence dividing it from the waste. Afterwards W. obtained a grant from the enclosure comrs. of that part of the waste, having this fence between it & B.'s land. B. had always continued to repair the fence, & one day, owing to the fence being out of repair, W.'s sheep had trespassed on B.'s land:—*Held*: the presumption from the facts was, that B. had originally obtained his enclosed lands on condition of repairing the fence against the rest of the common, & that obligation still continued; therefore he could not distrain.—*BARBER v. WHITELEY* (1865), 34 L. J. Q. B. 212; 29 J. P. 678; 11 Jur. N. S. 822; 13 W. R. 774.

Annotation:—*Mentd.* *Ellis v. Loftus Iron Co.* (1874), 23 W. R. 246.

1785. ———.]—*VIVIAN v. DALTON* (1896), 41 Sol. Jo. 129, D. C.

1786. Persons possessed of adjoining closes—Concurrent possession—No right of distress inter se.]—If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other. *Qu.*: but if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, & distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, & by the fair enjoyment of his right may happen to the other.

But clearly the one cannot distrain the cattle of the other damage feasant (*per CUR.*). A. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant for having broken the stones. B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones. A. replied that he was not bound to fence; & on demurrer the replication was held bad.—*CHURCHILL v. EVANS* (1809), 1 Taunt. 529; 127 E. R. 939.

Annotation:—*Mentd.* *Ricketts v. East & West India Docks*, etc. Ry. (1852), 12 C. B. 160.

1787. Tenant—On sufferance.]—*ANON.* (1502), Keil. 41; 72 E. R. 198.

that set apart as aforesaid should be liable to a penalty of £2:—*Held*: the further regulation did not take away the right of the municipality to impound stock of travellers & carriers which were grazing on a portion of the commonage where they had no right to graze, but merely imposed an additional penalty where stock continued to graze after a warning had

been given.—*ALI WAL NORTH MUNICIPALITY v. BARNARD* (1914), C. P. D. 879.—S. AF.

PART VII. SECT. 6.

1791 i. *At time of trespass.*]—A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done.

1788. Holding over after term—No rights over landlord's cattle—Put in for taking possession.]

—A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession.—*TAUNTON v. COSTAR* (1797), 7 Term Rep. 431; 101 E. R. 1060.

Annotations:—*Mentd.* *Davis v. Connop* (1814), 1 Price, 53; *Turner v. Meymott* (1823), 1 Bing. 158; *Butcher v. Butcher* (1827), 7 B. & C. 399; *Doe d. Stevens v. Lord* (1838), 6 Dowl. 256; *Newton v. Harland* (1840), 1 Man. & G. 644; *Wright v. Burroughes* (1846), 3 C. B. 685; *Davison v. Wilson* (1848), 11 Q. B. 890; *Jones v. Chapman* (1849), 18 L. J. Ex. 456; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

See, also, Sect. 1, *ante*.

SECT. 6.—TIME FOR MAKING DISTRESS.

1789. By night.]—*ANON.* (1495), Y. B. 11 Hen. 7, fo. 5, pl. 18.

Annotations:—*Refd.* *Milborn's Case* (1587), 7 Co. Rep. 6 b; *Mackalley's Case* (1611), 9 Co. Rep. 65 b.

1790. At time of trespass—Effect of cattle being driven off by owner—Before distraint possible.]—*CASE OF AN AVOWRY*, No. 440, *ante*.

1791. ———.]—*VASPER v. EDDOWS*, No. 1771, *ante*.

1792. ——— Prevention of further damage.]—*Semble*: an animal doing damage to the freehold is doing such a damage as will justify the distraining of the animal damage feasant, provided that the animal be then actually doing the damage, or having done some damage, it be necessary to detain the animal to prevent its doing further damage. But if the owner of the freehold seize an animal which has done damage to the freehold, but which has ceased doing so, & it be not necessary to detain the animal to prevent further damage, & the owner of the freehold detain the animal & feed it for several days, & then sell it for its full value, the owner of the animal is entitled in trover to recover the full value of the animal, without any deduction for the feeding, as the owner of the freehold seized the animal in his own wrong.—*WORMER v. BIGGS* (1845), 2 Car. & Kir. 31, N. P.

SECT. 7.—WHAT MAY AND WHAT MAY NOT BE DISTRAINED.

SUB-SECT. 1.—ANIMALS.

1793. Horse—Horses yoked together—Distress severable.]—Trespass for taking horses, yoked to a plough.

A distress for damage feasant may be severed, but not for rent service.

In a distress for damage feasant, the party doth claim the land, & he may have several actions for trespass for every horse; for every one of them doth trespass (*per CUR.*).—*TUNBRIDGE'S CASE* (1582), Cro. Eliz. 8; 78 E. R. 274.

1794. ——— Being led.]—*WAGSTAFFE v. CLARK* (1826), cited in *Bullen's Law of Distress*, 2nd ed. p. 264.

—*GRAHAM v. SPETTIGUE* (1885), 12 A. R. 261.—CAN.

PART VII. SECT. 7, SUB-SECT. 1.

b. *Sheep in charge of shepherd.*]—Sheep under the charge of a shepherd may be impounded for trespass.—*BROUGH v. WALLACE & AFFLECK* (1863), 2 W. & W. 195.—AUS.

the possible damage, as security for the anticipated damage. This offer was refused & a replevin order was obtained:—*Held*: even if deft. had a right to insist upon reasonable security, he had no right to retain the engine to secure the fulfilment of such an unreasonable demand, & he had no right to detain the engine *damaged* *feasant* for merely anticipated injury,

Sect. 7.—What may and what may not be distrained:
Sub-sect. 2. Sect. 8: Sub-sect. 1, A. & B.]

CHAMPERNOON (1631), Cro. Car. 228; 79 E. R. 799.

1812. Ladder—While trespasser upon it—Not distrainable.]—COLLINS v. RENISON (1754), Say. 138; 96 E. R. 830.

*Annotations:—*Mentd. Gregory v. Hill (1799), 8 Term Rep. 299; Perry v. Fitzhowe (1846), 8 Q. B. 757.

1813. Railway engines—Distrainable at common law—Right not affected by statutory remedy.]—Railway Clauses Consolidation Act, 1845 (c. 20), ss. 115 & 116, which authorise a railway co., in case of an engine belonging to others, which is out of repair, being used on their railway, or in case of an engine belonging to others being used on their railway without the owners having first obtained from the co. a certificate of the fitness of such engine, pursuant to above sects., to remove such engines from off the line, & sue the owner for a penalty of £20 for each of such unlawful users of the engines, do not deprive the railway co. of their common law right to distrain such engines damage feasant; as the remedies given by the above sects. must be construed to be cumulative.—AMBERGATE, ETC. RY. CO. v. MIDLAND RY. CO.

& that, even if he had, his right was one of detention only & his interference with the engine made him a trespasser *ab initio*.—PFEIFER v. SHELDELM, [1921] 2 W. W. R. 41; 59 D. L. R. 631.—CAN.

PART VII. SECT. 8, SUB-SECT. 1.—A.

d. Right to impound — Pounds 1874 (No. 478), s. 14.]—In an action of trespass for seizing sheep, deft. pleaded that the sheep were trespassing upon his land, & that he took them to the nearest accessible pound, & there duly impounded them under the statute; & alleged that the sheep had been found trespassing on the same land within twelve months previously:—*Held*: the above sect. did not take away the common law right of impounding, & deft. need not prove the latter part of his plea, because it was for plff. to show that he had not complied with the Act.—MAIN v. ROBERTSON (1876), 2 V. L. R. 25.—AUS.

e. ———.]—Cattle damage feasant may, by above sect., be detained to give the owner an opportunity of taking them away on payment or tender of trespass rates, but the detention must be for the purpose of impounding if not so taken away.—JONES v. CAMPION (1878), 4 V. L. R. 473.—AUS.

f. — Impounding Act, 1858, s. 48.] HUNTS v. SHANKS (1918), S. A. L. R. —AUS.

g. — R. S. C. 104, s. 1.]—By R. S., c. 104, s. 1, the proprietors of islands in rivers are authorised to appoint poundkeepers & other officers:—*Held*: under this sect. the proprietors had the right to make orders for the impounding of cattle found upon the land, the power being necessarily implied in the right expressly given to appoint poundkeepers & other officers.—DICKIE v. LAWSON (1873), 2 Pug. 46.—CAN.

*h. — After demand for payment of damages.]—*The mere demand of a sum of money as damages for trespass by an animal before sending the animal to the pound does not make the impounding illegal.—v. NAIDOO (1919), 40 N. L. R. 1. AF.

*k. Liability of distrainer—For acts of servant—Within general scope of authority.]—*Deft. sent his servant C. with some cattle to his station, & told him to impound, on his arrival, any

strange cattle he found there. C. impounded plffs.' cattle which were not on deft.'s land:—*Held*: as C. had not acted wilfully, but had by mistake, in carrying out the orders given him by deft., taken the cattle when not trespassing, deft. was liable for his acts.—JONES v. BARTON (1883), 4 N. S. W. L. R. 271.—AUS.

*l. ———.]—*A master is liable for the acts of his farm servant in impounding cattle in his absence, the servant acting within the general scope of his authority.—SPAFFORD v. HUBBLE (1837), 2 Ont. Dig. 4168.—CAN.

*m. ———.]—Injury to animal impounded.]—*Plff.'s colt being found at large on deft.'s premises, he directed two of his employees to take it to the pound, & in doing so they injured the animal:—*Held*: it was not necessary to prove an intention on the part of deft. to injure the animal, he was lawfully entitled to impound it, but, in doing so, was bound to take that care of it which a man of ordinary discretion & judgment might be expected to exercise with regard to his own property, & having directed his employees to take the colt to the pound, was responsible for their negligent acts, which were within the scope of their authority.—KENNEDY v. GROSE (1914), 29 W. L. R. 364; 7 W. W. R. 74; 18 D. L. R. 414; 7 Sask. L. R. 104.—CAN.

*n. — Unreasonable delay.]—*Applt., who was the owner of a block of unfenced land thirty miles distant from a public pound, found a number of horses, which he knew were the property of resp., trespassing on his land on a Sunday. He instructed his daughter to drive them to another property belonging to him, situated two miles distant from the place where the animals were seized. On the way two of the horses escaped, & the rest were put in the applt.'s paddock, but no notice was served on the owner, as required by Impounding Act, 1884, s. 12. On the Monday the applt. engaged in a search for the two horses which had escaped & discovered that they had returned to the owner. On the Tuesday applt.'s daughter, by his instructions, drove the horses which had been detained to the public pound, the impounding thus being effected forty-eight hours later than if the animals had been driven to the pound immediately upon their seizure. On the complaint of resp., applt. was con-

(1853), 2 E. & B. 793; 2 C. L. R. 261; 23 L. J. Q. B. 17; 22 L. T. O. S. 85; 18 Jur. 243; 118 E. R. 964.
Cart with horse attached—In actual use.]—See No. 1799, *ante*.

SECT. 8.—PROCEEDINGS BETWEEN SEIZURE AND SATISFACTION.

SUB-SECT. 1.—IMPOUNDING.

A. In General.

1814. Right to impound—Damages.]—LEECH v. WIDSLEY (1670), 1 Vent. 54; 2 Keb. 590, 601; 1 Lev. 283; 86 E. R. 38; *sub nom.* ANON., T. Raym. 185.

*Annotations:—*Reid. Gates v. Bayley (1766), 2 Wils. 313. *Mentd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706; Robertson v. Hartopp (1889), 43 Ch. D. 484.

1815. Delivery out of pound of duly impounded cattle—Promise to pay in consideration of.]—A promise to pay in consideration of delivering deft.'s cattle out of the pound, is good.—WELL v. THOMPSON (1683), 2 Show. 329; 89 E. R. 969.

1816. Excessive poundage — Action by party aggrieved—Not penal.]—An action under 1 & 2

victed & fined for illegally impounding the horses:—*Held*: the delay was unreasonable, & applt. had been rightly convicted.—SMITH v. GRAHAM (1907), 26 N. Z. L. R. 1277.—N.Z.

*o. ———.]—*It is incumbent on a person who seizes animals trespassing in lands with a view to taking them to the pound, to bestow proper & reasonable care in regard to them. Not merely may he not detain them for more than 24 hours; he must likewise, while they are being detained & in his custody, whether within or beyond this statutory period, act with due & ordinary care in regard to them.—MOLEFE v. McLIBE (1919), E. D. L. 112.—S.

*p. Liability of pound-keeper—Extent of.]—*A pound-keeper is a public officer discharging a public duty, & is not liable for detaining a distress, unless he has done some act beyond his duty, whereby the owner of the things impounded suffered some particular damage not recoverable against the distrainer or party impounding; or when, by going out of the line of his duty, he makes himself a party to some illegal act of the distrainers.—WARDELL v. CHISHOLM (1859), 9 C. P. 125.—CAN.

*q. — For value of cattle stolen from pound.]—*A pound-keeper who uses ordinary diligence, is not liable for the value of cattle feloniously taken from his pound.—BUTT v. JORDAN (1841), Ir. Cir. Rep. 104.—IR.

*r. Duty of owner — To release animals—Though impounding irregular.]—*Where, notwithstanding irregularities, an animal is received into a pound, & the owner has notice thereof, it is the owner's duty to release the animal, & then sue for damages, if he thinks he is entitled to same. It is not his duty to leave the animal in the pound, & sue for its return or its value.—DHARRA v. NAIDOO (1919), 40 N. L. R. 132.—S. AF.

*s. Duty of distrainer — To leave written statement with pound-keeper—As to extent of damage.]—*Under Stray Animals Act, 1920 (c. 47), s. 17 (2) (now R. S. S. 1920, c. 124, s. 17 (2)), a person seizing stray animals damage feasant & impounding them, must leave with the pound-keeper a written statement of certain facts, including the nature & extent of the damage, if any, sustained by him, & the amount claimed. If he fails to do so, & merely states the amount verbally, no damages

Ph. & M. c. 12, sect. 2, by the party aggrieved is not a penal action within 31 Eliz. c. 5, sect. 2, or 21 Jac. 1, c. 4, sect. 2.—*FIFE v. BOUSFIELD* (1844), 6 Q. B. 100; 2 Dow. & L. 481 (A); 13 L. J. Q. B. 306; 3 L. T. O. S. 160; 8 Jur. 734; 8 J. P. Jo. 356; 115 E. R. 38.

Annotations :—*Reid. Fitzball v. Brooke* (1845), 6 Q. B. 873. *Mentd. Lewis v. Davis* (1875), 39 J. P. 148.

Tender before impounding.—See Sect. 8, subsect. 2, A., *post*.

Tender after impounding.—See Sect. 8, subsect. 2, A., *post*.

B. Place of.

1817. Public or private pound—At distrainer's option.—*PERKINS v. BUTTERFIELD* (1627), Het. 75; 124 E. R. 354.

1818. Must be fit & proper pound.—In an action for abusing a distress, by putting the animals distrained into a muddy pound, whereby they are injured, it is no defence that the place is the manor pound, & is generally in a proper state. The distrainer must, at his peril, put the distress into a pound which is, not only in general, but at the particular time, fit for it. If the common pound be unfit, though by reason of a casualty, as rain or snow, he must find another.

To trespass for distraining sheep, & injuring them by impounding them in a muddy pound, defts. pleaded distress damage feasant, & that the sheep were impounded in a common pound,

with no unnecessary damage to them. Replication, that defts. after the distress, at the time when, etc., impounded them in the pound in the declaration mentioned, which was then too small, & which was then muddy, & thereby injured them :—*Held* : this was an issue on the state of the pound at the time of the impounding; & on proof that the pound was then muddy, pltf. was entitled to recover.—*WILDER v. SPEER* (1838), 8 Ad. & El. 547; 3 Nev. & P. K. B. 536; 1 Will. Woll. & H. 378; 7 L. J. Q. B. 249; 112 E. R. 945.

Annotation :—*Apprvd. Bignell v. Clarke* (1860), 5 H. & N. 485.

1819. —.]—A person who distrains cattle is bound to impound them in a proper pound, & if the usual pound is in an unfit state, he must find another. Therefore, where a declaration alleged that deft. impounded pltf.'s cattle in a pound, which was at all times obviously, & as deft. well knew, wholly unfit for that purpose, whereby some of the sheep died :—*Held* : the averment was immaterial, the jury having found that the pound was in an unfit condition at the time of the impounding.—*BIGNELL v. CLARKE* (1860), 5 H. & N. 485; 29 L. J. Ex. 257; 2 L. T. 189; 157 E. R. 1271.

1820. Nearest pound.—*GIMBART v. PELAH* (1748), 2 Stra. 1272; 93 E. R. 1176.

Annotation :—*Reid. Collins v. Rose* (1839), 8 L. J. Ex. 273.

1821. Pound not more than three miles from where distress taken—1 & 2 Ph. & M., c. 12, s. 1.—*COAKER v. WILLCOCKS*, No. 758, *ante*.

are payable, & if the amount has been paid by the owner to the pound-keeper in order to obtain the release of his animals, he can, in proceedings under s. 35, recover the full amount as excessive.—*DARHOY v. BOROS-CZEWICZ*, [1922] 3 W. W. R. 518.—**CAN.**

t. — — — Distrainer also pound-keeper.—Pltf. was a tenant of land adjoining deft.'s land. Pltf.'s cattle went on to deft.'s land. Deft. was himself pound-keeper, & therefore did not give or file the notice to pound-keeper required by Stray Animals Act, R.S.S. 1920 (c. 124), s. 17, although he duly made entry in his book kept under s. 20. The cattle were advertised for sale & were released on the day of sale on payment by pltf. of the amount demanded :—*Held* : pltf. was entitled to be repaid all the money paid, except the fees authorised by s. 39 in regard to the three days for which a proprietor may under s. 16 temporarily impound before delivering the animals to the pound-keeper, on the grounds : (a) lack of notice to pound-keeper as required by s. 17; (b) lack of a proper pound.—*CARSWELL v. WHITTIG & RURAL MUNICIPALITY OF STAR CITY*, No. 428, [1922] 3 W. W. R. 485.—**CAN.**

a. — — — As to place of trespass—What is sufficient description.—A memorandum delivered with impounded cattle to a pound-keeper was headed like a letter by these words : "Loddon, Nov. 2, '68" :—*Held* : such memorandum did not within Pounds Statute, 1865, s. 11, sufficiently specify the place where the cattle were trespassing.—*WINGFIELD v. GLASS* (1869), 6 W. W. & A.B. 4.—**AUS.**

b. Duty of pound-keeper—To show place of trespass within district.—In a plea of justification by a pound-keeper for taking a pig, the justification was that the pig, contrary to the township regulations, broke through a lawful fence :—*Held* : it was necessary to allege, that the fence was within that township, & to show the close in which the pig was trespassing at the time of seizure.—*CAREY v. TATE* (1841), 6 O. S. 147.—**CAN.**

c. — — — To receive cattle whether properly impounded or not.—Two of pltf.'s cattle were distrained as damage feasant & placed in the custody of deft. as keeper of a public pound. Pltf. demanded his cattle but declined to pay deft.'s charges on the ground that the cattle were wrongfully impounded & they were finally sold to pay the charges :—*Held* : deft. was bound to receive the cattle, & whether properly impounded or not he was entitled to be paid his legal charges in respect to their feed & detention before they were released.—*BLACK v. STEWART* (1885), 7 R. & G. 77; 7 C. L. T. 118.—**CAN.**

d. — — — For performance of duties of office.—The fact that a man is duly appointed pound-keeper does not impose on him the obligation of being personally present at the pound all the time. He may absent himself from it from time to time, provided he leaves a man in charge who can properly fulfil the duties of pound-keeper, but he will be responsible for the due performance of such duties.—*MCCRAE v. LYONS*, [1921] 2 W. W. R. 490; 14 Sask. L. R. 268.—**CAN.**

e. Right of pound-keeper—Notice of action.—A pound-keeper, acting as such, is entitled to notice of action under C. S. U. C., c. 126, & it must be averred in the declaration that in discharging his duty he acted maliciously & without reasonable cause.—*DAVIS v. WILLIAMS* (1863), 13 C. P. 365.—**CAN.**

PART VII. SECT. 8, SUB-SECT. 1.—B.

1820i. Nearest pound.—The offence of illegal impounding under Act No. 478 applies only to impounding cattle elsewhere than in the nearest accessible pound.—*MCLAURIN v. GRIFFIN* (1887), 13 V. L. R. 140.—**AUS.**

1820ii. —.]—If an estray is distrained within the limits of a municipality or herd district & a pound is accessible or available, whether or not located within such municipality or herd district then Stray Animals Act, 1915, c. 32, Part III., applies & such

animal may be impounded in such accessible or available pound which is nearest. On the other hand, if an estray is distrained within the limits of a municipality or herd district & a pound is not accessible or available, either within or without such municipality or herd district, then, in contemplation of the fact that such animal cannot be impounded, Part IV. of the Act is applicable & must be followed.—*FOGDE v. PARSENAU*, [1918] 1 W. W. R. 25; 10 Sask. L. R. 423; 37 D. L. R. 758.—**CAN.**

f. — — — Meaning of.]—The question whether the pound is the nearest accessible pound within Pounds Act, 1890, s. 16, is one of fact, & must be considered not only from the point of view of distance, but also from that of convenience.—*ADAM v. RYAN* (1897), 23 V. L. R. 334.—**AUS.**

g. In one place by day—In another by night.—A. impounded sheep under Impounding Act, 1865, s. 23, & fed them on his own land during the day time, but every night removed them to adjoining land, with the consent of the owner of such land :—*Held* : such removal was a trespass.—*CARNE v. O'LEARY* (1869), 8 N. S. W. S. C. R. 146.—**AUS.**

h. Pound in division in which distrainer lives.]—In trespass against two for selling cattle, one deft. justified as pound-keeper, & because the cattle being in the close of A. wrongfully, etc. A. took the cattle trespassing & delivered them to deft. as a pound-keeper within his jurisdiction, & deft. impounded & afterwards sold them according to law; & the other deft. justified as having bought the cattle at the sale as the highest bidder. Pltf. demurred generally to both pleas :—*Held* : the plea by the pound-keeper was bad, as it did not show that he received the cattle from a person within his division, or that the close was so situated; & the plea of the purchaser good, as he could not be liable to the pltf. in trespass.—*CLARKE v. DURHAM* (1840), 2 Ont. Dig. 4514.—**CAN.**

Sect. 8.—Proceedings between seizure and satisfaction: Sub-sect. 1, C., D., E. & F.; sub-sect. 2, A.]

C. Responsibility to feed Animals Impounded.

See, now, Protection of Animals Act, 1911 (c. 27), sect. 7.

1822. In public & private pounds.]—PERKINS v. BUTTERFIELD (1627), *Het.* 75; 124 *E. R.* 354.

1823. —.]—If cattle are distrained damage feasant & impounded in a pound overt the owner of the cattle must feed them: if in a pound covert or close “the cattle are to be sustained with meat & drink at the peril of him that distraineth & he shall not have any satisfaction therefore” (LORD CAMPBELL, C.J.).—BRITISH EMPIRE SHIPPING CO. v. SOMES (1858), *E. B. & E.* 353; 27 *L. J. Q. B.* 397; 31 *L. T. O. S.* 196; 4 *Jur. N. S.* 893; 6 *W. R.* 600; 120 *E. R.* 540; *affd.* (1859), *E. B. & E.* 367, *Ex. Ch.*; *sub nom.* **SOMES v. BRITISH EMPIRE SHIPPING CO.** (1860), 8 *H. L. Cas.* 338, *H. L.*

Annotations:—Mentd. **Miedbrodt v. Fitzsimon**, *The Energie* (1875), 32 *L. T.* 579; **Bruce v. Everson** (1883), *Cab. & El.* 18; **Ivens v. G. W. Ry.** (1889), 53 *J. P.* 148; **Assets Development Co. v. Close** (No. 2) (1901), 46 *Sol. Jo.* 12; **Booth S.S. Co. v. Cargo Fleet Iron Co.**, [1916] 2 *K. B.* 570.

1824. In public pounds—On distrainer.]—A mare was distrained damage feasant by A. & detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, & A. & B. joined in selling her for the keep. In an action of trover by the owner against A. & B.:—*Held*: (1) if they *bond fide* intended to sell the mare under Cruelty to Animals Act, 1835 (c. 59), sect. 4, they were entitled to notice of action & to have the venue laid in the proper county.

Semble: (2) under above sect. the person who was bound to supply food to impounded cattle was the person at whose suit they were impounded, not the pound-keeper; but if the latter supplied the food at the request of the distrainer, or the distrainer joined with him in a subsequent sale of the cattle under this Act, the pound-keeper & the distrainer were for this purpose to be considered as one; (3) the above sect. excluded any right in the owner of the cattle to supply them with food while in the pound; (4) if cattle were sold under the above sect., the distrainer could only receive the single value of the food, not the amount of the damage for which the cattle were

distrained, as all overplus beyond the value of the food & expenses of the sale, was to be returned to the owner of the cattle.—**MASON v. NEWLAND** (1840), 9 *C. & P.* 575, *N. P.*

1825. —.]—Under 5 & 6 Will. 4, c. 59, sect. 4, requiring the distrainer of any horse, which word “horse” may, by sect. 21, be construed as “horses,” to feed it while in the pound, & empowering him, after seven days, to sell any such horse for the expenses, a party distraining several horses may sell one or more for the expenses of all. *Semble*: he may repeat such sale from time to time as need requires. But, if he pleads the sale in an action of trespass for taking & converting the horses sold, he must allege that it was necessary to sell them for payment of the expenses. Where deft. had obtained a verdict on such plea not containing the above allegation, judgment was given *non obstante veredicto*.—LAYTON v. HURRY** (1846), 8 *Q. B.* 811; 15 *L. J. Q. B.* 244; 7 *L. T. O. S.* 83; 10 *J. P.* 631; 10 *Jur.* 616; 115 *E. R.* 1079.**

1826. —.]—Not pound-keeper.]—Cruelty to Animals Act, 1849 (c. 92), sect. 5, by which every person who shall impound or cause to be impounded or confined in any pound or receptacle of the like nature, any animal, shall provide & supply during such confinement a sufficient quantity of fit & wholesome food & water to such animal, does not apply to the keeper of the pound in which the animal is impounded.—DARGAN v. DAVIES** (1877), 2 *Q. B. D.* 118; 46 *L. J. M. C.* 122; 35 *L. T.* 810; 41 *J. P.* 468; 25 *W. R.* 230.**

Cost of food & water supplied to animal impounded—Recoverable summarily from owner of animal as civil debt.]—See Protection of Animals Act, 1911 (c. 27), sect. 7 (3).

D. Responsibility for Death of Animals Impounded.

Due to want of food.]—See Nos. 1822, 1823, ante.

Due to pound being in unfit condition.]—See No. 1819, ante.

Due to chasing & impounding.]—See No. 1814, ante.

E. Sale.

1827. Right of sale—Former law—For expenses of feeding.]—DORTON v. PICKUP (1736), 1 *Selwyn's N. P.* 13th ed. 604.

1828. —.]—MASON v. NEWLAND, No. 1824, *ante*.

PART VII. SECT. 8, SUB-SECT. 1.—E.

k. Power of sale—Statutory requirements not complied with.]—A pound-keeper has no power to sell under Pounds Act, 1890 (No. 1129), s. 22, unless the requirements of ss. 21, 22 have been complied with.—DOIG v. KEATING**, [1908] *V. L. R.* 118.—**AUS.****

l. —.]—Incorrect description.]—Pltf.'s horses bearing pltf.'s brand were unknown to pltf. impounded. The pound-keeper in publishing the required statutory notices incorrectly described the brand & the horses not being claimed were sold:—*Held*: the sale was without authority & pltf. was entitled to recover as damages the full value of the horses, less the proper fees for impounding.—TRAQUAIR v. MICHELSON** (1917), 10 *Sask. L. R.* 453.—**CAN.****

m. —.]—Resp.'s ox was found trespassing on applt.'s farm & was handed over by applt. to the pound-master who sold it on the farm to applt. by auction for £3:—*Held*: as in Pounds & Trespasses Ordinance of Southern Rhodesia No. 13 of 1903, only animals actually impounded & in possession & under control of the pound-master can properly be sold at a pound sale, the sale was illegal &

resp. was entitled to recover the ox or its value from applt.—ROBERTS v. FYNN (1920), *App. D.* 23.—**S. AF.**

n. —.]—After satisfactory security given by owner.]—Pltf. sued deft., a pound-keeper, for selling pltf.'s horses impounded, after pltf. had given him satisfactory security as required by Municipal Act, 1866, s. 355, & demanded the horses. A count in trover was added; & pltf. had a verdict on both. On motion for a nonsuit, because the first count did not allege that the act complained of was maliciously:—*Held*: the verdict was right on both counts, for the special count showed a case in excess of jurisdiction.—SARGEANT v. ALLEN** (1869), 29 *U. C. R.* 384.—**CAN.****

o. —.]—Sale of more cattle than sufficient to cover expenses to date.]—Under 1 R. S., c. 61, s. 20, authorising all cattle impounded to be sold at public auction after fourteen days' public notice, unless all charges & expenses incurred on account thereof be paid, a pound-keeper is not authorised to sell all the cattle he may have in pound, but only sufficient to meet the charges, & expenses already incurred.—DIOKIE v. LAWSON** (1873), 2 *Pug.* 46.—**CAN.****

p. —.]—Where alleged damage not recoverable.]—Deft. seized pltf.'s oxen damage feasant in his wheat field, & being unable to find a pound-keeper, turned them loose near pltf.'s gate. On the evening of the same day, deft. again seized them for doing damage to his meadow & impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow. Pltf. forbade the sale, when deft. told the pound-keeper to sell & that he would be responsible:—*Held*: the damage to the wheat had been abandoned & the impounding & sale of the oxen for the damage so claimed were illegal.—BUIST v. MCCOMBE** ((1883), 8 *A. R.* 598.—**CAN.****

q. Title of purchaser—Sale to member of district council.]—A sale by a pound-keeper to a member of the council for the district in which such pound is situated of cattle impounded passes no property in such cattle to the purchaser; & the original owner may maintain trover against the purchaser for the cattle so purchased by him.—SWINDON v. CHARLES** (1878), 12 *S. A. L. R.* 24.—**AUS.****

r. —.]—Sale of stolen fore conviction of thief.]—Deft. whose

1829. —.]—LAYTON v. HURRY, No. 1825, *ante*.
See, now, Protection of Animals Act, 1911 (c. 27), sect. 7 (3).

F. Escape.

1830. Rights of distrainer—Whether action for trespass maintainable.]—If distress escapes, the person distraining cannot bring trespass, unless he shows the escape was without his default.—VASPER v. EDDOWS (1702), Holt, K. B. 256; 1 Ld. Raym. 719; 12 Mod. Rep. 658; 1 Salk. 248; 90 E. R. 1040; *sub nom.* JASPER v. EADOWES, 11 Mod. Rep. 21.

Annotations:—*Consd.* Knowles v. Blake (1829), 5 Bing. 499. *Appld.* Williams v. Price (1832), 3 B. & Ad. 695. *Consd.* Lechain v. Philpott (1875), L. R. 10 Exch. 242. *Refd.* R. v. Cotton (1751), Park. 112. *Mentd.* Lees v. Wright (1822), 1 Dow. & Ry. K. B. 391; Roscoe v. Roden (1894), 38 Sol. Jo. 291.

1831. —.]—Where a deft. in trespass pleads that he tendered pltf. a certain sum, being a sufficient amends, pltf. should reply that deft. did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends. Where cattle are distrained damage feasant, & put into a sufficient pound, & escape without default or neglect of the distrainer, he may bring trespass for the damage. Although deft. plead that the cattle were taken damage feasant, & impounded, & escaped without his default, a replication stating that the distress was put into a proper pound, & escaped without neglect or default of pltf., is a sufficient answer.—WILLIAMS v. PRICE (1832), 3 B. & Ad. 695; 1 L. J. K. B. 258; 110 E. R. 254.

Annotations:—*Refd.* Lechain v. Philpot (1875), 39 J. P. 584. *Mentd.* Marks v. Lahoe (1837), 3 Ring. N. C. 408.

Effect of—Whether second distress permissible.]—*See* Sect. 11, *post*.

SUB-SECT. 2.—TENDER OF AMENDS.

A. Time for.

1832. After impounding—Whether valid.]—Tender of amends for damage *fait* is good after impounding.—NEVILL v. SEAGRAVE (1594), Cro. Eliz. 332; 78 E. R. 582.

Annotation:—*Distd.* Pilkington v. Hastings (1601), Cro. Eliz. 813.

1833. —.]—On a distress for damage feasant amends may be tendered till the cattle are impounded, but after impounding the tender comes too late. Tender of amends to the bailiff is not good.—PILKINGTON'S CASE (1601), 5 Co. Rep. 76 a; 77 E. R. 169; *sub nom.* PILKINGTON v. HASTINGS, Cro. Eliz. 813.

Annotations:—*Apprvd.* Jennings v. Cousins (1630), Het. 165. *Dbtd.* Horn v. Luines (1700), 12 Mod. Rep. 352. *Consd.* Browne v. Powell (1827), 4 Bing. 230; Hatch v. Hale (1850), 19 L. J. Q. B. 289. *Expld.* Boulton v. Reynolds (1859), 2 E. & E. 369. *Refd.* Six Carpenters' Case (1610), 8 Co. Rep. 146 a; Wingfield v. Bell (1615), Cro. Jac. 377; Manby v. Scott (1662), O. Bridg. 229; Ayre v. Rushton (1673), Freem. K. B. 339; Twinning v. Stephens (1680), Freem. K. B. 527; Baker v. Johnson (1729), 1 Barn. K. B. 309; Evans v. Elliott (1836), 2 Har. & W. 231; Ladd v. Thomas (1840), 12 Ad. & El. 117.

1834. —.]—JENNINGS v. COUSINS (1630), Litt. 355; Het. 165; 124 E. R. 282.

Annotations:—*Refd.* Ayre v. Rushton (1673), Freem. K. B. 339; Twinning v. Stephens (1680), Freem. K. B. 527.

horse had been stolen, prosecuted the thief to conviction, & obtained an order under Vic. No. 17, s. 413, for its restitution to him. The horse after being stolen, & before being recovered by the police, was impounded for trespass, & regularly sold to pltf. under Impounding Act. In an action of trover in a district ct., a verdict was given for deft. On appeal:—*Held*: pltf. had obtained an indefeasible title

under Impounding Act as against the original owner; & that the order of restitution was a nullity, as deft. was not, at the time the order was made, the owner of the horse.—EMBLEM v. McRAE (1888), 9 N. S. W. L. R. 182; 4 N. S. W. W. N. 125.—AUS.

PART VII. SECT. 8, SUB-SECT. 2.—A.

1838 i. After impounding—Whether

1835. —.]—Upon a distress for damage feasant, tender of amends must be made before the impounding. A tender of amends before action brought by virtue of Statute of Limitation, 1623 (c. 16), is not pleadable in replevin.—AYRE v. RUSHTON (1673), 1 Freem. K. B. 339; 89 E. R. 252; *sub nom.* AIER v. RUSHTON, 3 Keb. 190.

1836. —.]—When in private pound.]—Where cattle distrained damage feasant were in a private pound, & the distrainer admitted they were about to be forwarded to a public pound:—*Held*: a tender of amends made while they were in the private pound was not too late.—BROWNE v. POWELL (1827), 4 Bing. 230; 12 Moore, C. P. 454; 5 L. J. O. S. C. P. 159; 130 E. R. 757.

Annotations:—*Consd.* Green v. Duckett (1883), 11 Q. B. D. 275. *Refd.* Gulliver v. Cosens (1845), 1 C. B. 788.

1837. —.]—Where an animal distrained as damage feasant is impounded on private premises, & not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good; & if the distrainer, by demanding an excessive sum for damages as the condition of his release of the animal obtains payment of such sum from the owner, such payment is not voluntary, & the sum paid may be recovered in an action for money had & received.—GREEN v. DUCKETT (1883), 11 Q. B. D. 275; 52 L. J. Q. B. 435; 48 L. T. 677; 47 J. P. 487; 31 W. R. 607, D. C.

1838. —.]—Whether action for detaining cattle maintainable.]—An action on the case will not lie for detaining cattle distrained & impounded, where a tender of amends was not made till after the impounding. *Semble*: such an action could not be supported, even if the tender of amends had been made before the impounding; as the proper mode to try the validity of a distress is by action of replevin or trespass.—ANSCOMB v. SHORE (1808), 1 Camp. 285, N. P.; *subsequent proceedings*, 1 Taunt. 261.

Annotations:—*Expld.* Gulliver v. Cosens (1845), 1 C. B. 788. *Refd.* Sheriff v. James (1823), 8 Moore, C. P. 334; Evans v. Elliott (1836), 2 Har. & W. 231; Ladd v. Thomas (1840), 12 Ad. & El. 117. *Mentd.* Pearce v. Lodge (1826), 12 Moore, C. P. 50.

1839. —.]—An action on the case does not lie for detaining cattle distrained damage feasant where tender of sufficient amends was made after the cattle had been impounded.—SHERIFF v. JAMES (1823), 1 Bing. 341; 8 Moore, C. P. 334; 130 E. R. 138; *sub nom.* SHIRREFF v. JAMES, 2 L. J. O. S. C. P. 5.

Annotations:—*Refd.* Ladd v. Thomas (1840), 12 Ad. & El. 117. *Mentd.* Gulliver v. Cosens (1845), 14 L. J. C. P. 215.

1840. —.]—Where cattle are distrained as damage feasant & impounded, & the owner after the impounding tenders amends, such tender is too late to enable him to maintain detinue for the recovery of the cattle.—SINGLETON v. WILLIAMSON (1862), 7 H. & N. 747; 31 L. J. Ex. 287; 5 L. T. 645; 26 J. P. 231; 8 Jur. N. S. 157; 10 W. R. 301; 158 E. R. 670.

1841. Before impounding—Action for detaining cattle not maintainable.]—ANSCOMB v. SHORE, No. 1838, *ante*.

1842. —.]—& before distress—Replevin or trespass maintainable.]—Where cattle are distrained

action for detaining cattle maintainable.]—When an animal found wandering is put into pound, the owner cannot claim without having offered previously to pay the fine & the damages incurred, & without renewing the offer & depositing the money in ct. if he proceeds for recovery.—BROSSEAU v. BROSSEAU (1885), M. L. R. 1 S. C. 307; 8 L. N. 226.—CAN.

Sect. 8.—Proceedings between seizure and satisfaction: Sub-sect. 2, A., B. & C. Sects. 9, 10, 11 & 12.]

as damage feasant, the owner cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, & recover the amount as money had & received to his use. If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress, & before the impounding, detinue.—*GULLIVER v. COSENS* (1845), 1 C. B. 788; 14 L. J. C. P. 215; 5 L. T. O. S. 199; 9 Jur. 666; 135 E. R. 753.

Annotations:—*Consd.* *Glynn v. Thomas* (1856), 11 Exch. 870; *Singleton v. Williamson* (1862), 7 H. & N. 747. *Expld.* *Maskell v. Horner*, [1915] 3 K. B. 106. *Refd.* *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120; *Green v. Duckett* (1883), 52 L. J. Q. B. 435. *Mentd.* *British Empire Shipping Co. v. Somes* (1858), 4 Jur. N. S. 893.

1843. — After distress—Action for detinue.]—*GULLIVER v. COSENS*, No. 1842, *ante*.

B. To Whom Made.

1844. To bailiff—Insufficient.]—*PILKINGTON'S CASE*, No. 1833, *ante*.

C. Payment of Excessive Sum demanded Damages.

1845. Whether recoverable in action for money had & received.]—*GREEN v. DUCKETT*, No. 1837, *ante*.

1846. —.]—An action for money had & received does not lie to recover back money paid for the release of cattle damage feasant though the distress was wrongful.—*LINDON v. HOOPER* (1776), 1 Cowp. 414; 98 E. R. 1160.

Annotations:—*Expld.* *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Hills v. Street* (1828), 5 Bing. 37. *Consd.* *Newsome v. Graham* (1829), 10 B. & C. 234. *Expld.* *De Cadaval v. Collins* (1836), 5 L. J. K. B. 171. *Consd.* *Ashmole v. Wainwright* (1842), 2 Q. B. 837. *Foll.* *Gulliver v. Cosen* (1845), 1 C. B. 788. *Expld.* *Maskell v. Horner*, [1915] 3 K. B. 106. *Refd.* *Anscomb v. Shore* (1808), 1 Camp. 285; *Clarence v. Marshall* (1834), 2 Cr. & M. 495; *Skeate v. Beale* (1841), 11 Ad. & El. 983; *Wakefield v. Newbon* (1844), 6 Q. B. 276; *Kearns v. Durell* (1848), 6 C. B. 596; *Glynn v. Thomas* (1856), 11 Exch. 870. *Mentd.* *Cowne v. Gairment* (1834), 1 Bing. N. C. 318; *Clare v. Lamb* (1875), L. R. 10 C. P. 334.

1847. —.]—*GULLIVER v. COSENS*, No. 1842, *ante*.

SECT. 9.—RESCUE OF DISTRESS.

1848. Justification—Where distress wrongful—Inseparability from other animals damage feasant—Not valid.]—If sheep be taken wrongfully by distress, the owner in rescuing them cannot justify rescuing also the sheep of another which might be damage feasant, under a suggestion that they

mixed with his flock, & he could not sever them.—*JENNYNGS v. PLAYSTOWE* (1620), Cro. Jac. 568; 79 E. R. 486; *sub nom.* *GENINGS v. PLAISTO*, Palm. 122.

1849. —.]—*COTSWORTH v. BETISON*, No. 1044, *ante*.

1850. What constitutes—Retaking of cattle to owner's land before impounding—After abandonment of the distress.]—Pltf. distrained deft.'s cattle, damage feasant, & went to apprise him of the circumstance, leaving the cattle in a close of deft., where they remained half an hour. On pltf.'s return he drove the cattle from deft.'s close, to his own yard, whence they were liberated by deft.:—*Held*: this was not a rescue; as the leaving cattle in deft.'s close was an abandonment of the distress.—*KNOWLES v. BLAKE* (1829), 5 Bing. 499; 3 Moo. & P. 214; 7 L. J. O. S. C. P. 228; 130 E. R. 1154.

1851. Not indictable offence.]—*R. v. BRADSHAW*, No. 1413, *ante*.

See, also, Part II., Sect. 18, *ante*.

SECT. 10.—ABUSE OF DISTRESS.

1852. When tortious ab initio—Taking outside county—Sale & conversion.]—*PLEDALL v. KNAP* (1581), 1 And. 65; 123 E. R. 356.

1853. — Using distress—Without necessity—Or benefit to owner.]—*BAGSHAW v. GOWARD* (1607), Cro. Jac. 147; Yelv. 96; Noy, 119; 79 E. R. 129.

Annotations:—*Refd.* *Lawton v. Ward* (1696), 1 Ld. Raym. 75; *Gates v. Bayley* (1766), 2 Wils. 313; *Dye v. Leatherdale & Simpson* (1769), 3 Wils. 20; *Sayre v. Rochford* (1777), 2 Wm. Bl. 1165. *Mentd.* *Vaspor v. Edwards* (1701), 12 Mod. Rep. 658; *R. v. Cotton* (1751), Park. 112; *Atkinson v. Teasdale* (1772), 2 Wm. Bl. 817; *Clark v. Gilbert* (1835), 2 Scott, 520.

1854. —.]—*AGAR v. LISLE* (1613), 1 Brownl. 5; Hob. 187; Hut. 10; 123 E. R. 629.

1855. Pleading.]—To a justification by distress pltf. may reply an abuse, & it is no departure.—*GARGRAVE v. SMITH* (1691), 1 Salk. 221; 91 E. R. 196.

Annotations:—*Appld.* *Gates v. Bayley* (1766), 2 Wils. 313. *Apprvd.* *Dye v. Leatherdale & Simpson* (1769), 3 Wils. 20. *Refd.* *Ellis v. Rowles* (1750), Willes, 638.

1856. —.]—Trespass for impounding cattle, & keeping them so close that one died. Justification for damage feasant, the dying of the beast was only gravamen, & need not be answered in trespass.—*GATES v. BAYLEY* (1766), 2 Wils. 313; 95 E. R. 830.

Annotations:—*Apprvd.* *Dye v. Leatherhead & Simpson* (1769), 3 Wils. 20. *Refd.* *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; *Curlewis v. Laurie* (1848), 11 L. T. O. S. 308.

of the keeper.—*LODGE v. ROWE* (1875), 1 V. L. R. 65.—**AUS.**

a. Not indictable—Information under Impounding Act, 1865 (No. 2), s. 33.]—A prisoner was convicted on an information, framed apparently under the above sect. for rescuing animals impounded damage feasant & was fined £20 with imprisonment until paid:—*Held*: the sect. did not create any indictable offence & the prisoner must be discharged.—*R. v. COLWELL* (1868), 7 N. S. W. S. C. R. 404.—**AUS.**

b. —.]—A breach of the above sect. is an offence punishable on summary conviction, & an information under that sect. is a criminal proceeding within the meaning of 16 Vic., No. 14, s. 3, & deft. is not competent to give evidence in his own behalf.—*Ex p. KELLETT* (1878), 1 N. S. W. S. C. R. N. S. 148.—**AUS.**

PART VII. SECT. 8, SUB-SECT. 2.—C.

a. Whether recoverable in action for money had & received—Paid under protest.]—Where animals are distrained damage feasant & impounded & excessive damages are under protest paid to the pound-keeper before release, who pays them to the distrainer, the owner can recover the excess against the distrainer as money had & received.—*CAMPBELL v. HALVERSON*, [1919] 3 W. W. R. 657.—**CAN.**

1845 i. —.]—When a pound-master charges in excess of pound fees chargeable & hands such excess to the impounder the latter is liable to the owner of the stock on the principle that the person is not entitled to enrich himself at the expense of another.—*GROBLER v. OOSTHUIZEN*, [1918] O. P. D. 75.—**S. AF.**

PART VII. SECT. 9.

1849 i. Justification—Where distress

*wrongful.]—*Pltfs., trustees of a common, prosecuted deft. under Impounding Act (29 Vic. No. 2), s. 33, for rescue of horses seized for the purpose of being impounded. The complaint having been dismissed on the ground that deft., as a carrier, was entitled to graze his horses on the common. Pltfs. then brought an action in a district ct. for rescue, trespass to common under the Act, & trespass to land, but were nonsuited on the ground that the cause of action was *res judicata*. On appeal:—*Held*: the judge's decision was right.—*BARCLAY v. WHYTE HONG* (1882), 3 N. S. W. L. R. 119.—**AUS.**

t. What constitutes.]—To constitute "pound breach" there must be a criminal intention. To constitute a "rescue" from a pound there must be something amounting to a breach of the peace, or likely to provoke a breach of the peace, & a taking in the presence

1857. —.]—Trover for several deer. Plea, as to the conversion of one deer, that it was wrongfully on deft.'s close doing damage; wherefore deft. seized it as a distress; which seizing is the same conversion, etc.:—*Held*: (1) the plea was good without the formal commencement of *actionem non*, or prayer of judgment; (2) it sufficiently confessed a conversion in fact, & was not bad as amounting to the plea of not guilty, or as an argumentative denial of pltf.'s possession; it was unnecessary to allege how deft. disposed of the distress.

Semble: that if the conversion, relied on by pltf., was not the seizure, but a subsequent abuse of the distress, he must show it in reply to the plea.—*WEEDING v. ALDRICH* (1839), 9 Ad. & El. 861; 1 Per. & Dav. 657; 8 L. J. Q. B. 119; 112 E. R. 1440.

Annotations:—As to (1) *Apld.* *Ratton v. Davis* (1841), 1 Q. B. 496. As to (2) *Refd.* *Unwin v. St. Quintin* (1843), 12 L. J. Ex. 209; *Needham v. Rawbone* (1844), 9 Jur. 274. Generally, *Mentd.* *White v. Teale* (1840), 9 L. J. Q. B. 377.

SECT. 11.—SECOND DISTRESS.

1858. Not permissible—After escape or death—Of first distress.]—*ANON.* (1700), No. 963, *ante*.

SECT. 12.—REMEDIES.

1859. Of owner—General rule.]—*LINDON v. HOOPER*, No. 1846, *ante*.

1860. — Action for trespass—Inclusion of plea of conversion.]—Declaration in trespass for

taking pltf.'s hog. Plea that defts. took the hog damage feasant & impounded it. Replication that after the taking & impounding defts. converted the hog to their own use. Demurrer to replication. Converting pltf.'s hog to defts.' use is only aggravation in an action of trespass for taking the hog & is not answered by the general issue.—*DYE v. LEATHERDALE & SIMPSON* (1769), 3 Wils. 20; 95 E. R. 910.

Annotations:—*Mentd.* *Taylor v. Cole* (1789), 3 Term Rep. 292; *Shorland v. Govett* (1826), 5 B. & C. 485; *Lucas v. Nockells* (1833), 10 Bing. 157.

— Effect of tender of amends.]—See Sect. 8, sub-sect. 2, A., *ante*.

— Payment of excessive sum demanded as damages.]—See Sect. 8, sub-sect. 2, C., *ante*.

1861. Of distrainer—Effect of distraining—Bars action for trespass.]—A pony belonging to deft. having got into pltf.'s field & kicked a horse belonging to him, pltf. seized the pony & refused to give it back to deft. unless he paid for the injury inflicted on pltf.'s horse. Deft. having refused to pay the amount demanded, pltf. detained the pony & sued him for the injury caused by deft.'s pony galloping over his field, for the damage caused to his horse, for veterinary expenses incurred, & for the keep of the pony:—*Held*: pltf., having elected to seize & impound deft.'s pony, could not recover damages for the injury caused either to his freehold or to his horse.—*BODEN v. ROSCOE*, [1894] 1 Q. B. 608; 58 J. P. 368; 42 W. R. 445; *sub nom.* *ROSCOE v. BODEN*, 63 L. J. Q. B. 767; 70 L. T. 450; 10 T. L. R. 317; 38 Sol. Jo. 291; 10 R. 173, D. O.

— For escape of distress.]—See Sect. 8, sub-sect. 1, F., *ante*.

PART VII. SECT. 12.

c. Of owner—Where trespass rates fixed—Return of cattle to owner—Whether condition precedent to award of damages.]—Where trespass rates have been fixed under Pounds Act, 1915, the restoration of impounded cattle to their owner is not a condition precedent to an award of damages for trespass by justices under Justices Act, 1915, s. 64 (4).—*CHROZIER v. BETHUNE*, [1919] V. L. R. 364.—AUS.

d. — By replevin—For unlawful impounding.]—Sheep which were impounded were grazing upon an open common with the consent of the owner thereof, & were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance:—*Held*: the sheep were not "running at large," in contravention of a bye-law of the municipality on the subject, & the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper.—*IBBOTTSON v. HENRY* (1885), 8 O. R. 625.—CAN.

e. — Action for damages—When previous tender necessary—Costs.]—In an action for damages for the unlawful seizure & detention of cattle defts. were the acting pound-keeper, employed by the pound-keeper, & the person on whose land the animals were

alleged to have been trespassing:—*Held*: the cattle must be returned to pltf., but since the action against the representative of the pound-keeper was for unlawful detention &, as such representative, he could not have given up the cattle without being paid the damages demanded, which pltf. was held to have been justified in refusing to pay as they were exorbitant, he was held entitled to his costs against pltf., but as the whole cause of litigation was the other deft.'s exorbitant claim for damages, such costs were included in the costs given pltf. against such other deft.—*MCCRAE v. LYONS*, [1921] 2 W. W. R. 490; 14 Sask. L. R. 268.—CAN.

f. — — Whether action at common law barred by statutory remedy.]—Where a magistrate has dismissed a complaint made under Impounding Act, 1908, ss. 9, 10, asking for damages for illegal impounding of cattle the person complaining is estopped, on the ground of *res judicata*, from suing civilly for such damages.—*BANKS v. WILSON* (1910), 29 N. Z. L. R. 832.—N.Z.

g. — — Whether barred by securing conviction for wrongful impounding.]—Justices convicted P. on a summons by C. for having impounded C.'s sheep in a pound which was not the nearest pound to the place where the sheep were found trespassing:—

Held: the conviction was not a bar to a civil action for injury which the sheep sustained in being driven to a more distant pound.—*CARROLL v. PARKS* (1913), 47 I. L. T. 88.—IR.

h. Of distrainer—Whether limited by Cattle Trespass, Fencing & Impounding Act, 1882 (No. 7).]—In an action in a local ct., pltf. alleged that defts.' horses had trespassed on his land & damaged his crops, & that upon his impounding the horses on the land defts. broke & entered on his land & rescued the horses, & in doing so caused pltf.'s horses to take fright & escape, & that he was put to loss of time in recovering them & lost his recourse against defts.' horses & suffered damage:—*Held*: the claim was within the jurisdiction of the local ct. & pltf.'s right to proceed in that ct. was not affected by the fact that certain limited remedies by proceedings before justices were created by above Act.—*LUGG v. SCHORER* (1911), 13 W. A. L. R. 170.—AUS.

k. — Against pound-keeper—For releasing cattle.]—An attachment will not be granted at the instance of a receiver, against a pound-keeper for releasing cattle, as fast as the receiver, who distrained deft., impounded them. The receiver's remedy is at law.—*WOLSELEY v. SOUTHWELL* (1829), 2 Ir. L. Rec. 1st ser. 269.—IR.

Part VIII.—Distress for other Purposes.

SECT. 1.—AGAINST OVERSEERS.

1862. In respect of rates—Refusal to pay balance in hand—Suspension of warrant to ascertain correct balance—Liability for subsequent execution.]—Two justices allowed the accounts of overseers going out of office. By a subsequent warrant, reciting that on the accounts a certain balance appeared to be in the hands of one of the overseers, which he had neglected & refused to pay, they required the succeeding overseers to distrain for the balance on his goods, under 50 Geo. 3, c. 49, s. 1. Afterwards, a doubt being raised whether the balance was correctly ascertained, they signed an order to the overseers to suspend, & not execute, the warrant of distress. This was delivered to one of the overseers, who nevertheless distrained. An action of trespass being brought against him:—*Held*: (1) the justices had no power to suspend the order on account of a doubt as to the correctness of the balance; (2) deft. was acting under a legal warrant & was entitled to a demand of a copy of the warrant, under Constables Protection Act, 1750 (c. 44), s. 6.

(3) *Qu.*: whether the justices who issued the warrant could have suspended it under any circumstances, as, for instance, upon discovering that the balance had been paid before the warrant was signed.—*BARONS v. LUSCOMBE* (1835), 3 Ad. & El. 589; 4 L. J. M. C. 109; 111 E. R. 537.

Annotations:—*As to* (3) *Refd.* *R. v. Crossman, Ex p. Chetwynd* (1908), 98 L. T. 760. *Generally, Mentd.* *R. v. Brisby* (1849), T. & M. 109.

1863. ——— What must be set out in warrant.]—A warrant of distress against an overseer for not paying over his balance in hand, must distinctly set out the summons, the hearing before the magistrate, & the refusal to pay; & if it does not do so, it is bad; & persons granting & executing it will be liable in an action of trespass.—*HARRIS v. STUART* (1837), 7 C. & P. 779.

1864. ——— Disobedience to order to contribute—Absence of legal obligation to pay.]—Poor Law Comrs. in 1837, by an order, directed nine parishes, townships & places, to be formed into a union, to be called the P. Union, for the administration of the law for the relief of the poor. In the margin of the order were enumerated eleven townships: first, B.; second, D., etc., & the Comrs. ordered that a board should be constituted according to Poor Law Amendment Act, 1834 (c. 76), fourteen to be the number of guardians, three for B., two for D., etc., treating them as separate townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, etc., & afterwards fixed the proportions payable by each township or place. In 1848, the chairman & guardians of the union made an order on pltf. & three others, as overseers of the parish of D.-cum-B., treating the two as one township, for payment of £500 by way of contribution towards the relief of the poor, etc. This order having been disobeyed, defts., who were magistrates, issued their summons to pltf. & the other overseers, as overseers of D.-cum-B., & afterwards issued a warrant of distress, under which pltf.'s goods were taken. In an action of trespass against defts. for a seizure of pltf.'s goods under this warrant:—*Held*: Poor Rate Act, 1839 (c. 84), s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor rate; but, in the absence of a legal obligation to pay the contribution by the

party whose goods had been seized, the magistrates had acted without jurisdiction & were liable.—*NEWBOULD v. COLTMAN* (1851), 6 Exch. 189; 20 L. J. M. C. 149; 16 L. T. O. S. 488; 15 J. P. 372; 155 E. R. 508.

Annotations:—*Refd.* *Pedley v. Davis* (1861), 10 C. B. N. S. 492. *Mentd.* *Brushfield v. Baynton* (1859), 33 L. T. O. S. 145.

— **Sum debited to overseers in accounts—Certified correct by auditor—Appeal pending before Poor Law Board.]—**The ct. refused to make absolute a rule calling upon justices to show cause why they should not issue their warrant for a sum of money placed to the debit of overseers in their accounts, & certified as correct by the poor-law auditor, in a case in which there was an appeal pending before the Poor Law Board.—*R. v. DENBIGH JJ.* (1859), 33 L. T. O. S. 145; 23 J. P. Jo. 259.

1866. ——— Payment by overseers upon valuation subsequently reduced—Right to be credited with amount overpaid—Refusal to pay on subsequent precepts.]—The overseers of the town of B. paid the guardians of T. Union contributions to rates on the basis of a valuation list afterwards found by arbn. to have been excessive. On the overseers refusing to pay the amount of two subsequent precepts issued by the guardians on the ground that they had already paid too much on the excessive valuation list & were entitled to be credited with the surplus, the guardians applied to justices for a distrain-warrant to enforce their precepts. The justices refused to grant the warrant:—*Held*: (1) the justices had a discretion as to granting the warrant, & had exercised it properly; (2) the overseers were entitled to be credited on the precepts now in question with the amounts previously overpaid under the incorrect valuation list.—*TYNEMOUTH UNION GUARDIANS v. BACKWORTH OVERSEERS* (1888), 57 L. J. M. C. 53; 59 L. T. 178; 52 J. P. 357; 4 T. L. R. 492, D. C.

Annotations:—*As to* (1) *Refd.* *R. v. Gillespie* (1903), 73 L. J. K. B. 106. *Generally, Refd.* *R. v. Bermondsey B. C., Ex p. Bermondsey Grdns.* (1908), 99 L. T. 14.

1867. ——— Payment of rate upon parish—Partly within & partly without borough—Liability of magistrates for wrongful issue of warrant.]—(1) Municipal Corporation Act, 1835 (c. 76), s. 92, which adopts, with respect to the borough rate, the provisions of the County Rate Act, 1814 (c. 51), gives to the magistrates of a borough no power of enforcing the payment of a rate made upon parishes partly within & partly without such borough.

(2) Action of trespass being brought against the mayor of a borough for signing a warrant of distress upon the goods of an overseer of such parish for a borough rate, made before the passing of 1 Vict. c. 81:—*Held*: maintainable.—*FERNLEY v. WORTHINGTON* (1840), 1 Man. & G. 491; 1 Scott, N. R. 432; 10 L. J. M. C. 81; 133 E. R. 425; *sub nom.* *FEARNLEY v. WORTHINGTON*, 4 Jur. 918.

Annotations:—*As to* (2) *Refd.* *Wilkinson v. Gray* (1844), 9 J. P. 71. *Generally, Refd.* *Cobb v. Allan* (1846), 16 L. J. Q. B. 397.

See, further, RATES & RATING.

1868. Disallowance by auditor—Production of auditor's appointment.]—*R. v. BRECKNOCKSHIRE JJ.* (1857), 7 E. & B. 951, n.; 29 L. T. O. S. 126; 21 J. P. Jo. 356; 119 E. R. 1500.

1869. *Inquiry into validity of.*—A magistrate to whom application is made for a distress warrant for a sum of money disallowed by the poor-law auditor, has no jurisdiction to decide as to the legality of the disallowance, but is bound to issue his warrant.—*R. v. FINNIS* (1859), 1 E. & E. 935; 28 L. J. M. C. 201; 33 L. T. O. S. 146; 23 J. P. 692; 5 Jur. N. S. 791; 120 E. R. 1162.

Annotations:—*Folld. R. v. Hertfordshire JJ.* (1873), 38 J. P. 87. *Refd. R. v. Denbigh JJ.* (1859), 33 L. T. O. S. 145.

1870. ———. ———.]—When a poor law auditor has certified a sum in the overseers' collecting book to be due by them & he seeks to enforce payment before justices under Poor Law Audit Act, 1848 (c. 91), s. 9, the treasurer's certificate that the sum was not paid is only *prima facie* evidence, & the justices may hear evidence that the overseer had paid part of the sum subsequently &, if satisfied, should only issue the distress warrant for the balance unpaid.—*R. v. HERTFORDSHIRE JJ.* (1873), 38 J. P. 87.

1871. Cost of maintenance of pauper—Suspension of order of removal—Enquiry into validity of order.—An order of removal was made & suspended in 1841. In Oct. 1852, the pauper being dead, the suspension was taken off, & an order for the costs of maintenance during the whole period of the suspension, exceeding £20, was made, against which there was no appeal. In Feb. 1853, an application was made for a distress warrant, which was resisted on the ground that it had been recently discovered that the pauper had resided for five years in the removing parish, & that the costs of maintenance, subsequent to the passing of Poor Law Amendment Act, 1847 (c. 110), were chargeable to the common fund of the union, & not to the parish of settlement. The justice, on this ground, refused to issue the warrant:—*Held*: he was bound to do so, as the objection should have been taken by appeal, when the amount of costs might have been reduced by the sessions.—*Re WILLIAMS* (1853), 2 E. & B. 84; 17 Jur. 763; *sub nom. Ex p. WILLIAMS*, 22 L. J. M. C. 125.

Annotation:—*Apld. R. v. Higginson* (1862), 2 B. & S. 471.

1872. ———. ———.]—Upon an application under Poor Removal Act, 1794 (c. 101), s. 2, for a warrant of distress to levy the charges incurred by the suspension of an order of removal, the justice cannot inquire into the merits of the order directing payment, but is bound to enforce it by issuing his warrant. This holds even where, by reason of the amount ordered to be paid not exceeding £20, there is no appeal against the order.—*R. v. HIGGINSON* (1862), 2 B. & S. 471; 31 L. J. M. C. 189; 8 Jur. N. S. 1176; 121 E. R. 1148; *sub nom. R. v. NORTH RIDING OF YORKSHIRE JJ.*, 6 L. T. 351; 26 J. P. 629.

See, further, POOR LAW.

1873. Costs of proceedings—Non-repair of highways—Order directing repair & for payment of costs—Magistrates exceeding jurisdiction.—One of defts., who were magistrates having received information on oath, that a certain turnpike road was out of repair, summoned the surveyor of the road, under 5 & 6 Will. 4, c. 50, s. 94, to appear at a special sessions. At that sessions the two defts. ordered A. to view the road, & report thereon to them at another special sessions. A. having reported at the latter sessions, where defts. were present, that the road was out of repair, defts.

ordered the surveyor to repair it within six weeks, & at the same time ordered him, under 18 Geo. 3, c. 19, s. 1, to pay £2 3s. as costs. The surveyor having refused to pay this sum, & his goods having been taken as a distress by warrant from defts., he replevied them, & brought the present action of replevin:—*Held*: (1) a single magistrate had no authority, under 5 & 6 Will. 4, c. 50, s. 94, to summon the surveyor of turnpike roads; (2) defts. could not inflict costs under the statute 18 Geo. 3, c. 19, s. 1; (3) defts. were not justified in inflicting costs upon pltf., since, not having disobeyed the order of the justices, he had not committed any offence; (4) an action of replevin would lie against defts.—*GEORGE v. CHAMBERS* (1843), 2 Dowl. N. S. 783; 11 M. & W. 149; 12 L. J. M. C. 94; 7 J. P. 79; 7 Jur. 836; 152 E. R. 752.

Annotations:—*As to* (1) *Refd. R. v. Trafford & Lancashire JJ.* (1856), 2 Jur. N. S. 399; *Rhymney Ry. v. Price* (1867), 16 L. T. 394. *As to* (4) *Refd. Allen v. Sharp* (1848), 2 Exch. 352; *Jones v. Johnson* (1850), 5 Exch. 862. *Generally, Refd. Mellor v. Leather* (1853), 1 E. & B. 619; *R. v. St. Albans JJ.* (1853), 22 L. J. M. C. 142; *Pease v. Chaytor* (1863), 3 B. & S. 620.

1874. ———. ———. **Indictment under Highway Act, 1835 (c. 50), s. 95.**—At the hearing of an information against a township for non-repair of a highway, the surveyor, on behalf of the township, denied the obligation to repair, whereupon the justices ordered an indictment to be preferred at the quarter sessions, under above sect. The indictment was preferred against the township, & a verdict of guilty recorded, & the justices made an order for the payment of the prosecutor's costs out of the highway-rate. The overseers neglected to pay the costs:—*Held*: sect. 103 did not authorise the justices to issue their warrant of distress against the goods of the overseers for such neglect to pay the costs.—*R. v. FLINTSHIRE JJ.* (1854), 2 C. L. R. 878; 22 L. T. O. S. 281.

See, further, HIGHWAYS.

SECT. 2.—CHARGES DUE TO PUBLIC SUPPLY COMPANIES.

Electric Lighting & Power.—*See Gasworks Clauses Act, 1871 (c. 41), s. 40; Electric Lighting Act, 1882 (c. 56), s. 12; ELECTRIC LIGHTING.*

1875. Gas—Statutory power to distrain for charges—Granting of warrant judicial act—Necessity for previous summons.—An Act, incorporating a gas co., enacts, that in case any party who shall contract with the co. for gas, shall neglect, after ten days after demand made, to pay the gas rents, such rents may be recovered by the co. by warrant under the hand & seal of a justice of the peace, & that it shall be lawful for the co., with such warrant, to levy the sums so due & owing as aforesaid by distress & sale:—*Held*: (1) the granting of the warrant was a judicial & not merely a ministerial act, & a magistrate could not issue a warrant without a previous summons; (2) although an officer executing such a warrant might justify under it, yet the co. who procured the warrant, & interfered in the execution of it, could not. *Semble*: (3) in no case can a magistrate issue a warrant of distress in the nature of an execution, without previously summoning the party whose goods are to be distrained, in order

PART VIII. SECT. 2.

1. Gas—Statutory power to distrain for charges—Must be strictly construed.—A corpn. supplying gas to the inhabitants of a city has not necessarily

rights of distress for unpaid gas accounts similar to the rights of a landlord for unpaid rent. The rights of the corpn. must be sought in the statute under which it is incorporated, &, being new

rights wholly statutory, they must be strictly construed.—*SMOKLER v. WINNIPEG ELECTRIC Ry. Co.*, [1923] 3 W. W. R. 241; 33 Man. L. R. 378.—CAN.

Sect. 2.—Charges due to public supply companies.
i. 3, 4 & 5.]

that he may have an opportunity of being heard ; (4) 27 Geo. 2, c. 20, s. 1, which enacts, that in all cases where any justice of the peace shall be required, by any Act of Parliament, to issue a warrant of distress for levying any penalty or sum, the justice may by such warrant order the goods so to be distrained to be sold within a time therein limited, so as such time be not less than four or more than eight days, applies only where the granting of the warrant is a judicial act.—**PAINTER v. LIVERPOOL GAS CO.** (1836), 3 Ad. & El. 433 ; 2 Har. & W. 233 ; 6 Nev. & M. K. B. 736 ; 5 L. J. M. C. 108 ; 111 E. R. 478.

Annotations :—As to (1) Apld. Hammond v. Bendyshe (1849), 13 Q. B. 869. *Refd. Morrell v. Martin* (1841), 3 Man. & G. 581. *As to (3) Refd. Re Hammersmith Rent-charge* (1849), 4 Exch. 87 ; *Bessell v. Wilson* (1853), 20 L. T. O. S. 233. *Generally, Mentd. Attwood v. Jolliffe* (1848), 10 L. T. O. S. 392 ; *Labalmondiere v. Frost* (1859), 5 Jur. N. S. 789 ; *Cronmire v. MacColla* (1893), 9 T. L. R. 549.

1876. — Bankruptcy of consumer—Company in position of landlord distraining.]—The corp'n. of W., who were the gas co. for their district, were empowered under sect. 44 of their special Act to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear. On Nov. 12, 1883, P., who was a trader at W., presented a petition for liquidation. At that time he was indebted to the corp'n. of W. for gas supplied to him by them. On Nov. 29 a resolution was passed for liquidation by arrangement, & a trustee was appointed. On Dec. 14 the corp'n. distrained for & recovered the amount due from P. for gas supplied to him before the liquidation :—*Held* : the corporation, under their special Act, were placed with regard to the sum due to them for gas in the same position as landlords to whom rent was due, and therefore were entitled, as against the trustee in liquidation to distrain on the debtor's goods for that amount.—*Re PEAKE, Ex p. HARRISON* (1884), 13 Q. B. D. 753 ; 53 L. J. Ch. 977 ; 51 L. T. 878, C. A.

—*See BANKRUPTCY, Vol. I., pp. 956–958, Nos. 7843–7845, 7852, 7853.*

1877. — Charges due from company in hands of receiver—Priority of gas company over debenture holders.]—At the date when a receiver was appointed in a debenture-holders' action against a co., the co. owed a sum of money to a gas co. for gas supplied, which the receiver refused to pay. The debentures were not secured by a trust deed & operated only as an equitable charge on the co.'s property & assets. The gas co. obtained, under Gasworks Clauses Act, 1871 (c. 41), s. 23, & sect. 74 of their special Act, which provided that sums payable to the co. might be recovered summarily or by action, an order & warrant from justices empowering them to levy a distress on the co.'s goods & chattels for the amount of the debt, & then applied in the debenture-holders' action for leave to proceed with the distress :—*Held* : the statutory rights of the gas co. overrode the equitable rights of the debenture-holders & leave was granted to proceed with the distress.—*Re CROSBIE (ADOLPHE), LTD., JOHNSON & HUGHES v. CROSBIE (ADOLPHE), LTD.* (1909), 74 J. P. 25 ; 8 L. G. R. 50.

—*See, generally, GAS.*

Water supply.]—See Water Works Clauses Act, 1847 (c. 17), ss. 68–74 ; 85 ; Metropolitan Water Board (Charges) Act, 1907, s. 33 ; Part III., Sect. 5, ante.

SECT. 3.—PAYMENTS DUE BY FRIENDLY SOCIETIES.

See, generally, FRIENDLY SOCIETIES.

1878. Warrant must set out facts necessary to give jurisdiction—Refusal by stewards to pay relief to member.]—In order to protect justices from an action of trespass for issuing a warrant of distress, all those facts must appear upon the face of the warrant, which are necessary to give jurisdiction to the justices in the subject-matter :—*Held* : (1) a warrant of justices, under 33 Geo. 3 (c. 45), s. 15, for distress against the goods of the stewards of a friendly society, for refusal by the stewards to pay a certain sum alleged to be due for relief to an individual, who, upon oath, stated himself to be a member, was defective in not adjudicating that he was a member, that the sum awarded was due, & that the parties against whom the warrant issued were the stewards ; (2) the ct. would not imply any such adjudication from the recital of the information on which the order was made, in which any of those facts were asserted.—*DAY v. KING* (1836), 5 Ad. & El. 359 ; 2 Har. & W. 178 ; 6 Nev. & M. K. B. 845 ; 5 L. J. M. C. 130 ; 111 E. R. 1201.

Annotations :—As to (1) Refd. Wilkinson v. Gray (1844), 9 J. P. 71. *Generally, Mentd. R. v. Toke* (1838), 8 Ad. & El. 227 ; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610.

1879. Necessity for summons before issue of warrant.]—Under 10 Geo. 4, c. 56, s. 27, power is given to settle disputes by arbn. ; & if the arbitrators by their award direct a sum of money to be paid, then, in case of non-payment, one justice is required to issue a summons calling on the party against whom the award is made to show cause why he refuses to pay ; & if no sufficient cause is shown, two justices have power to enforce the award by distress. Section 28 gives power to two justices to hear any complaint, & make an order directing what should be paid, & goes on to enact "that they shall proceed to enforce their award in the manner hereinbefore directed to be used in case of any neglect to comply with the decision of the arbitrators appointed under the authority of this Act" :—*Held* : an order of justices under sect. 28 is analogous to an award by arbitrators under sect. 27 ; & justices cannot proceed to enforce their order by distress, without first issuing a summons, giving to the party called upon to pay, an opportunity of showing why he refuses to obey such order.—*HAMMOND v. BENDYSHE* (1849), 13 Q. B. 869 ; 3 New Sess. Cas. 619 ; 18 L. J. M. C. 219 ; 13 L. T. O. S. 486 ; 13 J. P. 619 ; 14 Jur. 62 ; 116 E. R. 1495.

SECT. 4.—RECOVERY OF COSTS.

Against overseers.]—See Part VIII., Sect. 1, ante.

1880. Incurred in prosecuting appeal—Under Highway Act, 1835 (c. 50)—What must be recited in warrant.]—Where a distress warrant was issued to levy the costs incurred by a party in prosecuting an appeal under Highway Act, 1835 (c. 50), sect. 88, which did not recite any order of quarter sessions for payment of such costs, but was founded on a subsequent conviction by two justices out of sessions for non-payment of such costs :—*Held* : the warrant was illegal, & no property passed to the vendee of goods seized & sold under it.—*LOCK v. SELLWOOD* (1841), 1 Q. B. 736 ; 1 Gal. & Dav. 366, n. ; 113 E. R. 1313.

Annotation :—Mentd. R. v. Long (1841), 10 L. J. M. C. 124.

SECT. 5.—OTHER CASES.

1881. Amercement on township for repair of jetty—Individual liability to distress.]—Replevin. Cognisance that the owners & occupiers of lands within the lordship of M. had immemorially repaired a jetty, which defended the sea coast in the lordship & parish of M.; that, the jetty being out of repair, a ct. of sewers was holden & a jury impanelled, who presented, finding the prescription as above, & that the owners & occupiers ought forthwith to repair: that notice was given to the owners & occupiers to appear at the next ct., to plead to the inquisition; that they appeared by L., & pleaded not guilty: that the traverse was tried, & the owners & occupiers found guilty by a jury, who amerced them in £200, which the comrs. confirmed, & set the amercement on them, & respited the levying thereof, of which they had notice. At an adjourned ct., it was ordered that, unless the owners & occupiers repaired within fourteen days the £200 should be levied. At a subsequent ct., the repairs not being proceeded with, N. was appointed to demand & receive the amercement, & afterwards did demand it, but the owners & occupiers refused to pay. At an adjourned ct., the clerk was ordered to give notice that, unless the amercement were paid before a day named, a warrant would be issued to levy it by distress & sale; such notice was given, but the owners & occupiers did not pay. At a subsequent ct., a warrant was made by six comrs. directing persons therein mentioned to levy the £200 by distress & sale of the goods, etc., of the owners & occupiers: that pltf., at the time of the presentment & thence to the time when, etc., was an owner & occupier; that deft. by virtue of the warrant demanded the £200 of him, & on his refusal, the jetty being still unrepaired, deft., as

a constable mentioned in the warrant & bailiff of the commissioners, well acknowledged, etc.:—*Held*: a good cognisance, for that the amercement might be on the owners & occupiers of the lordship generally, yet the levy on the individual, & whether a sale was justifiable, or not, the cognisance was good, because it did not show that a sale had been made in fact, though directed by the warrant.—*RAMSEY v. NORNABELL* (1840), 11 Ad. & El. 383; 3 Pcr. & Dav. 253; 9 L. J. Q. B. 138; 113 E. R. 461.

1882. Recovery of mortuary fees.]—Mortuaries, which is not a term used in 7 & 8 Will. 3, c. 6, relative to the more easy recovery of small tithes, are not an ecclesiastical payment, within the meaning of the words “offerings, oblations, or obventions,” which are used in it; & therefore, where two Justices made an order under sect. 3 of that Act, by which they directed the exors. of a deceased inhabitant of the parish to pay to the rector 10s. as for a mortuary, & upon non-payment thereof, issued their warrant to distrain the goods of the deceased in the hands of the exors.:—*Held*: (1) the Justices had exceeded their jurisdiction, & were liable to the exors. in an action of trespass.

The justices by the terms of their order, directed the payment to be made in respect of obventions, oblations, “& other customary dues & payments”; (2) on account of the generality of the latter words, evidence was properly admitted to show that the justices decided, in fact, that the payment was due in respect of a mortuary.—*AYRTON v. ABBOTT* (1849), 14 Q. B. 1; 4 New Mag. Cas. 5; 18 L. J. Q. B. 314; 14 L. T. O. S. 249; 13 J. P. 810; 14 Jur. 36; 117 E. R. 1.

Annotation:—As to (1) *Refd. R. v. Kidd* (1867), 16 L. T. 203.

Tithe rentcharge.]—See ECCLESIASTICAL LAW.

Recovery of inclosure expenses.]—See COMMONS, Vol. II., p. 84, Nos. 1036, 1037.

PART VIII. SECT. 5.

m. Top wharfage—Goods landed on wharf—Distress a cumulative remedy.]—Under 5 Vict. c. 39, s. 6, an action of assumpsit may be maintained to recover top wharfage against the owner of goods landed on a wharf; the words

“sue for” & “recover” indicating a proceeding *in personam*. The remedy by distress given by section 7 is only cumulative.—*M'LEOD v. YEATES* (1861), 5 All. 168.—CAN.

n. Gold mines—Encroaching on claim—Order to pay damages therefor—Not enforceable by distress.]—*FOSTER v.*

HAYES (1867), 7 N. S. W. S. C. R. 4.—AUS.

o. Lunatic—Expense by examining & removing—Distress against shire council—Jurisdiction of magistrates.]—*R. v. PANTON* (1869), 6 W. W. & A'B. 6.—AUS.

DISTRIBUTION.

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DISTRICT COUNCILS.

See LOCAL GOVERNMENT.

DISTRICT REGISTRY.

See COURTS.

DISTRINGAS.

See EXECUTION.

DISTURBANCE OF PUBLIC ASSEMBLIES.

See CRIMINAL LAW AND PROCEDURE.

DISTURBANCE OF PUBLIC WORSHIP.

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DISUSED BURIAL GROUND.

See BURIAL AND CREMATION.

DIVIDEND.

See BANKRUPTCY AND INSOLVENCY ; COMPANIES.

DIVIDEND WARRANT.

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DIVINE SERVICE.

See ECCLESIASTICAL LAW.

DIVORCE.

See CONFLICT OF LAWS ; HUSBAND AND WIFE.

DOCK WARRANT.

See SALE OF GOODS.

DOCKS.

See RAILWAYS AND CANALS ; SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

DOCTORS.

See MEDICINE AND PHARMACY.

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EVIDENCE.

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DOMICIL.

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DOMINIONS.

See DEPENDENCIES INCLUDING DOMINIONS, DEPENDENCIES, COLONIES AND BRITISH
POSSESSIONS.

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DRAMATIC COPYRIGHT.

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DURHAM, COUNTY PALATINE OF.

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END OF VOL. XVIII.

